



Issue Date: 02 May 2008

Case No.: 2007-RIS-00111

In the Matter of

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

v.

**Plan Administrator
ARENSON OFFICE FURNISHINGS, INC.
P/S 401(K) PLAN,**
Respondent.

**DECISION AND ORDER CANCELLING HEARING AND GRANTING
COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT**

Complainant, U.S. Department of Labor, Employment Benefit Security Administration (EBSA), moves for summary judgment in this proceeding for a civil penalty assessed under § 502(c)(2) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. § 1001, et seq., and its implementing regulations at 29 C.F.R. §§ 2560, 2570.

On March 15, 2007, Respondent, Plan Administrator for Arenson Office Furnishings, Inc. ("Respondent" or "Plan Administrator"), requested a hearing with this Office of Administrative Law Judges for a waiver or reduction of a civil penalty assessed against Respondent for failure to timely file an acceptable 2004 Form 5500 Annual Report. A hearing is currently scheduled for May 8, 2008, at 12:00 p.m. The Complainant filed the instant Motion for Summary Judgment on April 18, 2008, and the Respondent filed an Affidavit in Opposition to Complainant's Motion for Summary Judgment on April 28, 2008.

Standard for Summary Judgment

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 issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. § 18.40(d). In civil penalty proceedings under § 502(c)(2) of ERISA, where no issue of a material 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 standard for granting summary judgment under 29 C.F.R. § 18.40 is the same as that for summary judgment under the analogous Fed. R. Civ. P. 56(e): the moving party must show that there is no material issue of fact and that he is entitled to prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Flour v. DOE*, 1993-TSC-1, (ARB Dec. 9, 1994).

The party filing the motion for summary judgment has the initial burden to show the absence of evidence to support the non-moving party's case. *Munoz v. St. Mary-Coran Hosp.*, 221 F.3d 1160, 1164 (10th Cir. 2000). Once this burden has been met, the non-moving party must establish the existence of an issue of fact that could affect the outcome of the litigation. *Seetharaman v. General Elec. Co.*, 2002 CAA 21 (ARB May 28, 2004). At this stage of the summary decision, the non-moving party may not rest upon mere allegations, speculations or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Id.*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Findings of Fact

Based on the evidentiary submissions of the parties, I hereby make the following findings of fact on which this Decision is based. Where appropriate, these findings have been adopted from Complainant's Undisputed Facts. I have considered all of the evidence submitted by both parties in making these findings.

1. Arenson Office Furnishing, Inc. (Arenson) is the plan administrator of Arenson Office Furnishing, Inc., Profit Sharing 401(k) Plan (the "Plan"). *EBSA Exhibit 1*.
2. Under ERISA, the plan administrator of an employee benefit plan is required to file an annual report with the federal government within 210 days after the end of the plan year. 29 U.S.C. § 1024.
3. Arenson filed the 2004 Form 5500 annual report for the Plan on or about October 12, 2005.
4. EBSA issued a Notice of Rejection (NOR) to Arenson on or about September 26, 2006. The NOR notified Respondent of the deficiencies contained in the IQPA Report. Specifically, the IQPA Report contained an improper scope limitation and that the financial statements were not in conformity with GAAS principles. Arenson was advised that it had 45 days within which to

comply without incurring a penalty. *EBSA Exhibit 2*. The NOR, inter alia, specifically contains the following notice:

WARNING: Read this Notice carefully. YOU must file a written response within 45 days of the date of this Notice to avoid potential civil penalties authorized by Title I of ERISA. The law does not allow for extensions of time to respond to this Notice, therefore no extensions will be granted by the Department. *EBSA Exhibit 2, p. 1*.

