

Issue Date: 19 July 2011

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

CASE NO. 2009-RIS-00068

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*In the Matter of:*

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

v.

PLAN ADMINISTRATOR,  
THIBEAULT CORP. OF NE/T-QUIP SALES &  
LEASING 401(K) PLAN,  
*Respondent*

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Before: Jonathan C. Calianos, Administrative Law Judge

Appearances:

Ashton S. Phillips, Esq. and Gail A. Perry, Esq. (U.S. Department of Labor, Office of the Solicitor), Washington, D.C., on behalf of the Complainant

Emile R. Bussiere, Jr., Esq. (Law Office of Bussiere and Bussiere), Manchester, NH, on behalf of the Respondent

**DECISION AND ORDER**

**I. Statement of the Case**

This proceeding arises under section 502(c)(2) of the Employee Retirement Income Security Act of 1974 (“ERISA” or “the Act”), 29 U.S.C. § 1132(c)(2), and the implementing regulations at 29 C.F.R. § 2560.502c-2 and 29 C.F.R. § 2575.502c-2 pursuant to which Thibeault

Corp. of NE/T-Quip (“Respondent” or “Thibeault”), the plan administrator of the Thibeault Corp. of NE/T-Quip Sales & Leasing 401(k) Plan (“Plan”), was assessed a \$50,000 civil penalty by the U.S. Department of Labor, Employee Benefits Security Administration (“EBSA” or “Complainant”).<sup>1</sup> EBSA alleges that Thibeault failed to comply with filing requirements outlined in section 103(a)(3) of the Act, 29 U.S.C. § 1023(a)(3), and the implementing regulations at 29 C.F.R. § 2520.103-1(b), which require plan administrators to submit a report from an independent qualified public accountant (“IQPA”).

Thibeault filed its 2006 annual report on October 16, 2007, and an amended report for 2006 on November 7, 2007. JX-1; JX-2; ALJX-10, at ¶2-3.<sup>2</sup> On December 24, 2007, and February 14, 2008, respectively, EBSA sent letters informing Thibeault that its 2006 annual report was deficient. JX-3; JX-4; ALJX-10, at ¶8, 10. On September 29, 2008, EBSA sent Thibeault a Notice of Rejection (“NOR”) stating that its 2006 annual report was rejected because it did not contain an audit from an independent qualified public accountant. JX-5; ALJX-10, at ¶12. In two separate responses to the NOR, dated October 7, 2008, and December 4, 2008, respectively, Thibeault acknowledged not having completed an IQPA audit and requested additional time to complete the audit. JX-6; JX-7; ALJX-10, at ¶15. On December 15, 2008, EBSA issued Thibeault a Notice of Intent to Assess a Penalty that afforded Thibeault an opportunity to provide a Statement of Reasonable Cause explaining why it failed to comply with

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<sup>1</sup> 29 C.F.R. § 2560.502c-2 provides that “the amount assessed under section 502(c)(2) of the Act shall not exceed \$1,000 a day (or such other maximum amount as may be established by regulation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 [“Inflation Adjustment Act”], as amended) . . . .” The Inflation Adjustment Act is codified at 28 U.S.C. § 2461 note, Pub. L. No. 101-410, 104 Stat. 890. On July 29, 1997, the maximum civil penalty allowable under ERISA section 502(c)(2) was increased from \$1,000 a day to \$1,100 a day for violations occurring after July 29, 1997 29 C.F.R. § 2575.502c-2 (2010); Adjusted Civil Penalty Under Section 502(c)(2), 62 Fed. Reg. 40699 (July 29, 1997) (final rule establishing increase).

<sup>2</sup> In this Decision and Order, “JX” refers to exhibits offered jointly by both Complainant and Respondent; and “ALJX” refers to exhibits offered by the undersigned.

the Act. JX-8; ALJX-10, at ¶16-17. On January 20, 2009, Thibeault sent EBSA a Statement of Reasonable Cause. JX-9; ALJX-10, at ¶18. On February 9, 2009, EBSA alerted Thibeault that the Statement of Reasonable Cause failed to include a required penalty of perjury statement and was therefore deficient. JX-10. On February 19, 2009, Thibeault attempted to correct the deficiency by filing the required penalty of perjury statement. JX-11. On April 6, 2009, EBSA issued a Notice of Determination on Statement of Reasonable Cause (“NOD”) to Thibeault, assessing a \$50,000 civil penalty. JX-13; ALJX-10, at ¶22.<sup>3</sup> On May 11, 2009, Thibeault filed a request seeking a formal hearing before the Department of Labor, Office of Administrative Law Judges (“OALJ”) to contest the penalty assessment. ALJX-1.

