

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 March 2007

Case No.: 2006-RIS-00007

In the Matter of

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

v.

PLAN ADMINISTRATOR,
STOVER INDUSTRIES, INC. 401K PLAN,
Respondent

APPEARANCES:

Charles Michael Jackson
Washington, D.C.
For the Complainant¹

BEFORE: JOSEPH E. KANE
Administrative Law Judge

**DECISION AND ORDER GRANTING COMPLAINANT'S
MOTION FOR SUMMARY DECISION**

This matter concerns a \$44,400.00 civil penalty assessed under §502(c)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA" or "the Act") and its implementing regulations. *See* 29 U.S.C. § 1132(c); 29 C.F.R. §§ 2560.502c-2 and 2570.60-71. Complainant, the United States Department of Labor, Employee Benefits Security Administration ("EBSA") assessed the penalty against respondent, the Plan Administrator of the Stover Industries, Inc. 401(k) Profit Sharing Plan & Trust ("plan"), for failure to include the report and opinion of an independent qualified public accountant ("IQPA report"), as part of its 2003 Form 5500 Annual Report as required by ERISA §103(a)(3)(A), 29 U.S.C. § 1023(a)(3)(A).

¹ Respondent's counsel withdrew his representation on June 27, 2006 (Notice of Withdrawal of Counsel).

Respondent requested a hearing with this Office for waiver or reduction of the penalty. EBSA has filed the instant motion for summary decision with supporting documentation, which is currently pending before me.

Background

Factual History

The material facts in this case are essentially undisputed.² Although the parties may differ as to the effect of the plan administrator's belief that the plan had fewer than 100 participants, I find that the difference is not material in this case. As such, there is no genuine issue of material fact left for a hearing, and the case is ready for decision. *See* 29 C.F.R. § 2570.67.

Respondent, Stover Industries, Inc., ("Stover"), serves as the sponsor and administrator of the plan, a profit sharing and 401(k) plan (EBSA Exhibit 1-Form 5500 at 1, line 2a; EBSA Exhibit 11-Form 5500 at 1, line 2a). At the beginning of the 2003 plan year, the plan held assets in a trust and had in excess of 100 participants (*id.* at 1, 2, lines 6, 7(a)-7(g), and 9(a)-9(b)). On or about July 28, 2004, Stover filed Form 5500, the 2003 Annual Return/Report ("annual report") for the plan with EBSA without attaching an IQPA report. Although the Form 5500 indicated that the opinion of an independent qualified public accountant was attached, no report was in fact included (*id.*, Schedule H at 3, pt. III).

By letter dated October 4, 2004, EBSA notified respondent that EBSA had received the Form 5500, but that the accountant's opinion was missing (EBSA Exhibit 4 at 1). EBSA instructed respondent to send the report within 30 days (*id.*). The letter warned of the potential for Internal Revenue Service ("IRS") and Department of Labor ("Department") penalties for failure to supply the requested report and provided respondent with a toll-free telephone number and mailing address it could utilize should it have questions (*id.*). Having received no reply to the October 4 letter, EBSA again notified respondent by letter dated December 16, 2004 that it still had not received the accountant's opinion (EBSA Exhibit 5 at 1). EBSA again instructed respondent to send the opinion within 30 days (*id.*). The December 16 letter also warned of the potential for IRS and Department penalties for noncompliance and provided the same toll-free telephone number and mailing address for questions about the letter (*id.*).

By letter dated December 22, 2004, Simpkins & Associates, on behalf of respondent, responded to the December 16, 2004 letter, advising that respondent was in the process of acquiring an accountant's opinion as requested in the October 4 and December 22, 2004 letters, para. 2 (EBSA Exhibit 6 at 1).

