

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 January 2010

CASE NO.: 2009-RIS-00014

In the Matter of:

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

vs.

PLAN ADMINISTRATOR,
DUTCH AMERICAN IMPORT CO., INC.
EMPLOYEE STOCK OWNERSHIP PLAN,
Respondent.

Appearances: Elizabeth Goldberg, Esq.
For the Complainant

Martin Heming, Esq.
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER REDUCING CIVIL PENALTY

INTRODUCTION

This proceeding involves penalty assessments made against the Plan Administrator for the Dutch American Import Company, Inc., Employee Stock Ownership Plan, the Respondent, pursuant to the provisions of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"). The implementing regulations particularly at issue in this proceeding are published at 29 CFR Part 2520, which are the rules for reporting and disclosure, and at 29 CFR Part 2570, which include the procedures for assessment of civil penalties.

For the reasons set forth below, the penalty assessments are REDUCED.

PROCEDURAL BACKGROUND

By a formal Notice of Intent to Assess a Penalty issued on June 23, 2008, (“Notice”) the Employee Benefits Security Administration of the U.S. Department of Labor (“EBSA”) advised the Respondent, Jacob G.C. Schep, Plan Administrator of the Dutch American Import Co. Employee Stock Ownership Plan, that EBSA had assessed a penalty of \$49,200 for its failure to file a satisfactory Annual Report for calendar year 2006. The Notice specified the particular deficiencies found by EBSA and provided references to the specific regulations upon which the Notice was based. Respondent filed a timely Statement of Reasonable Cause pursuant to 29 CFR § 2560.502c-2 of the governing procedural regulations on July 28, 2008, requesting waiver of the assessment “for good cause.”

After the request for a waiver was denied, the Respondent filed a request on October 16, 2008, for a hearing before the Office of Administrative Law Judges (“OALJ”). Their request was made pursuant to 29 CFR §§ 2560.502c-2(h), 2570.61(c) and 2570.62. The hearing took place on August 11, 2009, in Long Beach, California. The Complainant’s counsel, Respondent, and counsel for the Respondent appeared at and participated in the hearing. Both parties had a full opportunity to introduce evidence and present testimony.

At the hearing, I admitted the following exhibits into evidence: Complainant’s exhibits (“EBSA Ex.”) 1, 3-5, 7, 9-13; and Respondents’ exhibits (“RX”) B-D. I excluded Complainant’s Exhibits 2, 6, and 8, and Respondent’s exhibit A was withdrawn. (HT,¹ p. 11)

STIPULATIONS

The Complainant and the Respondents agreed to and filed the following stipulations at the beginning of the hearing:

- (1) The Annual Report of Respondent for the plan year ending December 31, 2006, was incorrectly filed because it had non-qualifying assets that required either a 100% of assets ERISA bond or a report of an Independent Qualified Public Accountant (“IQPA”).
- (2) The non-qualifying assets consisted of loans from the plan to the Respondent which were prohibited transactions. The bond amount was insufficient to cover such non-qualifying assets.
- (3) Complainant followed its procedural rules and gave timely notices of the failure and subsequently assessed a penalty of \$49,200. Parties do not dispute the initial calculation of the penalty amount.
- (4) Respondent did not respond to the Complainant’s Notice of Rejection of Form 5500 dated April 28, 2008, in any manner and did not file a corrected Form 5500 during the 45 day window provided by the Notice of Rejection. After the Complainant sent a Notice of Intent to Assess a Penalty dated June 23, 2008, the Respondent timely filed a Statement of Reasonable Cause which

¹ References to “HT” are to the hearing transcript.

was rejected by the Complainant, but did not file a corrected Form 5500 before or with that Statement of Reasonable Cause.