On June 18, 2010, I conducted a formal hearing in Boston, Massachusetts. The parties appeared represented by counsel and the official papers were admitted without objection as ALJX 1-10. Hearing Transcript (“TR”) 16-18. Documentary evidence was admitted without objection as JX 1-14 and the parties were afforded the opportunity to present evidence and oral argument. TR at 18-20. I heard testimony from Michael Auerbach, Chief of the Division of Accounting Services in the Office of the Chief Accountant in the Employee Benefits Security Administration; Bonnie Wadsworth (“Ms. Wadsworth”), Respondent’s comptroller; and Ernest Thibeault (“Mr. Thibeault”), Respondent’s president and owner. The record was left open at the close of the hearing, and on August 9, 2010, I issued an order closing the record and requiring briefs by September 13, 2010.

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<sup>3</sup> The Joint Stipulation has twenty-three numbered paragraphs, but there are two paragraphs labeled “20.” Accordingly, when I refer to “¶22” here, it is labeled “21.” in the ALJX-10 document. The same goes for the other two paragraphs coming after the actual paragraph “20.” That is, “¶21” in this Decision & Order is the second “20.” in ALJX-10; “¶23” in this Decision & Order is labeled “22.” in ALJX-10.

The Complainant's Post Trial Brief ("Compl. Br.") was received on September 8, 2010, and on September 13, 2010, the Respondent's Post Trial Brief ("Resp. Br.") was filed along with a Motion to Reopen the Record. On September 17, 2010, the Complainant filed an Objection to the Motion to Reopen the Record, and on September 29, 2010, I conducted a hearing on the motion to reopen. Thibeault sought to reopen the record to introduce evidence that it submitted a report from an independent qualified public accountant, thereby making the annual report for the 2006 plan year complete. EBSA acknowledged that Thibeault came into compliance sometime after the close of the formal hearing, and based on the arguments, I granted the Motion to Reopen the Record and requested supplemental briefs from the parties on the applicability of *United States Dep't of Labor, EBSA v. Dutch American*, ALJ No. 2009-RIS-00014, at 10 (ALJ Jan. 6, 2010) (administrative law judge finding that reducing a section 502(c)(2) penalty by 50% was appropriate where compliance occurred four months prior to a formal hearing being held).

A few days later, on October 1, 2010, I received a packet of two exhibits from the Respondent. The first exhibit contains the 2006, 2007, and 2008 Annual Return Reports of Employee Benefits Plan, the IQPAs for each year, and a print-screen from the U.S. Department of Labor Website indicating the submission of the completed Form 5500s for each plan year, with corresponding IQPAs. The second exhibit is a letter from Steven R. Boivin, CPA, explaining the delays encountered in completing the audits. As there have been no objection to these exhibits being admitted (except for the objection to the Motion to Reopen the Record), these two exhibits are admitted as Respondent's Exhibits ("RX") 1-2. By mid-October, the Complainant's Supplemental Brief ("Compl. Sup. Br.") and the Respondent's Further Post-Trial Brief ("Resp. Sup. Br.") were received. The record is now closed and the matter is ripe for disposition.

The only disputed issue is whether the penalty assessed by EBSA is proper under the circumstances of this case. In deciding that issue, there appears to be some unsettled terrain over the applicable standard of review, so an initial question must be asked: Does the well worn *de novo* standard apply, or does the review require an analysis of EBSA's decision to see whether it acted in an arbitrary and capricious manner in assessing the \$50,000 penalty? I find that the law requires a *de novo* standard of review, and based on the evidence and arguments presented, I find that a penalty of \$50,000 is warranted in this case. My findings of fact and conclusions of law are set forth below.