On January 31, 2005, EBSA issued a Notice of Rejection ("NOR"), rejecting the 2003 annual report as deficient because (i) an accountant's opinion was not attached; and (ii) the plan did not meet any of the exceptions to the requirement of attaching an IQPA report (EBSA Exhibit 7). The NOR informed respondent that an annual report rejected under § 104(a)(4) of

² In response to complainant's motion for summary decision, respondent has made no reply setting forth any facts showing a genuine issue of fact for hearing. *See* 29 C.F.R. §2570.67(a).

ERISA, 29 U.S.C. § 1024(a)(4), for failure to provide material information required to be part of the annual report is treated as a failure to file an annual report unless a revised, satisfactory report is filed within 45 days of the date of the NOR (*id.* at 2). The NOR also warned that the Secretary of Labor (“Secretary”) could assess civil penalties in an amount of up to \$1,100.00 per day from the date on which the annual report was due (without regard for any extension for filing) should respondent fail to submit a revised annual report with the IQPA report attached within the 45-day time limit (*id.*). The NOR also warned that no extensions of time for such response were available (EBSA Exhibit 7 at 1, 3).

Stover filed with EBSA on or about March 15, 2005, an amended Form 5500 Annual Return/Report of Employee Benefit Plan for the Plan for the calendar plan year ending December 31, 2003; however, no IQPA report was filed with this amended report (EBSA Exhibit 2).

On May 23, 2005, at which time Stover still had not filed an amended annual report containing the IQPA report, EBSA issued a Notice of Intent (“NOI”) to assess a civil penalty against respondent in the amount of \$44,400.00 (EBSA Exhibit 8 at 1). The NOI informed respondent that the 2003 annual report was deficient due to its original failure to ensure that an IQPA report was attached and that a revised annual report containing the IQPA report had not been submitted to the Department within 45 days of the date of the NOR (*id.* at 1-2). Accordingly, the NOI gave respondent notice of EBSA’s intent to assess a penalty of \$44,400.00 pursuant to § 502(c)(2) of ERISA, 29 U.S.C. § 1132(c)(2) (*id.* at 2). The NOI provided that the penalty accrued for 296 days, from August 1, 2004, the day following the due date of the plan’s annual report, to May 23, 2005, the date of the NOI (*id.*). EBSA assessed a penalty of \$150.00 per day for each of the 296 days in which the accountant’s report was missing (*id.*). Finally, the NOI directed respondent to file a Statement of Reasonable Cause in which the respondent was to state that it complied with ERISA § 101(b)(1), 29 U.S.C. § 1021(b)(1), or state any mitigating circumstances regarding either the degree or willfulness of noncompliance and set forth facts as to why the penalty as calculated, should either not be assessed or reduced (*id.*).

In a letter dated June 23, 2005, respondent finally responded to the NOI in its Statement of Reasonable Cause, stating that respondent did not file the report in a timely manner because it was initially unaware that the Plan had exceeded the number of Plan participants to continue filing as a small plan and thus did not know of the requirement for the IQPA report.³ (EBSA Exhibit 9). Respondent also stated that Stover had engaged a certified public accounting firm and was working to obtain the accountant opinion, which respondent concluded was required, and, to demonstrate respondent’s willingness to comply, enclosed a draft of the audited financial statement⁴ (*id.*).

An IQPA report without the “DRAFT” marking was submitted on August 7, 2006 (see EBSA Exhibit 17), which still did not comply with the requirements of § 103 of ERISA.⁵

³ A review of the Plan’s 2002 annual report for the preceding plan year (2002), however, reveals that the Plan exceeded the number of participants to file as a small plan during that year as well. (EBSA Exhibit 16).

⁴ That report, marked “DRAFT,” was clearly inadequate.

⁵ The IQPA includes a scope limitation, which is not allowed, and, therefore the IQPA does not express an opinion. Also the statement of net assets available is not comparative with the prior year.

