

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 06 December 2012**

Case Number: 2012-RIS-00042

In the Matter of:

UNITED STATES DEPARTMENT OF LABOR,  
EMPLOYEE BENEFITS SECURITY  
ADMINISTRATION,

Complainant

v.

Plan Administrator  
ALL GLASS 401(k) PLAN,  
ALL GLASS INC. (Case No. 11-2139D),  
Respondent

**ORDER GRANTING SUMMARY JUDGMENT**

This matter arises under §§ 101(b)(1) and 104(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1021(b)(1) and 1024(a)(1) as amended, and the regulations at 29 C.F.R. §§ 2520.103-1 and 2520.104a-5 issued thereunder.

On June 6, 2012, Complainant filed a motion for summary judgment in this matter pursuant to 29 C.F.R. § 18.40 seeking affirmance of the penalty assessment against Respondent for failure to file an annual report for the Plan's 2009 plan year that contained an acceptable report of an independent qualified public accountant ("IQPA report") for the Plan described in ERISA § 103(a)(1)(B) and 103(a)(3)(A), 29 U.S.C. § 1023(a)(1)(B) and 1023(a)(3)(A), and regulation 29 C.F.R. § 2520.103-1(b)(5) issued thereunder. Complainant's motion was accompanied by thirteen exhibits, consisting of correspondence from or to the parties, as well as Respondent's 2009 Annual Report Form 5500, all of which I find admissible for purposes of the instant motion.

On June 20, 2012, Respondent filed an opposition to Complainant's motion alleging that "there remain numerous disputed issues of material fact on [the issues contested in this matter.]" Respondent's Response in Opposition to Complainant's Motion for Summary Judgment ("Respondent's Opp.") at 2. Respondent's opposition consists simply of argument and is unaccompanied by affidavits or evidence relevant to the issues presented.

On July 2, 2012, Complainant filed a motion seeking leave to reply to Respondent's opposition, accompanied by a response to the allegations raised in Respondent's opposition.<sup>1</sup> For the reasons set forth below, Complainant's motion for summary judgment will be granted.

## DISCUSSION

OALJ's rules of practice and procedure provide in relevant part:

(a) Any party may, at least twenty (20) days before the date fixed for any hearing, move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within ten (10) days after service of the motion, serve opposing affidavits or countermove for summary decision. The administrative law judge may set the matter for argument and/or call for submission of briefs.

(b) Filing of any documents under paragraph (a) of this section shall be with the administrative law judge, and copies of such documents shall be served on all parties.

(c) Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(d) The 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. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

29 C.F.R. § 18.40. See also 29 C.F.R. § 18.41(a)(1) (ALJ may grant summary judgment where no issue of material fact is found to have been raised).

Summary decision under 29 C.F.R. § 18.40 is reviewed under the same standard governing summary judgment under Federal Rule of Civil Procedure 56. The ALJ views the evidence in the light most favorable to the nonmoving party in determining whether there exists any genuine issue of material fact. When responding to a motion for summary decision, the nonmoving party may not rest solely upon the allegations of its complaint, speculation or denials, but must set forth specific facts that could support a finding in its favor. See 29 C.F.R. § 18.40(c). Where the moving party presents admissible evidence in support of its motion for summary decision, as Complainant has done here, the nonmoving party must submit admissible evidence to raise a genuine issue of material fact and, as noted above, cannot simply rely on allegations, speculation or denials alone. *Hasan v. Enercon Servs.*, ARB No. 10-061, ALJ No. 2004-ERA-022, slip op. at 5 (ARB July 28, 2011).

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<sup>1</sup> OALJ's rules provide that no reply or answer to a response to a motion is permitted unless the ALJ provides otherwise. 29 C.F.R. § 18.6(b). No objection to Complainant's Motion to Reply to Respondent's opposition to summary judgment was ever filed by Respondent. I find Complainant's reply informative and helpful regarding the issues presented, and its motion to reply is therefore granted.