## II. Stipulations and Issue Presented

The parties have stipulated to the following facts<sup>4</sup>:

1. Thibeault Corp. of NE/T-Quip is the plan administrator of the Thibeault Corp. NE/T-Quip Sales and Leasing 401(k) Plan ("401(k) Plan" or "Plan"). JX-1.
2. Thibeault filed a Form 5500 Annual Return/Report of Employee Benefit Plan for the 401(k) Plan for the 2006 Plan Year on October 16, 2007. Thibeault filed Schedule H with this return, and on this schedule, Thibeault indicated that the return included a disclaimed opinion from an independent qualified public accountant ("IQPA"). No such report was attached to the return. JX-1.
3. On November 7, 2007, Thibeault filed an amended Form 5500 Annual Return/Report of Employee Benefit Plan for the 401(k) Plan for the 2006 Plan Year. Thibeault filed an amended Schedule H with this return. On the amended Schedule H, Thibeault again indicated that the return included a disclaimed opinion from an independent qualified public accountant. No such report was attached to this return. JX-2.
4. Under section 104 of 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. *See* 29 U.S.C. § 1024.
5. The 401(k) Plan held assets in trust and had 199 participants at the beginning of the plan year and 184 participants at end of the plan year. JX- 2, Lines 6, 7(g).
6. Under ERISA, a plan with 100 or more participants that holds assets in trust is required to have an annual audit performed on the plan and to attach the report of an independent qualified public accountant to the plan's annual report. 29 C.F.R. § 2520.104-20(b).
7. On December 24, 2007, EBSA issued its first thirty-day clarification letter to Thibeault ("first 30-day letter") requesting that it provide the required IQPA report and submit a schedule of assets held for investment at the end of the year in the format prescribed in

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<sup>4</sup> Prior to the hearing, the parties submitted a Joint Pre-Trial Stipulation which contained Section A entitled: "Admitted Facts Requiring No Proof." *See* ALJX-10. The stipulated facts listed herein are drawn from that section of the Joint Pre-Trial Stipulation.

the Form 5500 instructions. A response was required within thirty days. JX-3.

8. Thibeault did not comply with the first 30-day letter request.
9. On February 14, 2008, EBSA issued its second thirty-day clarification letter to Thibeault (“second 30-day letter”) requesting that it provide an IQPA report and submit a schedule of assets held for investment at the end of the year in the format prescribed in the Form 5500 instructions. Again, a response was required within thirty days. JX-4.
10. Thibeault did not comply with the second 30-day letter request.
11. On September 29, 2008, EBSA issued a Notice of Rejection (“NOR”) which set forth, in further detail, the noted deficiencies. JX-5.
12. The NOR advised Thibeault that it had forty-five days within which to comply without incurring a penalty. The NOR, *inter alia*, specifically contained 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.**

JX-5.

13. A satisfactory response to the NOR with a completed IQPA and financial statements was due on or before November 13, 2008, forty-five days from the date of the NOR. JX-5.
14. Thibeault’s October 7, 2008 and December 4, 2008 responses to the rejection notice did not contain an amended 2006 annual return with the required IQPA opinion. *See* JX-6-7.
15. On December 15, 2008, EBSA issued a Notice of Intent to Assess a Penalty (“NOI”) notifying Thibeault of the impending \$50,000 penalty assessment for its failure to file an amended 2006 annual report with the required accountant’s opinion. JX-8. The NOI advised Thibeault that it had 35 days within which to submit a statement of reasonable cause. The NOI, *inter alia*, specifically contains the following:

**WARNING: Read this Notice carefully. YOU must file a written response within 35 days of the date 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.**

JX-8.

16. The NOI also makes clear that the written statement of reasonable cause must: (i) state that the plan administrator complied with the requirements of section 101(b)(1) of ERISA

or state the mitigating circumstances regarding the degree or willfulness of the noncompliance; (ii) set forth all alleged facts as to why the penalty, as calculated, should be reduced or not be assessed based upon section 2560.502c-2 of the implementing regulations; (iii) contain a declaration by the plan administrator that the statement is made under the penalties of perjury, as required under section 2560.502c-2(e); (iv) be signed by the plan administrator or his or her authorized representative where the representative has been granted that specific authority pursuant to a duly executed, notarized power of attorney; and (v) be filed within 35 days at the designated address. JX-8.

