

U.S. Department of Labor

Office of Administrative Law Judges
William S. Moorhead Federal Office Building
1000 Liberty Avenue, Suite 1800
Pittsburgh, PA 15222



(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 15 November 2010

CASE NO.: 2009-RIS-80

In the Matter of:

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

v.

P.E.C. CONTRACTING ENGINEERS
Respondent

APPEARANCES:

Gail A. Perry, Esq.
For the Complainant

Joshua Smith, Esq.
For the Respondent

Before: DANIEL L. LELAND
Administrative Law Judge

**DECISION AND ORDER GRANTING COMPLAINANT'S MOTION
FOR SUMMARY DECISION, IN PART, AND DENYING
RESPONDENT'S COUNTER-MOTION FOR SUMMARY DECISION**

This matter arises under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001, *et seq.*, and the implementing regulations published at 29 C.F.R. Parts 2560 and 2570. On May 26, 2009 Complainant Employee Benefits Security Administration (EBSA) assessed a penalty totaling \$180,000 against Respondent P.E.C. Contracting Engineers (P.E.C.) for failure to timely file annual reports for the 2005, 2006, and 2007 plan years. On June 30, 2009, Respondent P.E.C. Contracting Engineers filed an appeal with the Office of Administrative Law Judges and the matter was thereafter assigned to the undersigned.

On August 11, 2010, Complainant filed a Motion for Summary Judgment seeking to affirm its assessment of the \$180,000 penalty. On October 19, 2010, Respondent filed a Cross-Motion for Summary Decision, arguing that no penalty should be assessed because it is

unconstitutionally excessive under the Eighth Amendment.¹ On November 5, 2010, Complainant filed an Opposition to Respondent's Cross-Motion for Summary Judgment.

SUMMARY JUDGMENT STANDARD OF REVIEW

29 CFR § 18.40 (d) provides that an administrative law judge may enter summary decision for either party if the pleadings, affidavits, material obtained in 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. In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The moving party bears the initial burden to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party meets this burden, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact. The non-moving party may not rest upon mere allegations, but must present affirmative evidence in order to defeat a properly supported motion for summary decision. *Anderson*, 477 U.S. at 247; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

UNDISPUTED FACTS

The parties' filings agree on the following points, which I find are supported by the exhibits filed in support thereof:

1. Respondent is the plan administrator of P.E.C. Contracting Engineers Davis-Bacon Pension Plan (the Plan).
2. The Plan failed to timely file Annual Report Form 5500 for the 2005, 2006, and 2007 plan years.
3. On September 3, 2008, EBSA's Philadelphia Regional Office (PRO) sent a Voluntary Compliance letter to Mr. Paul Chambers, as Trustee of the Plan, informing him that he and Respondent had violated ERISA's provisions with respect to the non-payment of \$24,120.67 to five terminated employees.² See CX 1.³
4. On or about March 16, 2009, EBSA's PRO referred this matter to the Office of the Chief Accountant (OCA) for possible reporting and disclosure violations of ERISA. See CX 2.

¹ Respondent alternatively argues that "[e]ven if this Court were to conclude that the fine sought to be imposed is not unconstitutionally excessive, it is nonetheless unreasonably excessive in light of the surrounding circumstances and should therefore be significantly reduced." Memorandum of Law in Support of Respondent P.E.C. Contracting Engineers' Cross-Motion for Summary Decision, at 10 n. 8.

² The letter also informed Mr. Chambers that the Plan's Annual Report Form 5500 was not filed with the Secretary of Labor after the Plan year ending 1997 and that such failures resulted in a violation of ERISA § 104(a)(1)(A). The letter also stated that on June 20, 2006, Mr. Chambers provided Complainant with a list of five participants who had terminated employment with the company but who had not yet received their final distributions.

³ CX=Complainant's exhibits.