### Undisputed Material Facts

The undisputed material facts established by the evidence submitted by Complainant in this case include the following:

1. All Glass, Inc., as plan administrator of the All Glass, Inc. 401(K) Plan in 2007, filed a 2007 Form 5500 which was deemed unsatisfactory by the Department of Labor's Employee Benefits Security Administration ("EBSA") because the Plan had 100 or more total participants and the 2007 report failed to include "an Accountant's Opinion, audited financial statements or accompanying footnotes." Complainant EBSA's Exhibit 1 and 2 in Support of Material Facts Not In Dispute (hereinafter "CX \_\_").
2. On September 8, 2009, Respondent was notified by Complainant that it intended to assess a penalty against Respondent for failing to file a 2007 Form 5500 annual report satisfactory to the Department of Labor. CX 2 at 1.
3. Respondent thereafter filed a statement of reasonable cause, and in a Notice of Determination on Statement of Reasonable Cause issued November 2, 2009, Complainant agreed to waive \$51,150 of the civil penalty and to assess a penalty against Respondent of only \$2,500 inasmuch as Respondent had by that time filed an IQPA report and related financial statements in response to Complainant's prior Notice of Intent to Assess a Penalty. CX 2 at 2.
4. All Glass, Inc., as plan administrator of the All Glass, Inc. 401(K) Plan, filed a 2009 Form 5500 on or about October 14, 2012. CX 3 at 3.
5. The total number of participants noted on the 2009 Form 5500 for the plan at the beginning of the 2009 plan year was 136. CX 3 at 3.
6. Part III of the 2009 Form 5500 notes that the opinion of an independent qualified public account for the plan is "Unqualified." CX 3 at 6.
7. On or about March 10, 2011, Respondent's counsel sent correspondence to the Small Business Administration ("SBA") Ombudsman in which he stated that over the past three years, Respondent had laid off approximately 90-100 employees, its revenues had dropped from \$15 million to \$1 to \$2 million, and the owners of the business had not paid themselves regular paychecks for several months in an attempt to keep the company afloat. CX 4 at 1-2.
8. In his March 10, 2011 letter, Respondent's counsel noted that he had been advised of Complainant's intent to issue "a Notice of Intent to Assess a Penalty against [Respondent] for its Form 5500 Annual Report for the Plan for 2009 which was filed unaudited." CX 4 at 2.
9. Counsel's March 10, 2011 letter alleges that "[t]here is no material benefit of an audit of our client's 401(k) plan for 2009 and the DOL's position . . . is simply unreasonable, impracticable and an abuse of discretion, especially in light of how this same matter was dealt with and resolved for our client's 2007 filing." CX 4 at 2.
10. The March 10, 2011 letter further notes that Respondent had previously successfully resolved a penalty assessed by Complainant for failing to file its 2007 Form 5500 accompanied by an IQPA report and alleges that the "issues and reasonable cause exceptions that [Respondent] has for its 2009 Plan filing are the same issues and exceptions that [it] presented to the DOL pertaining to [Respondent's] 2007 filing and for which [Respondent] paid a penalty of \$2,500.00 to resolve." CX 4 at 2.
11. On March 14, 2011, Complainant notified Respondent that its Form 5500 annual report for 2009 had been rejected because the report did not have an attached IQPA report, and it provided Respondent with forty-five days within which to file a revised report satisfactory to Complainant. CX 5 at 2.

12. An April 11, 2011 letter from SBA's Ombudsman to Barry Weinstein, the General Manager of All Glass, Inc., notes that Complainant's rejection of Respondent's Form 5500 annual report for 2009 and Complainant's forthcoming Notice of Intent to Assess a Penalty against Respondent was referred to the Department of Labor for a high-level review and response. CX 6.
13. Attached to the April 11, 2011 SBA letter from SBA's Ombudsman is an April 8, 2011 memorandum from Phyllis C. Borzi, Assistant Secretary for DOL's Employee Benefits Security Administration, responding to the SBA National Ombudsman which states, *inter alia*:
  - a. ERISA covered plans may be eligible to waive the audit requirement under certain conditions when a plan has *fewer than* 100 eligible participants at the beginning of a reporting period.
  - b. Respondent's 2009 Form 5500 report disclosed that it had 136 total participants in the plan at the beginning of the 2009 plan year.
  - c. ERISA requires plan administrators of pension benefit plans with over 100 participants, such as Respondent, to engage an IQPA to audit the plan's financial statements and certain required schedules in accordance with generally accepted auditing standards to determine whether the statements and schedules are prepared in accordance with generally accepted accounting principles and DOL regulations, and to attach the IQPA report to the Form 5500.
  - d. The IQPA audit report is intended to ensure the integrity of the financial plan and other required information in the plan's annual report which assists DOL and plan participants in monitoring plan activities.
  - e. EBSA's audit waiver regulation permits small plans, i.e., those with *fewer than* 100 participants, to waive the audit requirement provided they meet the conditions of the waiver.
  - f. EBSA's "80-120" participant rule permits a small plan, i.e., one that has between 80 and 120 total participants, to file in the same category as it had filed in the prior year.
  - g. EBSA routinely determines to assess reduced civil penalties *after a plan complies* with its annual reporting requirements before the penalty becomes a final agency order.
14. On April 26, 2011, Respondent's counsel wrote to EBSA in response to Complainant's Notice of Rejection of the Form 5500 for Respondent's 2009 Plan, and asked Complainant to afford Respondent the small employer exception that would relieve it of having to obtain and file an IQPA report. CX 7 at 1.
15. Counsel's April 26, 2011 letter states that Respondent had dealt with EBSA "on this exact same issue for its Form 5500 filing for plan year 2007" and "DOL's action of rejecting [Respondent's] Form 5500 Annual Report for plan year 2009 is double jeopardy to [Respondent] and unwarranted and unnecessary by the DOL." CX 7at 1.
16. Counsel's April 26, 2011 letter reiterates allegations that Respondent has suffered financial difficulties over the prior 2-3 years as a result of economic factors affecting the housing construction industry, and states that Respondent "do[es] not have any extra money at this time to incur the expense of an independent qualified public accountant providing an audit of the Plan for 2009." CX 7 at 2.
17. Counsel's April 26, 2011 letter acknowledges that "[b]ut for the total number of former employees and inactive participants in the Plan for 2009, the Plan would have qualified for the small plan audit report exemption" but, despite this admission, argues that Respondent "meets the small plan exception and/or . . . should be eligible for the small plan exception based on the Department's discretion . . . ." CX 7 at 2.