17. On January 20, 2009, Thibeault as Plan Administrator submitted a written statement of reasonable cause ("Reasonable Cause Statement"). JX-9.
18. The Reasonable Cause Statement was signed by Ernest Thibeault, III, as Plan Administrator. While the statement failed to contain a declaration that it was executed under the penalties of perjury, Mr. Thibeault submitted a subsequent statement declaring that facts set forth in his Reasonable Cause Statement were true and made under the penalty of perjury. *See* JX-9-11.
19. As reasonable cause for failure to submit a completed 2006 annual report, Mr. Thibeault stated that he was under the mistaken belief that the third party administrator was responsible for the administrative needs of the Plan (including the audit), that the Plan found an auditor who could perform the audit for \$32,000, which he believed was unreasonably expensive, that the fees to administer the Plan plus the cost of an audit exceeded the value of employer contributions to the Plan, that the company is small/medium sized and that the participants and the company had lost proceeds due to the market conditions, that the company was having difficulty keeping employees employed, and that the plan administrator believed that the Plan would have been exempt from the audit requirement if he had "forced" a lump sum cash payout on any employee vested with less than \$1,000 in their account. JX-9.
20. On March 24, 2009, EBSA's Reasonable Cause Committee met to discuss Thibeault's Reasonable Cause Statement. The Committee expressly considered the assertions in Thibeault's Reasonable Cause Statement, Thibeault's correspondence in response to EBSA's NOR, the number of participants in the Plan, the dates of the Notice of Intent and Reasonable Cause Statement, and that Thibeault was not in compliance as of the date of the meeting. The Committee recommended that EBSA assess the proposed \$50,000 penalty. JX-12.
21. On April 6, 2009, EBSA issued a Notice of Determination on Statement of Reasonable Cause (NOD) to Thibeault finding that: (i) no IQPA report or amended Form 5500 was submitted in response to the Notice of Intent to Assess a Penalty; and (ii) the plan administrator failed to present reasonable cause for his failure to file an acceptable annual report in his original filing and his failure to timely correct his filing. The NOD thereby assessed a \$50,000 penalty against Thibeault. JX- 13.

22. As of the date of the trial, Thibeault had not filed a Form 5500 Annual Report containing IQPA opinions for the plan years 2006, 2007, or 2008.

### III. DISCUSSION

Congress enacted ERISA as a remedial statute to protect the integrity of employee benefit plans. *Brink v. DaLesio*, 667 F.2d 420, 427 (4th Cir. 1981). “To that end, . . . [Congress] established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee’s expectation of the benefit would be defeated through poor management by the plan administrator.” *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). One such reporting requirement is an annual report which must be filed by the plan administrator within 210 days after the end of the plan year. 29 U.S.C. §§ 1021(b)(1), 1023(a)(3), 1024. Additionally, a plan with 100 or more participants must have an annual audit performed on the plan by an independent qualified public accountant (IQPA), and that audit must be attached to the annual report for the plan. *See* § 1023(a)(3); 29 C.F.R. § 2520.104-20(b). *Compare* 29 C.F.R. § 2520.103-1(b) (requirements for plans with 100 or more participants) *with* § 2520.103-1(c) (requirements for plans with less than 100 participants).<sup>5</sup> This requirement proved to be Thibeault’s Achilles’ heel.

Thibeault did not include an audit from an independent qualified public accountant with its 2006 annual report as required by the Act. *See* ALJX-10, at ¶23. Thibeault knew in late 2007 that the annual report for 2006 was deficient, and it began to solicit bids from IQPAs, eventually finding a professional to complete the work but never actually retaining the firm because the cost was considered too expensive. *See* JX-9, TR 133-37, 141-42, 146. Notwithstanding the

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<sup>5</sup> The NOR, NOI, and NOD all refer to 29 C.F.R. § 2520.103-1(b), and the Joint Pre-trial Stipulations and both parties’ briefs refer to 29 C.F.R. § 2520.104-20(b) when citing the 100-participant threshold. In this case, there is no dispute that Thibeault was required to file an IQPA report with its annual statement, so the citation discrepancy is a non-issue. *See* ALJX-10, at ¶7.

expense, Thibeault had the funds available within the Plan to cover the costs of the independent accountant. TR at 149. Thibeault terminated the Plan in 2008 and it eventually hired a qualified auditor in January 2010 to complete the required audit for the 2006-2008 Plan years. TR at 107, 109, & 136. On August 27, 2010, Thibeault finally came into compliance for the 2006 plan year by filing the annual report with the required audit, and the report was accepted by EBSA. *See* RX-1.

