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Issue Date: 26 June 2013

Case Nos.: 2010-RIS-00013
2012-RIS-00113
2012-RIS-00114

In the Matter of:

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

v.

PLAN ADMINISTRATOR,
HOME OF ECONOMY 401(K) PLAN,
HOME OF ECONOMY, INC.
Respondent.

APPEARANCES:

Gail A. Perry, *Esq*.
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
Washington, D.C.
For the Complainant

Jon J. Jensen, *Esq*.
Jensen Bata, PLLC
Grand Forks, ND
For the Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

This case arises under § 502(c)(2) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(c)(2), and the implementing regulations contained at 29 C.F.R.

Parts 2560 and 2570. The dispute concerns $150,000 in civil penalties assessed against Respondent, Plan Administrator of the Home of Economy, Inc. ("HOE") 401(k) Plan, by Complainant, the Employee Benefits Security Administration ("EBSA"), pursuant to its ERISA enforcement authority.[1] EBSA assessed three separate $50,000 penalties against HOE for its failure to file the required report of an independent qualified public accountant ("IQPA report") with its Form 5500 Annual Report for plan years 2006, 2007, and 2009, as required by § 103(a)(3)(A) of ERISA, 29 U.S.C. § 1023(a)(3)(A). EBSA contends that there are no genuine issues of material fact and that the penalties should be affirmed in full. HOE admits that it failed to comply with ERISA's reporting requirements, but maintains that there are genuine issues of material fact regarding the existence of mitigating circumstances and the degree of willfulness in its noncompliance. For the reasons set forth below, EBSA's Motion for Summary Decision is granted.

Procedural History

On September 14, 2009, EBSA assessed a $50,000 penalty against HOE for its failure to file an IQPA report with its Form 5500 Annual Report for the 2006 plan year. On October 19, 2009, HOE filed an Answer. On October 29, 2009, the Chief Administrative Law Judge issued a Notice of Docketing, and assigned case number 2010-RIS-00013. On January 13, 2010, the Chief Judge issued an Order to Show Cause why default judgment should not be entered in favor of EBSA due to HOE's failure to comply with the instructions contained in the Notice of Docketing. On February 16, 2010, HOE filed a Response to the Order to Show Cause, together with its Pre-Hearing Exchange.

On August 3, 2011, case number 2010-RIS-00013 was assigned to me. On November 7, 2011, I issued a Notice of Hearing and Pre-Hearing Order for a hearing scheduled on April 17-18, 2012 in Grand Forks or Fargo, North Dakota. On March 30, 2012, the parties filed a joint motion to postpone the hearing to July 17-18, 2012. On June 18, 2012, HOE filed a motion for a 120-day extension of the hearing date and noted that EBSA consented to such an extension. In the June 18, 2012, motion, HOE explained that two subsequent plan years, 2007 and 2009, were also under consideration by EBSA, and in the event a hearing was necessary for those plan years, the parties intended to seek consolidation of those two cases with the case relating to the 2006 plan year. On August 30, 2012, I issued a Notice of Hearing and Pre-Hearing Order for a hearing scheduled on December 4-5, 2012 in Grand Forks or Fargo, North Dakota.

On July 23, 2012, EBSA assessed two $50,000 penalties against HOE for its failure to file an IQPA report with its Form 5500 Annual Report for the 2007 and 2009 plan years. On August 27, 2012, HOE filed Answers to both penalties. On September 6, 2012, the Chief Judge issued Notices of Docketing for both cases and assigned case numbers 2012-RIS-00113 and 2012-RIS-00114. On October 3, 2012, EBSA filed a Motion to Consolidate all three cases—case numbers 2010-RIS-00013, 2012-RIS-00113, and 2012-RIS-00114—"on the grounds that the cases and the Respondent are one and the same." On October 18, 2012, HOE stated it had no

[1] The Secretary of the Department of Labor delegated certain ERISA enforcement authority, including authority to make final decisions assessing penalties under § 502(c)(2), to the Assistant Secretary for Employee Benefits Security Administration (formerly the Public Welfare and Benefits Administration). Secretary's Order 6-2009, 74 FR 21524 (May 7, 2009), *superseding* Secretary's Order 1-2003, 68 FR 5374 (Feb. 3, 2003).

objection to consolidating the three cases. On October 25, 2012, the Chief Judge issued an Order consolidating the three cases, pursuant to 29 C.F.R. § 18.11, which permits consolidation when "two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing. . . ."