18. On April 29, 2011, Respondent's counsel again wrote to SBA's Ombudsman seeking her intervention on Respondent's behalf with DOL arguing that "there is no material benefit of an audit of our client's 401(k) plan for 2009 and the DOL's position . . . is simply unreasonable, impracticable and an abuse of discretion, especially in light of how this same matter was dealt with and resolved for our client's 2007 filing." CX 8 at 2.
19. On June 13, 2011, Complainant issued a Notice of Intent to Assess a Penalty of \$47,250 regarding Respondent's failure to file a satisfactory Form 5500 annual report for 2009 in which it warned Respondent that failure to respond to the notice within thirty-five days could result in the assessment of additional civil penalties up to \$1,100 per day until Respondent filed an amended annual report satisfactory to the Department. CX 9.
20. In a letter dated July 13, 2011 from Respondent's counsel responding to EBSA's Notice of Intent to Assess a Penalty, counsel states that All Glass, Inc. ceased operating as a going concern on June 17, 2011 and its owners were then in the process of winding down its business. CX 10 at 2.
21. In his July 13, 2011 letter, Respondent's counsel wrote, *inter alia*:
  - a. "As we have previously advised the DOL in response to its previous Notice of Rejection of the Plan for 2007, All Glass actively employed only 62 employees at the beginning of 2007 and it was only because of **terminated employees and inactive plan participants** . . . that the Plan could not get its third party administrator to remove from the Plan that caused the Plan for that plan year to arguably not qualify for the small employee benefit plan audit waiver exception." CX 10 at 2. (Emphasis in original.)
  - b. "In December 2009, All Glass paid a negotiated penalty and fine of \$2,500.00 to the DOL to resolve the Notice of Intent to Assess a Penalty for the DOL's Rejection of the Plan for 2007." CX 10 at 2.
22. Respondent's attorney again argues in his July 13, 2011 letter that Complainant's assessment of a penalty based on Respondent's failure to file a satisfactory Form 5500 for 2009 "is effectively double jeopardy for the DOL to cite and assess a penalty against All Glass, Inc. and the Plan for its defective 2009 Plan year filing that occurred for the same reasonable cause reasons already provided to the DOL for the defective 2007 Plan year filing." CX 10 at 2.
23. Counsel further argues in his July 13, 2011 letter that Respondent "would have met the small plan audit report exemption if [its third party administrators] had administered the Plan properly." CX 10 at 3.
24. Attached to Counsel's July 13, 2011 letter is an affidavit from David Kaplan, attesting to the fact that he is Respondent's Plan Administrator for its 401(k) Profit Sharing Plan, he assisted counsel in the preparation of the Plan's written statement of reasonable cause, and the information contained therein is factually true and accurate to the best of his personal knowledge. CX 10 at 6.
25. According to the "Reasonable Cause Committee Notes" of Pamela Wilkins, an EBSA Analyst, the Reasonable Cause Committee recommended assessment of a penalty against Respondent in the amount of \$47,250. CX 11.
26. On November 21, 2011, Complainant issued a Notice of Determination on Statement of Reasonable Cause informing Respondent that it was assessing a penalty of \$47,250 against Respondent for its failure to file an amended Form 5500 which included an IQPA report for 2009. CX 12.
27. On January 17, 2012, Complainant issued a First Amended Notice of Determination on Statement of Reasonable Cause withdrawing its November 21, 2011 Notice of Determination and reiterating its assessment of a penalty of \$47,250 against Respondent for its failure, as of that date, to file an amended Form 5500 which included an IQPA report for 2009. CX 13.