The applicable penalty provision is found in section 502(c)(2) of ERISA and states the following:

The Secretary may assess a civil penalty against any plan administrator of up to \$1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

29 U.S.C. § 1132 (c)(2). To carry out the provisions of ERISA, the Secretary may prescribe such regulations as she deems necessary and appropriate, and the Secretary has promulgated regulations setting forth the procedures governing penalty assessments under section 502(c)(2). *See* 29 C.F.R. § 2560.502c-2. With regard to waiver or reconsideration of the penalty, the regulation provides:

The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 101(b)(1) of the Act or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.

29 C.F.R. § 2560.502c-2(d).

Given its eventual compliance several months after the trial in this matter, Thibeault argues that the penalty should be abated in its entirety or, in the alternative, reduced to \$10,000.

Resp. Sup. Br. at 6. EBSA argues that its \$50,000 penalty assessment should be affirmed because Thibeault has not demonstrated that it acted in good faith and with diligence in filing a completed annual report for the 2006 plan year. Compl. Br. at 19-21. To resolve this issue, I first must determine the appropriate standard of review.

The case law on the applicable standard, surprisingly, is not uniform, and there is little discussion in the published opinions. ALJs have applied two different standards of review in these cases—arbitrary and capricious or *de novo*. ALJs applying the arbitrary and capricious standard explain it as follows:

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.").

*United States Dep't of Labor, EBSA v. Plan Administrator, Arenson Office Furnishings, Inc. P/S 401(k) Plan*, OALJ No. 2007-RIS-00111, at 5 (ALJ May 2, 2008); *see also U.S. Dept. of Labor, EBSA v. Nebraska Meat Corp.*, OALJ No. 2010-RIS-00017, at 7 (ALJ Aug. 30, 2010). The best discussion I found regarding the applicable standard was by former Chief Administrative Law Judge John Vittone in *U.S. Dept. of Labor, EBSA v. Team Laurino 401(k) Plan*, OALJ No. 2008-RIS-00050 at 4 & n.6 (ALJ Dec. 9, 2008). Judge Vittone noted that ALJs applied an arbitrary and capricious standard which was in conflict with a prior Pension and Welfare Benefits Administration's ("PWBA") determination. *Id.* at n.6. In reversing course, Judge Vittone noted that by applying an arbitrary and capricious standard, ALJs were ignoring binding precedent

from the Secretary of Labor. *See id.* He explained that in the event of an appeal of an ALJ decision under ERISA, the Secretary of Labor is responsible for conducting the review. *Id.* In the 1990's, the Secretary delegated the review responsibility to the PWBA senior policy advisor, and “[a]t present, the senior policy advisor’s decisions constitute the entire body of administrative-appellate authority on ERISA adjudications within the Department of Labor.” *Id.* Looking to those decisions, Judge Vittone found two that discussed the appropriate standard of review for ALJs—*U.S. Dept. of Labor, Pension and Welfare Benefits Administration v. Spalding & Evenflo Companies, Inc.*, OALJ No. 1992-RIS-00019 (Nov. 18, 1994), and *U.S. Dept. of Labor, Pension and Welfare Benefits Administration v. Northwestern Institute of Psychiatry*, OALJ No. 1993-RIS-00023 (July 26, 1995). *See Team Laurino*, 2008-RIS-00050, at 4 n.6.