On September 19, 2005, EBSA issued a Notice of Determination on respondent's Statement of Reasonable Cause ("NOD"), which determined that no reasonable cause to waive the penalty existed (EBSA Exhibit 10). The NOD stated that an amended annual report containing the IQPA report had not been filed and that respondent, who bears the burden of assuring that ERISA's reporting requirements are met, had presented no reasonable cause either for its original failure to file the 2003 annual report or for the failure to file an amended report in a timely manner (*id.*). The NOD also warned respondent that it had 35 days from the date of the NOD to request a hearing with this Office or the penalty assessed would become the final order of the Secretary (*id.*).

Procedural History

On October 24, 2005, respondent requested a hearing with this Office (Letter from John L. Einstein, IV October 21, 2005). A Notice of Docketing issued on November 15, 2005, which required the parties to file a pre-hearing exchange within 30 days. Complainant EBSA filed its prehearing exchange on December 13, 2005; respondent filed its on December 20, 2005. On December 20, 2005, Associate Chief Judge Thomas M. Burke filed a notice of assignment of the case to an administrative law judge and the case was then assigned to me for hearing and decision. A hearing was then scheduled to be held in Columbus, Ohio on July 18, 2006.

On June 29, 2006, the parties submitted a joint motion to stay the proceeding, advising this Office that they were engaged in settlement negotiations.⁶ On July 7, 2006, I ordered a continuance of the hearing and ordered the parties to submit a status report by September 5, 2006. On September 5, 2006, complainant submitted a status report on behalf of the parties, which reflected that a report of an Independent Qualified Public Accountant (IQPA) was submitted by facsimile dated August 8, 2006. Complainant identified a number of deficiencies in the IQPA and stated the parties continued to discuss how to bring the annual report and IQPA into compliance. Following my order, another status report was filed on October 4, 2006, indicating a delay in progress to resolution of the matter and indicated that a telephone conference would take place between the Office of Chief Counsel and the IQPA. On November 6, 2006, complainant submitted the instant motion for summary decision. Respondent has not filed a response to complainant's motion for summary decision.

Discussion

Standard for Summary Decision

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, provide that an administrative law judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine

⁶ Respondent's counsel had withdrawn its representation on June 27, 2006 and Carl Stover, President, agreed to the joint motion on behalf of respondent (see Joint Motion for postponement).

issue as to any material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d); *see also* Fed. R. Civ. P. 56(c) (upon which 29 C.F.R. § 18.40 is modeled).⁷ In civil penalty proceedings under § 502(c)(2) of ERISA, where “no issue of a material of fact is found to have been raised, the administrative law judge may issue a decision which, in the absence of an appeal . . . shall become a final order [of the Department of Labor].” 29 C.F.R. §§ 2570.67(a)(1) and 2570.61(g). The party who files a motion for summary judgment has the initial burden of demonstrating an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion, the burden shifts to the non-moving party to show that there is a genuine issue of material fact left for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The opposing party may not “rest upon the mere allegations or denials” contained in the moving party’s pleading, but must “set forth specific facts showing that there is a genuine issue of fact for the hearing.” 29 C.F.R. § 18.40(c). In evaluating a motion for summary decision, an administrative law judge is to review the factual evidence in the light most favorable to the nonmoving party. *Stauffer v. Wal-Mart Stores, Inc.*, ALJ Case No. 99-STA-21, ARB Case No. 99-107, Decision and Order of Remand (Nov. 30, 1999). However, if respondent fails to make a showing sufficient to establish the existence of an element of his case, then complainant will be entitled to summary decision. *See Celotex*, 477 U.S. at 322-23.