- (5) Respondent filed an answer and Complainant its response.
- (6) Respondent hired an IQPA who prepared its reports for 2006 and 2007 and Respondent filed amended Annual Reports with the IQPA report attached. The corrected filing for 2006 was provided to the Department by letter dated April 8, 2009.
- (7) Complainant has accepted the amended reports as filed and as corrected.
- (8) As stated in a June 23, 2009, letter by EBSA Regional Director Billy Beaver; because the Respondent has taken action to repay the prohibited loans, the Department will take no further action, except to refer the issue to the IRS for assessment of excise tax, however the responsibility for the acceptance or rejection of the Annual Report is delegated to the Office of the Chief Accountant and the decisions of the EBSA regional office does not affect their authority with respect to the Annual Report.
- (9) Respondent requested a reduction of the penalty after full correction was made and suggested a modified penalty of \$7,380.00. Complainant rejected the offer and stated that no reduction of any kind would be acceptable. This does not affect the ability of the Complainant to object to the relevance of this request.
- (10) The parties stipulate that all written communications between the parties that are offered as Exhibits to this proceeding are authentic copies, were received by the opposing party, and are admissible. The contents of those communications are evidence, without need for testimony as to their contents.
- (11) This stipulation does not include the following, which are not written communications between the parties: EBSA Exhibit 2, EBSA Exhibit 6, EBSA Exhibit 8; and Respondent's Exhibit A. For those documents, the parties agree the documents are authentic copies, but make no stipulation as to admissibility or evidentiary value.
- (12) If deemed admissible, notice should be taken that EBSA Exhibit 8, page 53 refers to the date of August 15, 2008.

ISSUE

The only issue in this case is whether the \$49,200 civil penalty assessed by EBSA against the Respondent be reduced.

FINDINGS

Jacob G.C. Schep, serves as the Plan Administrator of the Dutch American Import Co., Employee Stock Ownership Plan. (EBSA Ex.1, p. 3.) On or about September 25, 2007, Mr.

Schep filed the 2006 Form 5500 (“Annual Report”) for the plan with EBSA without attaching an IQPA report. (EBSA Ex. 1, p. 3.) The Plan Administrator indicated on the Annual Report that they were claiming a waiver of the annual examination and report of an IQPA under 29 CFR § 2520.104-46. (EBSA Ex. 1, p. 7.)

By letter dated April 28, 2008, EBSA notified the Respondent that the 2006 Annual Report had been rejected because it did not meet the IPQA audit waiver conditions of 29 CFR § 2520.104-46. (EBSA Ex. 3, p. 18.) The Respondent was notified in the letter that a failure to provide material information would be treated as a failure to file an Annual Report unless a revised report satisfactory to the Department of Labor was filed within 45-days of the date of the Notice of Rejection. (EBSA Ex. 3, p. 19.) Additionally, the letter warned the Respondent that failure to file within the 45-day grace period could result in an assessment of a civil penalty of up to \$1,100.00 per day.

The Respondent did not file an amended Annual Report with an IQPA report within the 45-day grace period. In a Notice of Intent to Assess a Civil Penalty, dated June 23, 2008, EBSA informed the Respondent that it had assessed a \$49,200 civil penalty for the failure to file an amended Annual Report. (EBSA Ex. 4, p. 24.) The EBSA explained that the penalty was calculated based on the fact that 328 days had elapsed from the initial Annual Report due date of August 1, 2007, to the date of the Notice. (EBSA Ex. 4, p. 25.) EBSA calculated the penalty by multiplying the 328 days by \$150 per diem yielding a penalty of \$49,200.00. (EBSA Ex. 4, p. 25.) This Notice advised the Respondent to file a Statement of Reasonable Cause within 35-days from the date of the letter stating either that it had complied with the reporting requirements or stating the mitigating circumstances regarding the willfulness of the non-compliance and state all alleged facts as to why the penalty should be reduced or waived. (EBSA Ex. 4, p. 25.)

On July 21, 2008, EBSA sent a follow-up letter informing the Respondent, in detail, about the investigation of the Plan to advise the Respondent of EBSA’s findings and to give the Respondent the opportunity to reply before EBSA determined what further action, if any, was needed. (EBSA Ex. 9, pg. 59.) EBSA informed the Respondent that Mr. Schep, as the Plan Administrator, was “a fiduciary in his individual capacity as a Plan trustee pursuant to ERISA § 3(21)(A), and in his corporate capacity as a director and chairman of the Dutch American Import Co. (“Company”). It further informed the Respondent that Mr. Schep exercised a fiduciary duty with respect to the selection, monitoring, and retention of the Plan’s trustees on behalf of the Company and that both the Company and Mr. Schep were parties in interest in the Plan. (EBSA Ex 9, p. 62.)