## ERISA and Applicable Regulations

Plan Administrators must complete and file annual reports within 210 days of the end of every plan year for the plans they administer. ERISA §§ 101 and 104, 29 U.S.C. §§ 1021 and 1024. The form and content of the annual report are set forth in ERISA, including the requirement for an annual audit of an employee benefit plan and inclusion of the report or opinion of an IQPA regarding the benefit plan. ERISA § 103(a)(3), 29 U.S.C. § 1023(a)(3). Annual reports which do not comply with the requirements established by ERISA may be rejected by EBSA. ERISA § 104(a)(4) and (5), 29 U.S.C. § 1024(a)(4) and (5). When a report is rejected, and a revised filing satisfactory to the Department of Labor is not submitted within 45 days of the rejection, EBSA is empowered to retain an IQPA on behalf of a plan to perform the required audit and bring an action for legal and/or equitable relief. ERISA § 104(a)(5), 29 U.S.C. § 1024(a)(5).

For reports after December 31, 1987, Congress authorized the Department of Labor to assess a civil penalty of up to \$1,100 a day from the date a plan administrator fails or refuses to file a satisfactory annual report. ERISA § 502(c)(2), 29 U.S.C. § 1132(c)(2). Pursuant to ERISA, the Secretary of Labor promulgated 29 C.F.R. § 2560.502c-2 which sets forth the procedures governing the assessment of civil penalties under 29 U.S.C. § 1132(c)(2). The regulation expressly provides that the plan administrator “shall be liable for civil penalties assessed by the Secretary under section 502(c)(2) of the Act in each case in which there is a failure or refusal to file the annual report required to be filed under section 101(b)(1).” 29 C.F.R. § 2560.502c-2(a)(1). That regulation also provides, *inter alia*, the manner in which penalty amounts are to be determined and assessed and the procedures for considering reasonable cause for failure to file a satisfactory annual report. 29 C.F.R. § 2560.502c-2(b)-(d). The Secretary may waive or reduce an assessed penalty upon a showing that the plan administrator has complied with the reporting requirements or there are mitigating circumstances regarding the degree of willfulness of non-compliance. 29 C.F.R. § 2560.502c-2(d). The Department of Labor is required to provide notice of its determination on a plan administrator’s statement of reasonable cause, and the plan administrator may then seek an administrative hearing before an ALJ. 29 C.F.R. § 2560.502c-2(g)-(h).

### Standard of Review

The standard of review when examining determinations of the Department’s Employee Benefits Security Administration is the abuse of discretion or arbitrary and capricious standard. *Northwestern Institute of Psychiatry v. Martin*, 1993 WL 52553 (E.D.Pa. Feb. 24, 1993). “Agency action is entitled to a presumption of regularity.” *Id.* citing *Frisby v. United States Dept. of Housing and Urban Dev.*, 755 F.2d 1052, 1055 (3d Cir.1985). Furthermore, “[a]gency action may not be set aside on grounds that it is arbitrary and capricious if the action is rational, based on relevant factors, and within the agency’s statutory authority.” *Ibid.*

### Findings of Fact and Conclusions of Law

In his opposition to Complainant’s motion for summary judgment, Respondent’s counsel argues, in part, that “[w]hether the EBSA’s representatives failed to exercise their discretion and abused their discretion in this case turns on disputed material facts and a credibility determination in this case that can not [sic] be resolved in favor of the Respondent, the non[-]

moving party, in this case.” Respondent’s Opp. at 2-3.<sup>2</sup> Counsel’s argument is unavailing and cannot defeat summary judgment.