EBSA’s Penalty Assessment

ERISA protects the security of employees and dependents affected by employee benefit plans by requiring administrators of plans covered by the Act⁸ to comply with extensive reporting and disclosure provisions. *See* ERISA § 2, 29 U.S.C. §1001 (detailing Congressional findings) & ERISA §§ 101-05, 29 U.S.C. §§ 1021-25 (detailing reporting requirements). ERISA § 101(b)(1) requires the administrator of a plan to file an annual report of the plan with the Secretary. 29 U.S.C. § 1021(b)(1). The Act defines an administrator as either the person specifically designated by the terms of the plan’s operating instrument or, in the absence of such designation, the plan’s sponsor. ERISA § 3, 29 U.S.C. §1002(16)(i) and (ii). Section 101(b)(1) provides that the annual report is to include the information required by ERISA § 103, 29 U.S.C. § 1023. ERISA § 103 provides that a plan administrator of an employee benefit plan “shall engage” an independent qualified public accountant to conduct an examination of the plan’s books and records to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report “are presented fairly in conformity with generally accepted accounting principles.” 29 U.S.C. §1023(a)(3)(A). The IQPA

⁷ Summary judgment is appropriate when the record shows that there is “no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), Fed. R. Civ. P.

⁸ ERISA regulates both employee welfare and pension plans. An employee welfare benefit plan is defined as one providing employees or their beneficiaries with “medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability [or] death....” ERISA § 3, 29 U.S.C. § 1002(1). An employee pension benefit plan is defined as one providing employees with retirement income, “regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.” *Id.* § 1002(2)(A). Employee benefit plans include both welfare and pension plans. *Id.* § 1002(3). ERISA is applicable to any employee benefit plan “established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce.” ERISA § 4, 29 U.S.C. § 1003 (a)(1). 4, 29 U.S.C. § 1003(a)(1).

report “shall be made part” of the plan’s annual report, which is to be filed with the Secretary not more than 210 days after the close of a plan year. *Id.* §§ 1023(a)(3)(A) and 1024(a)(1).

Where an employee benefit plan has fewer than 100 participants at the beginning of the plan year, the Act and its implementing regulations provide for “simplified” annual reporting. *See id.* § 1024(a)(2)(A); 29 C.F.R. § 2520.103-1(c). An administrator of such a plan is still required to file the Form 5500 and any applicable statements or schedules, but is not required to file an IQPA report. 29 C.F.R. § 2520.103-1(c). Otherwise, the regulations provide that the administrator of a plan required to file an annual report in accordance with ERISA § 104(a)(1) shall include the information required by ERISA § 103, 29 U.S.C. § 1023 (which mandates the filing of an IQPA report), or the information required by 29 C.F.R. § 2520.103-1(a)(2), should the administrator elect an alternative method of compliance. 29 C.F.R. § 2520.103-1(b).⁹

If the Secretary determines that the annual report submitted by the plan administrator is either incomplete or contains a material qualification in the accountant’s opinion, she is empowered to reject the annual report. ERISA § 104(a)(4), 29 U.S.C. § 1024(a)(4). If the Secretary rejects an annual report as incomplete or containing a material qualification in the accountant’s opinion, and a revised filing is not made within 45 days after the Secretary makes this determination, she is further empowered to retain an independent qualified public accountant to perform the required audit and to bring an action for appropriate legal or equitable relief. ERISA § 104(a)(5), 29 U.S.C. § 1024(a)(5).

In 1987, Congress amended ERISA, adding § 502(c)(2), 29 U.S.C. § 1132(c)(2), which grants the Secretary the discretionary enforcement authority to assess civil penalties up to \$1,000.00 per day¹⁰ from the date of a plan administrator’s failure or refusal to file an annual report required to be filed with the Secretary for reports due after December 31, 1987. When the Secretary rejects an annual report under ERISA § 104(a)(4), that rejected annual report is to be treated as if it had not been filed. ERISA § 502(c)(2), 29 U.S.C. § 1132(c)(2).

Assessment of the penalty under § 502(c)(2) is guided by the regulations set forth at 29 C.F.R. § 2560.502c-2. The plan administrator is responsible for filing an annual plan report meeting the requirements of ERISA §101(b)(1) and bears the liability for civil penalties assessed by EBSA¹¹ for failure or refusal to file a compliant annual report. 29 C.F.R. § 2560.502c-2(a); EBSA is to consider “the degree and/or willfulness” of the administrator’s failure or refusal in

⁹ The technical requirements of the IQPA report to be filed with an annual report under this alternative method of compliance are listed at 29 C.F.R. §2520.103-1(b)(5).