The EBSA’s investigation revealed that the Respondent failed to include an IQPA report pursuant to ERISA §§ 103(a) and 104(a)(1). (EBSA Ex. 9, p. 69.) Under some circumstances, EBSA waives the audit requirement for small plans, but certain conditions must be met. (EBSA Ex. 9, p. 69.) The first condition for a small plan audit waiver is that at least 95% of the plan’s assets are held in qualifying plan assets or any person who handles the non-qualifying assets of the plan is bonded in accordance with ERISA § 412, but the amount of the bond cannot be less than the value of the non-qualifying plan assets. The term “qualifying plan assets” is defined in the regulation and includes publicly traded securities, participant loans, assets held by a bank or insurance company, mutual funds, investment and annuity contracts issued by an insurance company, certain qualifying self-directed investments, and employer securities. (EBSA Ex. 9, p. 69.)

The Plan at issue held over 50% of its assets in non-participant loans which are not qualifying assets under the small plan audit waiver regulation. The Plan also did not have a fidelity bond to cover the value of the non-qualifying assets. (EBSA Ex. 9, p. 69.)

Respondent timely filed a Statement of Reasonable Cause on July 28, 2008. (EBSA Ex. 5, p. 31.) In the Statement of Reasonable Cause, Respondent asserted that it believed the audit waiver applied to the Plan because the Plan had fewer than 20 participants, and in the past, small plans had been exempted from the audit requirement. (EBSA Ex. 5, p. 32.) Respondent argued that the Company lacked sophistication in ERISA matters, and was forced to rely on a third-party when submitting the Annual Report. (EBSA Ex. 5, p. 33.) Their third-party accountant had prepared the Annual Report for them and the Respondent relied on the third party's expertise. (EBSA Ex. 5, p. 32.) The Statement of Reasonable Cause also stated that the Annual Report provided to the Plan Administrator by its third-party accountant indicated in Item 4k that the Plan claimed the audit waiver, and the Company had no reason to believe that its third-party accountant had given it an incorrect form to sign. (EBSA Ex. 5, p. 32.) Lastly, Respondent stated that identical information had been submitted for the 2005 and 2004 plan years without any indication by the Department of Labor that the form was deficient. (EBSA Ex. 5, p. 32.) The Respondent argued that in light of these circumstances it was reasonable for the Plan Administrator to believe that the Plan was entitled to a waiver of the requirement to file an IQPA report. (EBSA Ex. 5, p. 32.) The Respondent also stated that it was examining its alternatives with respect to the audit waiver requirements and expected to have a plan for ensuring compliance with the filing requirements in the near future. (EBSA Ex. 5, p. 32.)

EBSA issued a Notice of Determination on Statement of Reasonable Cause ("Notice of Determination") on September 15, 2008, finding that the Respondent had not provided sufficient cause to warrant a reduction in the penalty. EBSA stated it was refusing to waive the penalty because an IQPA report and an amended Annual Report were not submitted with the response to the Notice of Intent to Assess a Penalty and the Plan Administrator has the fiduciary responsibility to assure himself that reporting requirements are met. (EBSA Ex. 7, p. 47.) EBSA also noted in its Notice of Determination that as of the date of that letter the Department still had not yet received an amended Annual Report. (EBSA Ex. 7, p. 48.) Respondent was informed of its right to request a hearing before the Office of Administrative Law Judges.

Respondent filed a timely request for a hearing before an Administrative Law Judge ("ALJ") on October 16, 2008. On April 8, 2009, Respondents submitted a compliant amended Annual Report. (EBSA Ex. 11, p. 80.) In this report they included an IQPA, which was performed by Farber Hass Hurley, LLP. (EBSA Ex. 11, p. 88.) The Plan was terminated effective January 1, 2009, and all assets were to be distributed to the participants before the year's end. (EBSA Ex. 12, p. 121.)