5. On April 6, 2009, EBSA, through its division of the Office of the Chief Accountant, issued a Notice of Intent to Assess a Penalty requesting submission of the 2005, 2006, and 2007 Form 5500 Annual Reports and proposing a penalty in the amount of \$180,000 against Respondent for its failure to file the reports. The Notice advised Respondent that it had thirty-five days within which to submit a statement of reasonable cause for failure to file the annual reports or why the penalties, as calculated, should not be assessed. Additionally, the Notice stated that although the Department intended to assess penalties for the 2005-2007 plan years, Respondent also needed to file satisfactory annual reports for the 1999 through 2004 plan years to avoid further penalties. See CX 3.
6. On May 11, 2009, Respondent submitted a letter of reasonable cause, providing facts as to why it believed the proposed penalty should not be assessed. It indicated that it had not received any employer contributions based on wages from Davis-Bacon projects since prior to 2001. It also stated that Dennis Waltko, P.E.C. Contracting Engineers' former Controller, not Mr. Chambers, was the plan administrator, and that in 2001 it was discovered that Mr. Waltko had been forging Mr. Chambers' name on checks and cashing them. Mr. Waltko was charged in Allegheny County Pennsylvania with theft and forgery and in 2002, and he pled guilty to theft of approximately \$180,000 of company funds (although Respondent contends that Mr. Waltko embezzled over \$600,000). Respondent stated that it never intended to be non-compliant and asserted that Mr. Waltko's fraudulent activities caused it to be in non-compliance because Mr. Waltko destroyed company records to cover up his criminal activity. Respondent indicated that it intended to file returns for the 2005, 2006, and 2007 plan years. See CX 4.
7. On or about May 19, 2009, the Reasonable Cause Committee reviewed Respondent's statement of reasonable cause and recommended assessment of the full penalty amount based on Respondent's failure to submit compliant annual reports for the 2005, 2006, and 2007 plan years. See CX 5.
8. On or about May 26, 2009, EBSA issued a Notice of Determination on Statement of Reasonable Cause to Respondent, rejecting its reasons for its failure to file annual reports for the 2005, 2006, and 2007 plan years and assessed a penalty of \$180,000. See CX 6.
9. In April 2010, Respondent submitted satisfactory Forms 5500 Annual Reports for the 2005, 2006, and 2007 plan years. Respondent did not file annual reports for the 1999 through 2004 plan years.

CONCLUSIONS OF LAW

ERISA contains extensive reporting and disclosure requirements and provides civil penalties for failure to comply. 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 is completed properly and

timely filed. The required annual report is due 210 days after the end of the applicable plan year. 29 U.S.C. § 1024(a)(1). A civil penalty of up to \$1,100 per day may be assessed for failure to file a timely annual report. 29 U.S.C. § 1132(c)(2). The Secretary of Labor has set forth procedures, at 29 C.F.R. § 2560.502c-2, governing the assessment of civil penalties under Section 502(c)(2) of the Act.

The standard of review in Section 502(c)(2) penalty proceedings, such as this, is *de novo*. *U.S. Dep't. of Labor (PWBA) v. Spaulding & Evenflo Companies, Inc.*, No. 92-RIS-19, slip op. at 7 (PWBA Nov. 18, 1994) (noting that an Administrative Law Judge has the power to review facts *de novo*; however, in deciding issues of law, the ALJ is bound by the governing statute and regulations, except to the extent that they are found to be invalid).

Although Respondent does not deny that it failed to file annual reports for the 2005, 2006, and 2007 plan years, it argues that the penalty imposed by the EBSA is unconstitutionally excessive under the Eighth Amendment, which prohibits “excessive fines.” See U.S. CONST. Amend. VIII. Respondent argues that a fine in the amount of \$180,000, which is “nearly *eight times*” the amount of retirement benefits in question for distribution, is an “incredibly disproportionate fine.” I disagree.

A civil penalty which is found to be, in part, punitive⁴ will be unconstitutional if it is “grossly disproportionate to the gravity of the offense.” *Korangy v. U.S. Food and Drug Administration*, 498 F.3d 272, 277 (4th Cir. 2007) (citing *Bajakajian*, 524 U.S. at 334). Respondent mischaracterizes the offense in this matter. The EBSA imposed a penalty in the amount of \$180,000 for Respondent’s failure to file annual reports, which is a matter entirely separate from Respondent’s failure to distribute \$24,120.67 to five terminated employees. Thus, in deciding whether the penalty is unconstitutionally excessive, a comparison of the amount of the penalty imposed and the amount of benefits that Respondent has failed to pay to its plan participants is irrelevant.