¹⁰ While the text of the Act provides a limit of \$1,000.00 per day, this amount is subject to inflation-based adjustments. Section 31001(s) of the Debt Collection Improvement Act of 1996 amended the Federal Civil Penalties Inflation Adjustment Act of 1990 to require that the head of each Federal agency adjust civil monetary penalties subject to its jurisdiction for inflation. 29 C.F.R. §2575.100. The regulations now provide that the maximum civil penalties assessed under ERISA §502(c)(2) are increased from \$1,000.00 per day to \$1,100.00 per day for violations occurring after July 29, 1997. *Id.* §2575.502c-2.

¹¹ Secretary of Labor Order 1-2003 delegated the Department’s ERISA enforcement responsibilities to EBSA.

filing the annual report. *Id.* § 2560.502c-2(b)(1); *see also* H.R. Conf. Rep. 100-495, at 889 (1987) (providing that penalties reflect the “materiality” of the failure). EBSA must provide the plan administrator with written notice indicating its intention to assess a penalty and inform the administrator of the amount, the period of time to which the penalty applies, and the reason or reasons for the penalty. *Id.* § 2560.502c-2(c).

Upon the issuance of the notice of intention, part or all of a penalty may be waived upon a showing by the plan administrator, within 30 days of the service of the notice, that there was reasonable cause for the failure to file a compliant annual report. 29 C.F.R. § 2560.502c-2(e). Although the regulations provide that the statement of reasonable cause must be made in writing, under penalty of perjury, and must “set forth all the facts alleged as reasonable cause for the reduction or non-assessment of the penalty,” they are flexible and do not define particular circumstances under which reasonable cause may exist. *See id.* Such flexibility ensures that “appropriate consideration is given to the *good faith* and *diligent* efforts by the [plan] administrator to comply with the annual reporting requirements.” *Dep’t of Labor, EBSA v. Callaghan & Callaghan, Inc.*, 2005-RIS-00099, at 3 (ALJ Apr. 24, 2006) (emphasis added).

After a review of all of the facts alleged in support of penalty waiver, EBSA is to notify the administrator in writing of its determination. 29 C.F.R. § 2560.502c-2(g). The determination notice becomes the final order of the Secretary within 45 days of the notice service date unless, within 30 days of the service date,¹² the administrator requests an administrative hearing with this Office in accordance with the procedures outlined at 29 C.F.R. §§ 2570.61-.71 and 29 C.F.R. § 18.4. *Id.* § 2560.502c-2(h).

As the chronology of undisputed material facts makes clear, EBSA followed the applicable procedures in assessing the penalty and even afforded respondent two additional 30-day periods within which to make an amended annual report filing prior to the issuance of the NOR. Stover’s 401(k) plan is an employee benefit plan subject to the requirements of ERISA. Although Stover currently serves as the plan’s administrator, EBSA has produced no evidence showing that the plan’s operating instrument names Stover as plan administrator. Indeed, in its brief accompanying the motion for summary decision, EBSA identifies Stover as the plan administrator (EBSA Memorandum in Support of Motion for Summary Decision at 2). I conclude that Stover is the plan administrator within the meaning of ERISA § 3, 29 U.S.C. § 1002(16)(A)(ii) (see EBSA Exhibit 1-Form 5500 at 1). Accordingly, it was responsible for engaging an independent qualified public accountant to provide an opinion of the plan and for attaching the IQPA report to the 2003 annual report.¹³ Although respondent stated in its

¹² Pursuant to 29 C.F.R. §2560.502c-2(i)(2), the NOD provided 35 days for response.