*Spalding & Evenflo* involved facts analogous to the instant case—a deficient annual report lacking the required independent audit. In affirming the ALJ’s finding that the plan administrator failed to establish that it acted with good faith and diligence in coming into compliance with ERISA’s reporting requirements, the senior policy advisor stated:

The burden, under the regulations, is not that the ALJ find that Spalding did not proceed in good faith to comply, but rather that Spalding must demonstrate, to the satisfaction of the ALJ, that it proceeded in good faith to comply. . . . Thus, the issue before the ALJ was whether Spalding, having been found to have filed a materially deficient statement, demonstrated to the ALJ that it demonstrated good faith and diligence in coming into compliance with ERISA’s audit requirements. The evidence before the ALJ fully supports his conclusion that “there was no satisfactory explanation as to why this final successful effort by Deloitte & Touche was not attempted earlier”.

*Spalding & Evenflo*, 1992-RIS-00019, at 5. The words arbitrary and capricious are not mentioned anywhere in the decision and the senior policy advisor talks about the ALJ’s findings based upon evidence presented—verbiage normally associated with a *de novo* standard of review. Any doubt as to the application of an appropriate standard is resolved later in the

opinion when discussing the penalty calculation applied by the ALJ. The senior policy advisor states: “the ALJ has the power to try facts *de novo*. However, in deciding issues of law, the ALJ is bound by the governing statute and regulations, except to the extent he finds them to be invalid.” *Id.* at 7 (citations omitted).

Similarly, *Northwestern Institute of Psychiatry* involved the appeal of a penalty assessed after failing to timely file an annual report free from material deficiencies. The plan administrator/appellant argued, *inter alia*, that once the Department of Labor made a determination that the plan administrator filed a completed independent auditor’s report, DOL could not alter that determination after the employer/plan administrator filed a notice of appeal seeking a hearing before an administrative law judge. In rejecting the argument, the senior policy advisor stated:

The ALJ is not an appellate court, but rather functions in many ways as a court of original jurisdiction, hearing evidence.

If anything, the appropriate analogy would be to view the DOL’s Determination as similar to a complaint, which could be enforced only if the ALJ, after hearing the evidence presented, agrees with the DOL’s determination.

*Northwestern Institute of Psychiatry*, 1993-RIS-00023, at 10.

While almost complete, I think it is important to add the observations mentioned by Judge Vittone in advocating for a *de novo* standard:

Moreover, an arbitrary and capricious standard of review does not fit the structure of the procedural regulations governing § 502(c)(2) proceedings before the Office of Administrative Law Judges. Specifically, the regulations contemplate discovery and the development of an evidentiary record before the ALJ. *See* [29 C.F.R.] §§ 2570.66, 2570(b), 2570.70. A judge simply cannot review the assessment under an arbitrary and capricious standard based on a record that was not before Complainant at the time it assessed the contested penalty.

*Team Laurino*, 2008-RIS-00050, at 4 n.6. Looking at these decisions, it is clear that a *de novo* standard is appropriate in these circumstances and it appears that other ALJs are beginning to follow this trend. See *U.S. Dept. of Labor, EBSA v. LFC Group Employees Retirement Plan*, 2009-RIS-00018 (ALJ May 20, 2010); *Dutch American*, 2009-RIS-00014. Under a *de novo* standard, an ALJ is entitled to make findings of fact and conclusions of law “based upon the whole record.” 29 C.F.R. § 2570.68(b). An ALJ may justifiably decide to reduce a civil penalty based on an overall assessment of a respondent’s conduct including events which occurred after EBSA issued its NOD.<sup>6</sup> See, e.g., *Dutch American*, 2009-RIS-00014, at 10 (reducing a section 502(c)(2) penalty by 50% where compliance occurred four months prior to a formal hearing being held).

Thibeault’s non-compliance with ERISA (at least prior to trial) is not contested, and the real focus here is on the mitigating circumstances surrounding the non-compliance and whether there is reasonable cause to adjust the civil penalty levied by EBSA. See 29 C.F.R. §§ 2560.502c-2(b), 2560.502c-2(e). Thibeault asserts the following constitute mitigating circumstances: (1) It labored under the false assumption that the Third Party Administrator, The Hartford, was responsible for the administrative needs of the Plan; (2) It considered the costs of hiring an independent auditor excessive, and when adding the costs to administer the Plan, the total exceeded the value of employer contributions into the Plan; (3) Thibeault is a small/medium sized company and the Plan was already negatively impacted by market condition; (4) Thibeault was having difficulty maintaining its employees in an economic climate that was very

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<sup>6</sup> It is important to note that the ALJ’s ability to consider new evidence developed at the hearing or through discovery need not necessarily benefit only respondents. See *Northwestern Institute of Psychiatry*, 1993-RIS-00023, at 10 (approving the ALJ’s consideration of an amended Notice of Determination).

challenging; (5) Thibeault mistakenly thought the Plan would have been exempt from the audit requirement if certain employees were forced to take a lump sum cash payout; and (6) Thibeault would have completed the audit prior to the formal hearing had it not been for problems obtaining necessary information from The Hartford. Resp. Sup. Br. at 5; RX-2.