ANALYSIS AND DISCUSSION

Purpose of ERISA

The purpose of ERISA, at 29 U.S.C. §§ 1001 *et seq.*, is to protect the integrity of employee benefit plans maintained by employers. *U.S. Department of Labor (PWBA) v. Sociedad Para Asistencia Legal Money Purchase Plan*, 1994-RIS-62 (ALJ, Mar. 29, 1995.) In line with its purpose, the Act contains extensive reporting and disclosure requirements. *Id.*

Specifically, when an employee benefit plan holds non-qualifying assets, the plan administrator must either ensure that they are sufficiently bonded or that they submit in IQPA report with the annual report required under the Act. If the plan administrator fails to comply with these requirements, penalties may be assessed at the discretion of the Secretary. *Id.*

Under 29 U.S.C. §§ 1021(b) and 1024(a)(1) it is the responsibility of the plan administrator to ensure that the annual report and any required IQPA report are completed properly and timely filed. The required annual report and all required attachments, *i.e.* an IQPA report, are due 210 days after the end of the applicable plan year. 29 U.S.C. § 1024(a)(1). The Secretary has the discretion to reject any annual report that does not comply with the statutory requirements. 29 U.S.C. § 1024(a)(4). If the Secretary does so, and a compliant report is not submitted within 45 days of her rejection, she may take any action authorized by Title I of ERISA. 29 U.S.C. § 1024(a)(5). Among those authorized actions are the imposition of civil penalties pursuant to 29 U.S.C. § 1132(c)(2). That section authorizes a civil penalty of up to \$1,100.00 per day for a failure to file a timely annual report.

Standard of Review

The standard of review in 29 C.F.R. § 502(c)(2) penalty proceedings, such as this, is *de novo*. *U.S. Department of Labor, PWBA² v. Spaulding & Evenflo Companies, Inc.*, No. 92-RIS-19, slip op. at 7 (PWBA Nov. 18, 1994); *U.S. Department of Labor, EBSA v. Plan Administrator, Team Laurino 401(k) Plan*, 2008-RIS-00050, slip op. at 4 (ALJ, Dec. 9, 2008); *see also U.S. Department of Labor, PWBA v. Northwestern Institute of Psychiatry*, 93-RIS-23, slip op., at 10 (PWBA July 26, 1995.) However, the ALJ is bound by the governing statute and regulations and cannot set aside the Complainant's method of calculating the penalty, except to the extent the ALJ finds them to be invalid. *See Spaulding*, slip op. at 7.

Reasonableness of Civil Penalty

The Respondent does not challenge the calculation of the penalty against it. (Stipulation No. 3.) It is undisputed that the Respondent initially filed an Annual Report without an IQPA report and delayed filing an amended Annual Report until after it received notice that their initial Annual Report was rejected by EBSA. The Complainant sent a Notice of Rejection to the Respondent on April 28, 2008, and informed the Respondent that it had a 45 day time period to file a correct amended report. (EBSA Ex 3.) The Respondent did not respond to that Notice of Rejection and did not file a report by the June 12, 2008, 45-day deadline. The Respondent has conceded that it failed to timely respond to the Complainant's Notice of Rejection and offered no evidence as to why it did not respond to the Notice of Rejection.

² At the time of the *Spaulding & Evenflo* decision and the *Northwestern Institute of Psychiatry* decision cited later in this paragraph, the Complainant operated as the Pension and Welfare Benefits Administration ("PWBA"). In the mid-1990s, the Secretary of Labor, who reviews all ALJ decisions in 29 C.F.R. § 502(c)(2) proceedings, delegated the appellant responsibility to a PWBA senior policy advisor. At present, the senior policy advisor's decisions constitute the entire body of administrative-appellate authority on ERISA adjudications within the Department of Labor. The senior policy advisor's decisions are the functional equivalent of decisions rendered by the Secretary of Labor. Also, the PWBA's responsibilities now rest with the EBSA.