5. In response to the Notice of Rejection, Respondent submitted a letter dated November 7, 2006, stating that it would file an amended filing with a new auditor's report. *EBSA Exhibit 3*. In addressing the audit report's scope limitation, Respondent and its auditor had a conference call with Mr. Michael Auerbach, Chief, Division of Accounting Services, and received a referral to the American Institute of Certified Public Accountants ("AICPA").
6. Arenson did not file an amended 2004 Form 5500 with a satisfactory IQPA report within 45 days of the date of the NOR.
7. On December 18, 2006, EBSA issued a Notice of Intent to Assess a Penalty ("NOI") requesting submission of a satisfactory 2004 IQPA report for the Plan. The NOI proposed a \$50,000 penalty against Arenson for its failure to file a satisfactory 2004 IQPA report. *EBSA Exhibit 4*. The NOI further advised Arenson that it had thirty-five days within which to submit a statement of reasonable cause – which requires setting forth the facts alleged as reasonable cause in writing and under penalty of perjury – for the failure to file the 2004 IQPA report or why the penalties, as calculated, should not be assessed. The NOI, inter alia, specifically contained the following:

WARNING: Read this Notice carefully. YOU must file a written response within 35 days of the date of this Notice to preserve your administrative rights. The law does not allow for extensions of time to respond to this Notice, therefore no extensions will be granted by the Department. *EBSA Exhibit 4, p. 1*.

8. Arenson responded by letter dated January 17, 2006, from Arnold Manche, Plan Administrator ("Reasonable Cause Statement"). *EBSA Exhibit 5*. Included with the Reasonable Cause Statement was a copy of the amended filing with the auditor's unqualified opinion report. On January 17, 2007, Arenson also filed an amended 2004 Form 5500 with the required IQPA report. *EBSA Exhibit 8*. Respondent states that in its attempt to address the improper scope limitation, Respondent and its auditor consulted with EBSA's DAS Division with the AICPA. *EBSA Exhibit 5*.

9. On February 12, 2007, EBSA issued a Notice of Determination on Statement of Reasonable Cause (NOD) to Arenson, assessing an abated penalty in the amount of \$2,500. Because Respondent was able to cure the deficiencies at the time of its Reasonable Cause Statement, EBSA waived \$47,500 or 95% of the intended penalty. *EBSA Exhibit 6*.
10. The Reasonable Cause Committee reviewed Respondent's Reasonable Cause Statement and determined that Respondent did not provide sufficient details to demonstrate reasonable cause for its failure to timely and properly file a satisfactory IQPA report. *EBSA Exhibit 7*.

Discussion and Conclusions of Law

ERISA is a comprehensive statute which is remedial in nature and designed to protect employee benefit plans. *Alessi v. Raybestos, Inc.*, 451 U.S. 504, 510 (1989); *Brink v. Dalesio*, 667 F.2d 420, 427 (4th Cir. 1981). The Act includes extensive reporting and disclosure provisions to accomplish that purpose, including the requirement of financial statements and audit and opinion of an IQPA in an annual report, referred to as Form 5500. Under ERISA §§ 102 and 104, 29 U.S.C. §§ 1021 and 1024, the plan administrator is responsible for ensuring that the Form 5500 is properly completed and timely filed. ERISA § 103, 29 U.S.C. § 1023, sets forth the requirements as to what the IQPA opinion should include. ERISA § 104, 29 U.S.C. § 1024 authorizes the Secretary of Labor ("Secretary") to reject annual reports that do not comply with the statutory requirements. If the Secretary rejects an annual report and an acceptable report is not filed within 45 days of the rejection, the Secretary is empowered to retain an IQPA on behalf of a plan (at the plan's expense) to perform the required audit and report, bring an action for appropriate legal or equitable relief, or take other action authorized by title 1 of ERISA. In 1987, Congress amended ERISA, adding § 502(c)(2), 29 U.S.C. §1132 (c)(2), giving EBSA discretionary authority to assess a penalty on the administrator of an employee benefit plan for filing late or defective annual reports. Thereafter, the Secretary promulgated regulations at 29 C.F.R. § 2560.502c-2, setting forth the administration and procedures governing the assessment of civil penalties under § 502(c)(2).