Thibeault also references two cases where the presiding judge considered similar mitigating circumstances with regard to reducing penalty assessments for failure to timely file annual reports. The first case is *U.S. Department of Labor v. Comagraphix*, 1999-RIS-00053 (ALJ Oct. 14, 1999), which involved an employer that discontinued operations entirely because it was insolvent and the plan administrator failed to hire an independent auditor and file an IQPA report because the plan had no assets from which to pay the auditor's fees. *Id.* at 3. These facts are markedly different from the instant case because Thibeault always had sufficient funds within the Plan to pay for the required audit and it was still an operating, viable business at the time of the hearing. In discussing whether insolvency is a valid excuse for non-compliance, the judge in *Comagraphix* held that insolvency does not relieve the plan administrator of its duty to file a complete annual report because "without an independent audit, it is impossible to ascertain whether there were fiduciary breeches [sic]." 1999-RIS-00053, at 8. The fact that Thibeault terminated its Plan in 2008, does not absolve it of its obligation to file a complete annual report for the 2006 Plan year.

Additionally, in *Comagraphix* the judge rejected the plan administrator's contention that erroneous legal advice is sufficient for waiving the penalty assessment. The judge found that the incorrect advice obtained by the plan administrator was "at best secondhand" because it did not seek legal advice on the precise question of whether it needed to file an IQPA report. *Id.* at 7.

The judge noted that after even being advised by PWBA<sup>7</sup> that an auditor's report was required, the plan administrator still did nothing to comply. *Id.* Similarly here, there is no evidence in the record that Thibeault sought legal advice regarding its filing obligations until sometime in 2009, long after receiving many notices from EBSA regarding the deficiency and the impending penalty. Even with counsel, compliance came very late in August 2010 after a full hearing on the merits of EBSA penalty assessment. Ultimately, the judge in *Comagraphix* affirmed a \$50,000 penalty because the plan administrator failed to show reasonable cause to reduce or set aside the assessment. *Id.* at 8-10. Thibeault's performance in this case is far worse than the plan administrator in *Comagraphix*. None of the mitigating circumstance argued by *Comagraphix* are applicable to Thibeault, and even if they were, they are insufficient to establish circumstances that would mitigate against willful non-compliance.

Thibeault also looks for a safe harbor in the case of *Airport Hospitality*, 2007-RIS-00048 (ALJ Dec. 22, 2009), where the judge affirmed a penalty in the amount of \$86,500. One of the arguments advanced by the plan administrator in *Airport Hospitality* was its inability to comply with the ERISA filing requirements because of missing records. *Id.* at 11. In rejecting this excuse, the judge stated: "the position that plan administrators must take responsibility for their own recordkeeping is long-held and reasonable." *Id.* at 12-13. Similarly, Thibeault cannot push blame on The Hartford because it was slow in responding to requests for copies of records.<sup>8</sup> Even if I allow some leeway for this delay, there is nothing in this record to excuse the almost

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<sup>7</sup> PWBA, the Pension and Welfare Benefits Administration, was the Dept. of Labor agency responsible for administering ERISA prior to February 2003.

<sup>8</sup> According to a statement by Thibeault's independent auditor, Boivin & Associates Certified Public Accountants, the information request from The Hartford was made on April 7, 2010, and the correct information was received a little over two months later, on June 17, 2010. RX-2. This "delay" is minor in comparison to the two years it took Thibeault to engage the independent auditor.

two years wasted by Thibeault in hiring an independent auditor. In the end, *Airport Hospitality* provides little assistance to Thibeault.