¹³ The record makes clear that respondent did engage at least one independent accountant, Norman, Jones, Enlow & Co., an accounting firm in Columbus, Ohio. Although the firm submitted an amended Form 5500 Annual Return/Report of Employee Benefit Plan for the Plan for plan year ending December 31, 2003, it did not include an opinion of an IQPA as required by Section 103 (a)(3) of ERISA (EBSA Exhibit 11). A draft independent auditor’s report was submitted by cover letter dated June 23, 2005, for the Plan for the calendar plan year ending December 31, 2003. (EBSA Exhibits 3, 9). An IQPA without the “DRAFT” marking was submitted on August 7, 2006 (see EBSA Exhibit 17), outside the period upon which the penalty was issued, but the report remained noncompliant. The report indicated that, due to inability of the IQPA to access certain records of investment transactions executed by the trust set up at an insurance company, the firm was unable to express an opinion on the financial statements (EBSA Exhibit 17 at 3).

statement of reasonable cause on June 23, 2005, that respondent was unaware it had exceeded the number of plan participants to continue filing as a small Plan because of reliance on another for guidance with respect to compliance issues, such argument is not reasonable. This statement is belied by the fact that, not only were there 171 plan participants at the beginning of plan year 2003 and 139 at the end (EBSA Exhibit 1-Form 5500 at 2, lines 6, 7a), but there were also 149 plan participants at the beginning of plan year 2002 and 104 at the end (EBSA Exhibit 11-Form 5500 at 2, lines 6, 7a). Furthermore, Mr. Carl Stover signed both the 2002 and 2003 Forms 5500 as plan sponsor (EBSA Exhibit 1-Form 5500 at 1; EBSA Exhibit 11-Form 5500 at 1). As Stover's plan had, by its own filing, over 100 participants at the beginning of plan year 2003, I conclude that an IQPA report was required to be attached to the 2003 annual report.

Additionally, as Stover's original annual report did not contain the IQPA report and respondent made no amended filings containing the IQPA report in response to the October 7 and December 16, 2004 letters, the annual report was incomplete under ERISA and properly rejected by the Secretary. Since the Act provides that an annual report rejected by the Secretary as incomplete is to be treated as if it had not been filed, civil penalties in the amount of up to \$1,100.00 per day¹⁴ may be assessed against the plan administrator. The Secretary, acting through EBSA, followed the applicable procedures, providing respondent with the appropriate written notices, an opportunity for waiver, and even afforded two 30-day periods within which to file an amended report before the issuance of the NOR.

Unless EBSA has acted in an arbitrary, capricious, or unreasonable manner, an administrative law judge generally will not disallow a penalty assessed for failure to file an IQPA report in a timely manner. *See Dep't of Labor, PWBA v. Sociedad Para Asistencia Legal Money Purchase Plan*, 1994-RIS-00062, at 3 (ALJ Mar. 29, 1995); 5 U.S.C. § 706(2); *see also Northwestern Inst. of Psychiatry v. Martin*, No. CIV. A. 92-0321, 1993 WL 52553, at 3 (E.D. Pa. Feb. 24, 1993) (citing *Revak v. Nat'l Mines Corp.*, 808 F.2d 996, 1002 (3d Cir. 1986) for the proposition that courts must defer to an agency's "consistent interpretation" of its own rules unless such interpretation is either "plainly erroneous" or "inconsistent with the regulation.")). I conclude that EBSA did not act in an arbitrary, capricious, or unreasonable manner in assessing the \$44,400.00 penalty against respondent.