Under § 101(b)(1) of ERISA, if a respondent can show mitigating circumstances regarding the degree or willfulness of the noncompliance they may be entitled to a reduction or waiver of the penalty. The Respondent offered mitigating circumstances for waiver of the civil penalties assessed against it in its Statement of Reasonable Cause, but the EBSA rejected those arguments and refused to waive the penalties, noting that an acceptable report still had not been filed.

Challenges to EBSA civil penalties under ERISA are not uncommon before the OALJ. In many cases, the plan administrator files an acceptable report while the case is pending before the OALJ, and the cases are resolved between the parties after the plan administrator files the acceptable report. EBSA often reduces or waives the penalty in the settlement. In this instance, though an acceptable report was filed after the case was pending before the OALJ, EBSA elected not to reduce or waive the penalty through a settlement.

The EBSA civil penalty appeals that are not resolved through settlement have generally involved situations in which a corrected annual report was never filed, filed with the Statement of Reasonable Cause, or filed after the filing of a Statement of Reasonable Cause but before the Determination of Reasonable Cause was made by EBSA. *See e.g., U.S. Department of Labor (PWBA) v. Compgraphix*, 1999-RIS-00053 (ALJ Oct. 14, 1999) (no acceptable report filed); *U.S. Department of Labor, EBSA v. Tile Finishers Local 88 NY BAC Savings Plan*, 2008-RIS-00020 (ALJ, June 3, 2008) (report filed with statement of reasonable cause); *U.S. Department of Labor, EBSA v. Plan Administrator, Arenson Office Furnishings, Inc.*, 2007-RIS-00111 (ALJ, May 2, 2008) (report filed with statement of reasonable cause); *U.S. Department of Labor, EBSA v. New Design Construction Co., Inc.*, 2007-RIS-00009 (ALJ, May 4, 2007) (report filed after statement of reasonable cause filed but before determination of reasonable cause made).

As mentioned earlier, an ALJ has the power to review the record *de novo* to make factual determinations with respect to the assessment and calculation of the penalty. *U.S. Dep't of Labor v. Spalding and Evenflo Companies, Inc.*, slip op. at 7. This includes a review of the evidence of a respondent's mitigating circumstances regarding the degree of willfulness or of the non-compliance. *U.S. Department of Labor, EBSA v. Plan Administrator, Team Laurino 401(k) Plan*, slip op., fn. 6 at 4.

In reviewing the record, it is apparent that the Respondent ignored EBSA's first notice that the Annual Report had been rejected. Not until the Notice of Intent to Assess a Penalty, did the Respondent take action. The Respondent submitted a Statement of Reasonable Cause asking for a waiver of the penalty and outlining their reasons as to why the Annual Report was deficient but still did not submit a compliant report. EBSA rejected their reasons for waiver of the penalty and affirmed the \$49,200 penalty. Respondent eventually filed a compliant Annual Report but not until April 8, 2009, after this case was pending before the OALJ. Respondent's current argument is that the penalty should be reduced because it did come into compliance, though late.

In view of the fact that the Respondent did not file an amended Annual Report at the time it filed its Statement of Reasonable Cause, I find that the calculation of the civil penalty was valid. However, as indicated earlier, I am conducting a *de novo* review of the penalty proceedings, which includes taking into consideration mitigating circumstances and events that transpired after the Statement of Reasonable Cause was issued.

As mentioned earlier many of the contested ERISA cases that were not settled involved appeals of reduced civil penalties in instances where the acceptable reports were filed before the case came before the OALJ. The decisions rendered by the ALJ in those cases involved disputes over the reduced penalty. In those cases where an acceptable report was filed with the Statement of Reasonable Cause, the EBSA usually reduced the assessed penalty by 95%, and the respondent appealed to the OALJ seeking a complete waiver of the penalty. Those reduced penalties were affirmed by the ALJ.