Deference should be given to the legislature in determining whether a fine is unconstitutionally excessive. *Bajakajian*, 524 U.S. at 336. The legislative history and statutory provisions of ERISA make clear that the filing of an annual report is central to ERISA’s monitoring and enforcement scheme, and Congress has authorized a civil penalty of up to \$1,100 per day for failure to file a timely annual report. 29 U.S.C. § 1132(c)(2). As Complainant has stated in its reply brief, Congress has determined that ERISA’s reporting and disclosure requirements are necessary to ensure that

fiduciaries are aware that the details of their dealings will be open to inspection and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

⁴ I assume, without deciding, that the penalty imposed in this case is at least, in part, punitive. The Supreme Court has suggested that remedial actions are brought to obtain compensation or indemnification for lost revenues, and the penalty in this case appears to go beyond those purposes. See *United States v. Bajakajian*, 524 U.S. 321, 329 (1998).

Report No. 93-127 To Accompany S. 4, April 18, 1973, 27-28 *reprinted in* 3 U.S. Cong. & Adm. News 1974 4863-64.

Thus, to successfully demonstrate that the fine imposed in this case is unconstitutionally excessive, Respondent would need to show that a fine in the amount of \$180,000 for a failure to file annual reports for three consecutive years is grossly disproportionate to the goal of ensuring that plan participants and beneficiaries receive information critical to their benefits. Respondent has not shown this, and thus its argument that the fine is excessive under the Constitution is overruled.

Respondent also argues that the penalty should be waived or reduced because Respondent was the victim of embezzlement by the company's former controller, Dennis Waltko, who, in addition to stealing at least \$180,000 from the company, destroyed records vital to complying with ERISA reporting requirements. Respondent argues that prior to his departure from the company, Waltko alone administered the Plan and that the Mr. Chambers, as CEO of the company, did not possess the specialized knowledge to involve himself with administering the Plan. Respondent argues that under such circumstances it is "downright naïve to reasonably expect" that Mr. Chambers would not have likely long forgotten that the plan "even existed." Respondent's Cross-Motion For Summary Decision at 7-8.

While it is difficult not to have sympathy for the situation in which Waltko left Respondent, the Plan is not relieved of its reporting obligations simply because a former employee, who at one time administered the Plan, embezzled money and destroyed important documents. Such circumstances may have provided Respondent with evidence of mitigating circumstances or reasonable cause resulting in a reduction or waiver of the penalty immediately following Waltko's criminal activity;⁵ however, approximately eight years elapsed between Respondent's discovery of Waltko's unlawful activity in 2001 and its receipt of the Notice of Intent to Assess a Penalty in April 2009. Regardless of the extent of the damage caused by Waltko's activity, it is unreasonable that the Plan continued to violate ERISA reporting obligations for so many years. Respondent's suggestion that Mr. Chambers forgot about the plan not only does not excuse the Plan's failure to submit annual reports, but it is contrary to information provided in the letter to Respondent from EBSA dated September 3, 2008, which states that on June 20, 2006 Mr. Chambers provided the EBSA with a schedule that included a list of five plan participants who had terminated employment with Respondent but who had not yet received their final distribution from the Plan. See CX 1. Thus, the evidence suggests that Mr. Chambers was aware of the Plan's existence in 2006. Furthermore, the letter to Respondent from EBSA dated September 3, 2008 concerning the outstanding plan distributions specifically alerted the Plan to its failure to comply with its reporting obligation; however the Plan continued to do nothing to come into compliance until after it received the Notice of Intent to Assess a Penalty on April 6, 2009. For these reasons, I find that the Plan has not demonstrated reasonable cause to waive or reduce the penalty based on Waltko's criminal activity.

⁵ The Department may waive or reduce a penalty upon a showing by the Plan of mitigating circumstances regarding the degree of willfulness of the noncompliance. § 2560.502c-2(d). Furthermore, the Plan has thirty days after issuance by the Department of a notice of intent to assess a penalty to submit a statement of reasonable cause explaining why the penalty should be reduced or not assessed. § 2560.502c-2(e).