Several factors support this conclusion. First, as ERISA places the responsibility for an accurate and timely filing of the annual report on the plan administrator, respondent had an original responsibility to file a compliant annual report and a subsequent responsibility to correct the deficient filing. The EBSA notices of October 7 and December 16, 2004 should have alerted respondent of the need to file an amended annual report with the IQPA opinion attached, or, at the very least, of the need to contact EBSA for further clarification. There is no evidence in the record that respondent followed up with EBSA in response to these requests, except for the December 22, 2004 letter advising that Stover was acquiring an accountant's opinion. (EBSA Exhibit 6). However, the evidence fails to indicate that respondent submitted the amended annual report for plan year 2003 within the time periods afforded by the letters. After the annual report was rejected, respondent retained an independent accountant, but the record contains no

¹⁴ See discussion *supra* note 10.

evidence that an amended filing was made within the timeframe provided by the NOR. Further, there is no evidence in the record that respondent ever followed up, either with its accountant or with EBSA, to insure that the amended report was filed, even in an untimely manner. As stated *supra*, respondent's filing of a clearly noncompliant IQPA report on August 7, 2006, is not availing to respondent.

Second, although respondent stated in its statement of reasonable cause that respondent was not informed about compliance issues or that an IQPA report was required, reliance on this mistaken information and advice would not excuse respondent from its responsibility to file the report. *See, e.g., Dep't of Labor, PWBA v. Schneiderman's Furniture, Inc.*, 2000-RIS-00040, at 5 (ALJ Mar. 23, 2001); *Dep't of Labor, PWBA v. Compgraphix, Inc.*, 1999-RIS-00053, at 6-7 (ALJ Oct. 14, 1999). Further, Stover's filing on the Form 5500 shows that the plan did have 100 or more participants at the beginning of plan year 2003. Even assuming that the plan did in fact have fewer than 100 participants at the beginning of plan year 2003, which it did not, there is no evidence in the record that respondent attempted, at any time, to amend or correct its Form 5500 to reflect the correct number of plan participants. As the number of participants would bear on the issue of whether an IQPA report was required to be filed, respondent had a duty to list the correct number of participants on the annual report or correct any error. EBSA gave respondent the opportunity to do so with the two initial request letters, the NOR and the NOI, all of which afforded respondent opportunities either to amend the original annual report or to explain the circumstances regarding any mistaken number of plan participants. Respondent declined to take these opportunities.

Third, EBSA states that the penalty it imposes for a missing or deficient accountant's report is \$150.00 per day for the total number of days the accountant's report was missing, which, in this case, amounts to \$44,400.00 (EBSA Statement of Undisputed Facts, at 2-3). This per diem penalty is well below the statutory maximum of \$1,000.00 per day that the Secretary is authorized to assess under § 502(c)(2) of ERISA. As of the date of complainant's motion for summary decision, respondent had not filed even a late amended annual report containing an appropriate IQPA report. Respondent's continued assurances that Stover has retained an independent qualified public accountant still have not resulted in an amended filing with a compliant IQPA report. "ERISA places the responsibility for accurate, complete, and timely reporting on the plan administrator. [Respondent's] failure to take steps to ensure that the IQPA report was properly filed does not demonstrate good faith or diligence in the performance of a plan administrator." *Callaghan & Callaghan*, 2005-RIS-00099 at 4. EBSA, therefore, has acted reasonably in not reducing the penalty amount below \$150.00 per day. *Contra Callaghan & Callaghan, Inc.*, 2005-RIS-00099, at 3 (concluding that a 95% penalty reduction was not unreasonable once the plan administrator filed the IQPA report); *Schneiderman's Furniture, Inc.*, 2000-RIS-00040, at 6 (similarly concluding that a 95% penalty reduction was not unreasonable once Schneiderman's eventual compliance was taken into account).

Based on the foregoing, I conclude that Stover has failed to properly file its 2003 annual plan report, and the civil penalties imposed by the complainant are reasonable. EBSA is therefore entitled to summary decision in its favor.

ORDER

IT IS ORDERED that within 45 days of the date this Decision and Order is issued, the respondent shall pay to the U.S. Department of Labor a civil penalty in the amount of \$44,400.00. Respondent's payment shall be sent to the U.S. Department of Labor, ERISA Civil Penalty Collections, P.O. Box 100240, Atlanta, GA 30384-0240.

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JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 29 CFR §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 the decision will become the final agency action within the meaning of 5 U.S.C. §704.