For instance, in *U.S. Department of Labor, EBSA v. Tile Finishers Local 88 NY BAC Savings Plan*, 2008-RIS-00020, slip op. at 3 (ALJ, June 3, 2008), the EBSA reduced a \$50,000.00 civil penalty to \$5,000.00 after the plan administrator filed an acceptable report at the time it filed its statement of reasonable cause. The ALJ found the penalty to be reasonable and affirmed the final assessed penalty after considering the fact that the penalty had already been reduced and the plan's "disregard of its obligations." See also *U.S. Department of Labor, EBSA v. Plan Administrator, Arenson Office Furnishings, Inc.*, slip op. at 4; *U.S. Department of Labor v. Callaghan & Callaghan, Inc.*, 2005-RIS-00099, slip op. at 2.

A smaller reduction in the penalty was given to the plan administrator in *U.S. Department of Labor (EBSA) v. New Design Construction Company, Inc.* New Design had filed an annual report but it was deficient because it did not include an IQPA report, and EBSA had assessed a civil penalty of \$75,750.00. EBSA reduced the \$75,750.00 penalty by approximately 73.2%, to \$5,545.00 after the plan administrator filed an acceptable report with EBSA. Unlike the cases cited above, the acceptable report was not filed with the filing of its Statement of Reasonable Cause but it was filed before EBSA issued its Determination of Reasonable Cause. The reduced penalty was affirmed when the respondent appealed to the OALJ asking for a waiver. *U.S. Department of Labor (EBSA) v. New Design Construction Company, Inc.*, 2007-RIS-9, slip op. (ALJ, May 4, 2007)

The full penalty was affirmed in *U.S. Department of Labor (PWBA) v. Compgraphix*, where Compgraphix failed to file an acceptable amended annual report with an IQPA report. The ALJ affirmed the \$50,000 civil penalty assessed against Compgraphix, because Compgraphix had failed to file an amended and sufficient Annual Report by the time of the hearing. 1999-RIS-00053 (ALJ, Oct. 14, 1999.)

I found one decision in which EBSA and the respondent were unable to resolve the civil penalty issue after the respondent filed an acceptable report while the case was pending before the OALJ. In that case, the ALJ affirmed the entire assessed penalty in a summary decision after finding that the respondent had failed to file an acceptable plan and that the civil penalties imposed were reasonable. The ALJ applied an arbitrary and capricious standard to his review of the appropriateness of the penalty, stating that "[u]nless EBSA acted in an arbitrary, capricious, or unreasonable manner, an administrative law judge generally will not disallow a penalty assessed for failure to file a complete annual report in a timely manner." *U.S. Department of Labor, EBSA v. Dynapace Corporation*, 2005-RIS-00088, slip op. at 10 (ALJ, Jan 10, 2007).

However, Chief Administrative Law Judge John Vittone pointed out in a decision issued December 9, 2008, that those administrative law judges who had applied an "arbitrary and capricious standard" in these ERISA civil penalty disputes had applied the wrong standard of review. Judge Vittone explained that the Secretary of Labor's senior policy advisor's decisions

constitute the entire body of administrative-appellate authority on ERISA adjudications within the Department of Labor and that the senior policy advisor had ruled in *U.S. Department of Labor, PWBA v. Spaulding & Evenflo Cos., Inc.*, which I cited earlier, that the standard of review is *de novo* under ERISA. *U.S. Department of Labor, EBSA v. Plan Administrator, Team Laurino 401(k) Plan*, slip op., fn. 6 at 4.

Affirming the full penalty in this case, despite the Respondent's correction of the deficiencies, would remove an incentive for plans governed by ERISA to file corrected/amended reports after a penalty is assessed against them. The goal of ERISA is to protect the integrity of employee benefit plans maintained by employers through reporting requirements enforced upon Plan Administrators. *U.S. Dep't of Labor (PWBA) v. Sociedad Para Asistencia Legal Money Purchase Plan*, 1994-RIS-62 (ALJ, Mar. 29, 1995.) This protection is accomplished through the filing of proper reports with the EBSA so that the EBSA can monitor the benefit plans regardless of when the report are filed. The EBSA's Assistant Chief of the Division of Reporting and Compliance acknowledged at the hearing in this case that EBSA is interested in getting full compliance with the reporting requirements, even if it isn't accomplished before the Statement of Reasonable Cause is filed. (HT, p. 63.) EBSA's ability to achieve this goal would be diminished if plan administrators decided there was no point in filing an acceptable report once the civil penalties had been assessed because the penalties would not be reduced by their late compliance with the reporting requirements.