The undisputed facts show that EBSA followed the procedures governing the assessment of civil penalties and gave Respondent notice and an opportunity to file a statement of reasonable cause and the annual reports. EBSA assessed a fine in the amount of \$180,000 (\$30,000 x 3 years for Plan Year 2005; \$30,000 x 2 years for Plan Year 2006; and \$30,000 for Plan Year 2007), which is considerably less than the maximum amount allowable under the statute. See 29 U.S.C. § 1132(c)(2). While I find that the penalty was appropriate as assessed at the time EBSA issued its Notice of Determination on Statement of Reasonable Cause, for the following reasons, I find that the penalty should now be reduced.

The regulations specifically provide that penalties may be waived or reduced upon a showing that the administrator complied with the requirements of Section 101(b)(1) by filing the annual report. See 29 CFR § 2560.502c-2(d). Respondent filed annual reports for plan years 2005, 2006, and 2007 in April 2010 while this case was pending. As Administrative Law Judge Jennifer Gee has determined in a recent case, affirming the full penalty after Respondent corrected the reporting deficiency would remove an incentive for plans governed by ERISA to file reports after a penalty is assessed against them. See *U.S. Dep't. of Labor (EBSA) v. Plan Administrator, Dutch American Import Co., Inc. Employee Stock Ownership Plan*, 2009-RIS-14 (Jan. 6, 2010). As plan participants and beneficiaries, as well as EBSA, continue to have an interest in obtaining annual reports even after penalties are assessed, it follows that the Plan should be given an incentive to file reports while their cases are pending before the administrative law judge.

In the past, EBSA has reduced penalties by ninety-five percent where an acceptable report was filed with the Plan's statement of reasonable cause. See, e.g. *Dep't. of Labor (EBSA) v. Tile Finishers Local 88 NY, BAC Savings Plan*, 2008-RIS-20 (ALJ June 3, 2008); *U.S. Dep't. of Labor (EBSA) v. Plan Administrator Arsenson Office Furnishings, Inc. p/s 401 K Plan*, 2007-RIS-111 (ALJ May 2, 2008); *U.S. Dep't. of Labor (EBSA) v. Callaghan & Callaghan, Inc.*, 2005-RIS-99 (ALJ Apr. 24, 2006). In cases where plans have submitted acceptable reports before EBSA made its Determination of Reasonable Cause, the Department has reduced fines by seventy-five percent (See *Dep't. of Labor (PWBA) v. Northwestern Institute of Psychiatry*, 1993-RIS-23 (ALJ July 26, 1995) and by approximately seventy-three percent (See *Dep't of Labor (EBSA) v. New Design Construction Company, Inc.*, 2007-RIS-9 (ALJ May 4, 2007). I found only once instance in which, as here, the acceptable report was not filed until the case was pending before the ALJ. In that case, the Judge Gee reduced the penalty by fifty percent. *U.S. Dep't. of Labor (EBSA) v. Plan Administrator, Dutch American Import Co., Inc. Employee Stock Ownership Plan*.

I find that a reduction of the penalty by fifty percent to be appropriate in this instance. For the reasons set forth above, Complainant's assessment of a civil penalty in the amount of \$180,000 is reduced to \$90,000.

ORDER

IT IS HEREBY ORDERED that Respondent, P.E.C. Contracting Engineers, shall pay to the U.S. Department of Labor a civil penalty in the amount of \$90,000 within forty-five 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

DANIEL L. LELAND
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. A notice of appeal should be filed with

Director of the Office of Policy and Research
Employee Benefits Security Administration
200 Constitution Ave, NW, Ste N-5718
Washington, DC 20210

See Secretary's Order 6-2009, 74 Fed. Reg. 21524-01, 2009 WL 1227622 (signed Apr. 30, 2009) (delegation of review authority to the Assistant Secretary for Employee Benefits Security). A notice of appeal must state, with specificity, the issue or issues on which the party is seeking review. The notice of appeal must be served on all parties of record.