From the outset when Thibeault established the Plan, it did not appear to understand the responsibilities required of a plan administrator. Mr. Thibeault stated that when the company started the Plan, it was “without knowing all the details and costs associated” with such an endeavor. *See* JX-9, at 46. Thibeault admitted to knowing that an audit was required as of late 2007. JX-9, at 45; *see* TR at 146. Despite knowing about this requirement and receiving many notices from EBSA beginning in December 2007, warning of substantial penalties for noncompliance, Thibeault chose, after soliciting several bids, to not retain an independent auditor because the cost was too excessive. *See* JX-9, at 45-46; TR at 146. Armed with this knowledge, Thibeault began to forge a path of deceit when dealing with EBSA. In a letter dated October 7, 2008, comptroller, Bonnie Wadsworth, represented to EBSA that Thibeault was in the process of hiring an auditor stating: “we have contacted our Accountants and they are researching Auditing firms that can do this for us.” JX-6. On December 4, 2008, she stated that Thibeault will hire an auditor in a “week or so.” JX-7. At the time she made this representation to EBSA, Thibeault had received all of the bids from the independent accountants it solicited, and Ms. Wadsworth knew the bids were too high. *See* TR at 125-128. She stated: “in 2006 we put \$25,000.00 into the plan. It didn’t make any sense to us that you were paying more than that to get the plan audited.” *Id.* at 127. Given that the time frame was late 2008, the beginning of tax season for accounting firms, and that she had already received several bids, all \$32,000 or over, it was extremely unlikely that Thibeault could hire an auditor within a “week or so” of the December 4, 2008 letter. I find the statement was more than just wishful thinking on the part of Ms. Wadsworth. This conclusion is further buttressed by the fact that Thibeault did not hire an

independent auditor until over one year later in January 2010. This is more than two years after the original annual report for the 2006 Plan year was due, and more than two years after Thibeault was made aware of the deficiency. Clearly this is not indicative of a good faith attempt to comply with the reporting standards of ERISA, and perhaps is more in-line with a willful attempt to skirt the filing requirements.<sup>9</sup>

Based upon the record provided, I find no mitigating circumstance to exercise my discretion to abate or reduce the \$50,000 penalty in this case. I have found no case in which a civil penalty was reduced when a respondent came into compliance either during or after the formal hearing before the ALJ. The only case that comes remotely close is *Dutch American* where a penalty reduction was granted when the plan administrator corrected the deficiencies in its annual report approximately *four months prior to* the formal hearing. 2009-RIS-00014, at 10. The period of noncompliance in *Dutch American* was also far shorter than the instant case—less than one year. *Id.* at 2-3. In that case, the Notice of Rejection, which allows a period of 45 days to cure a deficiency without penalty, issued on April 28, 2008, and the plan administrator filed a report that was deemed compliant by April 8, 2009. *Id.* Here, the NOR issued on September 29, 2008 and compliance took almost two years with a proper annual report being filed on August 27, 2010. Accordingly, for the foregoing reasons, the penalty assessed against Thibeault in the amount of \$50,000 is affirmed and the following order shall enter:

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<sup>9</sup> I also note in the original form 5500 filed by Thibeault for the 2006 plan year, Thibeault indicated on Schedule H, Part III that it had attached an opinion of independent qualified public accountant, yet no such attachment was made to the report. *See* JX-1, at 14; TR at 128-29, 143-45. Thibeault had the option of checking the box just below on line “3d” on the form which indicates that the opinion is not attached to the Form 5500. *See* JX-1, at 14. The same misrepresentations are made on the amended Form 5500 filed on November 7, 2007. *See* JX-2, at 25. These misrepresentation do not aid Thibeault’s cause for a reduction in the penalty assessment.

## ORDER

**IT IS ORDERED** that the Respondent, The Plan Administrator for Thibeault Corp. of NE/T-Quip, shall pay to the U.S. Department of Labor a civil penalty in the amount of \$50,000.00 within forty-five days from the date of this Decision and Order. Any portion of this penalty not paid by that date shall be subject to such penalties and interest as provided for in the Act and the implementing regulations.

**A**

**JONATHAN C. CALIANOS**  
Administrative Law Judge

Boston, Massachusetts

**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 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.*