The reports provide for greater accountability of the Plans, and without such filings EBSA would not be able to determine whether plans are being maintained in accordance with provisions of ERISA. If civil penalty assessments are not reduced in circumstances such as this, there is no incentive for the plan to file corrected reports once civil penalties have been assessed and their statement of reasonable cause has been rejected. As noted by the Eleventh Circuit, it remains the intent of Congress that the courts use their power to fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well. *Herman v. South Carolina National Bank*, 140 F.3D 1413, 1423 (11th Cir. 1998)

The fact that the Respondent ultimately filed an acceptable report differentiates this case from those cases where the full penalty was affirmed because an acceptable report was never filed. The subsequent filing of an acceptable report while the case was pending before the OALJ is a mitigating circumstance that obviously could not be considered at the time the Determination of Reasonable Cause was made. Thus, while the civil penalties were appropriate at the time the Determination of Reasonable Cause was made, I find that the subsequent filing of the amended report warrants a reduction of the penalties that were assessed.

Reduction of Civil Penalty:

To determine what a reasonable reduction to the civil penalty would be in this case, I have reviewed other OALJ decisions, including the ones I discussed earlier, to see when the acceptable reports were finally filed and how much the civil penalty was reduced. In those cases, such as *Tile Finishers*, where the acceptable report was filed with the statement of reasonable cause, EBSA reduced the penalty by 95%. *Dep't of Labor (EBSA) v. Tile Finishers Local 88 NY, BAC Savings Plan*, 2008-RIS-00020, slip op. at 3. In *New Design*, where the correct report was not filed with the statement of reasonable cause but was filed before the EBSA actually made its

reasonable cause determination, the EBSA reduced the penalty by 73.2%. *Dep't of Labor (EBSA) v. New Design Construction Company, Inc.*, 2007-RIS-9, slip op. at 6.

In *Northwestern Institute of Psychiatry*, the Department reduced the penalty by 75% after receiving a corrected annual report. In this case, the Northern Institute of Psychiatry filed a statement of reasonable cause without a corrected annual report, but its statement of reasonable cause was rejected by the Department of Labor. The plan filed suit in Federal District Court challenging the rejection of its statement of reasonable cause and filed a corrected report. The District Court ordered the plan to submit an acceptable statement of reasonable cause, and in the subsequent determination of reasonable cause, the Department of Labor reduced the penalty by 25%. *Dep't of Labor (PWBA) v. Northwestern Institute of Psychiatry*, 1993-RIS-00023, at 4, (ALJ, July 26, 1995.)

It is clear that the Department of Labor has reduced the civil penalties assessed where the Respondent has submitted a compliant annual report before EBSA makes its Determination of Reasonable Cause. Though the penalties have generally been reduced 95% where the reports were filed with the Statement of Reasonable Cause, reductions of 75% and 73.2% were applied where the reports were filed before EBSA made its Determination of Reasonable Cause. Neither of these situations applies here, where the acceptable report was not filed until the case was pending before the OALJ.

Because of the additional delay in Respondent's filing of the acceptable report, I find that a fair and equitable penalty would be 50% of EBSA's original assessment. For the reasons discussed above, the Complainant's assessment of civil monetary penalties is reduced to \$24,600.

ORDER

It is hereby ORDERED that Respondent, Plan Administrator for Dutch American Import Company, Inc. Employee Stock Ownership Plan, shall pay to the U.S. Department of Labor a civil penalty in the amount of \$24,600 within 45 days of the date of this Decision and Order. 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.

A

JENNIFER GEE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 29 C.F.R. § 2570.69, a notice of appeal must be filed with the Secretary of Labor within 20 days of the date of issuance of this Decision and Order or this decision will become the final agency action within the meaning of 5 U.S.C. § 704.