While I am required to draw all factual inferences in favor of Respondent, its opposition to summary judgment must establish that there is a *genuine* issue of material fact, and it must do so through some means other than mere speculation or conjecture. See *Cablevision Sys. Corp. v. Town of East Hampton*, 862 F. Supp. 875 (E.D.N.Y. 1994), *aff’d*, 57 F.3d 1062 (2d Cir. 1995); *Boyer v. Board of County Comm’rs*, 922 F. Supp. 476 (D. Kan. 1996), *aff’d* 108 F.3d 1388 (10th Cir. 1997). There is simply no evidence in the record before me of animus or bias by EBSA against Respondent, and counsel’s unsubstantiated allegation that EBSA officials abused their discretion is nothing more than rank speculation on his part. On the contrary, EBSA’s actions are rational, based on relevant factors, and within the agency’s statutory authority. *Frisby v. United States Dept. of Housing and Urban Dev.*, *supra*, 755 at 1055 The undisputed facts set forth below establish that EBSA properly exercised its discretion to assess a civil penalty against Respondent for its failure to file a satisfactory annual report for 2009, and it did so in accordance with all relevant statutory and regulatory requirements.

In the instant case, the undisputed facts establish that: Respondent had 100 or more total participants in its 401(k) Plan in 2007; Respondent filed a Form 5500 annual report for 2007 without the required IQPA report; Respondent was informed by EBSA that it intended to assess a civil penalty of \$53,650 against Respondent; Respondent subsequently filed a satisfactory 2007 Form 5500 with an attached IQPA report; and Complainant thereafter agreed to waive \$51,150 of the proposed penalty and assess a penalty of \$2,500 against Respondent. CX 1 and 2.

The undisputed facts further show that: Respondent had 100 or more total participants in its 401(k) Plan in 2009; Respondent filed a Form 5500 annual report for 2009 without the required IQPA report; Respondent was informed by EBSA that it intended to assess a civil penalty of \$47,250 against Respondent; Respondent failed to file an amended 2009 annual report with an attached IQPA report; and Complainant therefore declined to reduce or waive the \$47,250 civil penalty.

In neither instance did Respondent qualify for the small plan audit exemption it claimed it was entitled to inasmuch as Respondent’s 401(k) plan did not have fewer than 100 total participants at the beginning of the plan year in either 2007 or 2009. In both instances, Respondent was informed of this fact, did not contest it, and instead simply argued that it was experiencing financial hardship and its third party administrator failed to take adequate steps which *would have* reduced the number of participants in the 401(k) plan to fewer than 100.

With regard to its unsatisfactory 2007 annual report, after being informed of EBSA’s intention to assess a civil penalty of \$53,650, Respondent took action required by ERISA and applicable regulations and filed an amended Form 5500 which included the missing IQPA

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<sup>2</sup> In his opposition to summary judgment, Respondent’s counsel also argues that EBSA’s assessment of a penalty for his client’s failure to file a satisfactory annual report for both the 2007 and 2009 plan years amounts to “double jeopardy.” Aside from the fact that double jeopardy is inapplicable to civil proceedings, inasmuch as it is a procedural defense under the Fifth Amendment to the United States Constitution which prohibits a criminal defendant from being tried twice for the same crime, the regulation governing EBSA’s authority to assess penalties for an administrator’s failure to comply with ERISA requirements is absolutely clear: An administrator is liable for civil penalties *in each case* where the administrator fails or refuses to file the required *annual* report. 29 C.F.R. § 2560.502c-2(a)

report. In response to the amended filing, EBSA thereafter agreed to reduce the civil penalty from \$53,650 to \$2,500.

In contrast, when Respondent again filed a deficient annual report in 2009, and was warned by EBSA that it intended to assess a civil penalty against Respondent of \$47,250, Respondent made no effort to prepare and file a satisfactory 2009 Form 5500 with the required IQPA report and instead simply argued that it should be treated as though its plan had fewer than 100 participants at the beginning of the plan year and exempt from the requirement for filing an IQPA report. Because of Respondent's failure to file a satisfactory 2009 Form 5500, and in conformance with ERISA and its applicable regulations, EBSA did what it had told Respondent it intended to do and assessed a civil penalty of \$47,250 against Respondent. See *U.S. Department of Labor, Pension and Welfare Benefits Admin. v. Northwestern Institute of Psychiatry*, 1993-RIS-23 (PWBA July 26, 1995) (affirming ALJ's summary decision affirming PWBA's decision not to abate a penalty when defendant was put on plain notice of consequences of failure to achieve timely remedies).

Given these undisputed material facts, I find EBSA did nothing to abuse its discretion when it declined to either waive or reduce the civil penalty which Respondent now contests. Complainant's motion for summary judgment is therefore GRANTED.

STEPHEN L. PURCELL  
Chief Administrative Law Judge

Washington, D.C.

**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 1-2011* (Dec. 21, 2011) (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.