The Complainant contends that the Secretary's assessment of an abated penalty was appropriate given that Respondent had ample opportunity to correct the deficiency before a penalty was assessed. The Complainant notes that the original due date for the 2004 Form 5500 Annual Report was July 31, 2005, and that the amended 2004 Form 5500 was not filed until January 11, 2007. Upon receipt of the amended 2004 Form 5500 Annual Report and the Statement of Reasonable Cause, 95% of the assessed penalty was abated.

Complainant states that EBSA followed the statute and regulations for assessing a penalty and that the abated \$2,500 penalty was assessed because no reasonable cause was shown for failing to file an acceptable report with the original filing or to timely correct the failure. Complainant argues that in October, 2005, the Plan Administrator knew or should have known that the IQPA report contained an improper opinion due to the auditor's statement that there was inadequate participant data. Complainant argues that the Respondent disclosed in its November,

2006, response to the NOR that it would file an unqualified IQPA report and was aware that a non-limited scope opinion needed to be filed within the 45-day time period in order to avoid a penalty. It was not until after the NOI was issued to the Respondent in January, 2007, that Respondent submitted a Reasonable Cause Statement and an amended report wherein the improper scope limitation was corrected. At that time, Respondent did not provide an explanation for its failure to timely and properly file an unqualified IQPA report. Complainant also notes that Respondent waited until November 6, 2006, to determine how to correct the improper scope limitation, well after the expiration of the penalty-free period.

The Respondent's lone argument in response to the Complainant's Motion for Summary Judgment is that it took actions in good faith to correct the IQPA report, thus warranting the waiver of the remaining penalty.

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."). Based on the foregoing, I find no basis to conclude that imposition of the abated fine of \$2,500 was arbitrary, capricious or an abuse of discretion.

The legislative and statutory provisions of ERISA make clear the central importance that the plan audit and IQPA report have in the monitoring and enforcement scheme under ERISA and that, if required, the failure to have an acceptable audit and IQPA report is a material reporting failure under ERISA § 103. In this matter, the Respondent had an improper, limited scope IQPA opinion, which is a material reporting violation under ERISA. The Respondent does not argue otherwise. It is the Plan Administrator's responsibility to comply with ERISA and the Respondent's failure to timely follow up to correct the deficient filing before and after receiving EBSA's Notices does not demonstrate good faith or diligence in the performance of its responsibilities under the Act.

The Secretary promulgated regulations at 29 C.F.R. § 2560.502c-2, setting forth the administrative procedures governing the assessment of civil penalties under § 502(c)(2). The undisputed facts indicate that the procedures governing the assessment of civil penalties were followed. The Respondent does not challenge the sufficiency of service of the Notices issued or the procedures used by EBSA. Additionally, the Respondent does not argue that it was not afforded all procedural opportunities available under the regulations to cure the filing deficiencies without incurring a penalty.

EBSA acknowledged Respondent's efforts to come into compliance – including its consultation with EBSA and the AICPA – by abating the penalty by 95%. The non-abatement of 5% of the assessed penalty was well within the EBSA's discretion to assess a penalty. Consequently, there is no basis to conclude that the penalty was arbitrary, capricious or an abuse

of discretion. The \$2,500 abated penalty is upheld and Complainant is entitled to summary decision in its favor.

ORDER

It is hereby ORDERED that:

1. The Complainant's Motion for Summary Judgment is granted;
2. Respondent, Plan Administrator for Arenson Office Furnishings 401(K) Plan, shall pay to the U.S. Department of Labor a civil penalty in the amount of \$2,500 within 45 days of the date of this order
3. Any portion of this penalty that is not paid by that date shall be subject to such penalties and interest as ERISA and its implementing regulations have provided.
4. The hearing scheduled in this matter for May 8, 2008, in New York, New York, is CANCELLED.

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JOHN M. VITTONI
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 the decision of this court will become the final agency action within the meaning of 5 U.S.C. § 704.