On November 20, 2012, I issued an Order continuing the December 4, 2012, hearing to an undetermined date and time. I allowed EBSA until February 4, 2013, to file a motion for summary decision. On February 4, 2013, EBSA filed its Motion for Summary Decision, Statement of Undisputed Facts, Supporting Memorandum, and Exhibits. On February 15, 2013, HOE filed its Response, Statement of Undisputed Facts, Exhibits, and Affidavit of HOE Controller Brian Cox.[2] On March 13, 2013, EBSA filed a Motion for Leave to File a Reply to Home of Economy's Response. Having received no objection, EBSA's Motion for Leave is granted and its Reply is received.[3] In its Motion for Leave, EBSA indicated that it would not object if HOE wished to file a Sur-Reply, but HOE has not done so.

Statement of Undisputed Facts

EBSA submitted a statement of undisputed facts in support of its Motion for Summary Decision containing thirty-four paragraphs. In its Response, HOE admitted certain facts, qualified certain facts, and submitted additional facts. EBSA did not contradict HOE's qualified or additional facts; therefore, I find that those facts are also undisputed. The following facts are not in dispute:

1. HOE is the plan administrator of Plan 001.
2. ERISA § 104, 29 U.S.C. § 1024, provides that the plan administrator of a benefit plan is required to file a Form 5500 Annual Report with the federal government within 210 days of the end of the plan year.
3. ERISA § 103(a)(3)(A), 29 U.S.C. § 1023(a)(3)(A), requires the plan administrator to file with the annual report an opinion of an independent qualified public accountant who shall conduct an audit of the report and the plan.
4. Pursuant to 20 U.S.C. § 1024(a)(2)(A) and 20 C.F.R. § 2520.103-1(c), an administrator of a plan covering less than 100 participants is not required to file an IQPA report.

Undisputed Facts Relevant to the 2006 Plan Year

5. HOE's Plan 001 for plan year 2006 had in excess of 100 participants, and therefore was not exempt from filing an IQPA report.
6. HOE filed its annual report for plan year 2006 on or about October 15, 2007, without a satisfactory IQPA report. (CX 1).
7. On January 15, 2008, and March 11, 2008, EBSA sent letters to HOE notifying it of the deficiencies contained in the annual report and requesting that it file the IQPA report for plan year 2006 within thirty days. (CX 2-3).

[2] Throughout this Decision and Order, EBSA's exhibits in support of its Motion for Summary Decision will be referred to as "CX," and HOE's e-mail exhibits in support of its Response will be referred to as "RX."
[3] *See* 29 C.F.R. § 18.6(b).

8. HOE failed to respond to the January 15, 2008, and March 11, 2008, letters.
9. On October 27, 2008, EBSA issued a Notice of Rejection ("NOR") of HOE's annual report for plan year 2006. The NOR informed HOE of its failure to file the IQPA report and stated, "YOU must file a written response within 45-days of the date of this Notice to avoid civil penalties authorized by Title I of ERISA." (CX 4).
10. HOE responded to the October 27, 2008, NOR on December 10, 2008. Brian Cox, the Controller of HOE, stated that its accounting firm, Brady Martz & Associates ("Brady Martz"), needed additional time to complete the audit and that HOE expected the audit to be completed and forwarded to EBSA within two weeks. (CX 5).
11. On March 3, 2009, EBSA issued a Notice of Intent to Assess a Penalty ("NOI") due to HOE's failure to comply with the IQPA report requirement in its annual report for plan year 2006. EBSA notified HOE of its intent to assess a $50,000 penalty pursuant to ERISA § 502(c)(2) and informed HOE of its right to file a Reasonable Cause Statement within thirty-five days of the date of the NOI. (CX 6, RX 199).
12. On April 6, 2009, HOE, through counsel, filed its Reasonable Cause Statement. The statement was signed by Wade Pearson on behalf of the plan administrator. HOE admitted it failed to file the IQPA report with its annual report for the 2006 plan year and that ERISA § 502(c)(2) authorized the assessment of penalties, but requested that EBSA waive or reduce the penalty as permitted by 29 C.F.R. § 2560.502c-2(d). In support of this request, HOE explained that its "efforts to gather the information [necessary for its accountant to compile the required report] have been significantly complicated by the plan's decision to change service providers during the 2006 plan year." HOE further explained that it experienced difficulty gathering the required information from the original service provider. (CX 7, RX 111, 168).
13. On May 13, 2009, EBSA's Reasonable Cause Committee determined that HOE failed to establish reasonable cause and recommended that the full $50,000 penalty be assessed. (CX 8).
14. On September 14, 2009, EBSA issued a Notice of Determination on Statement of Reasonable Cause ("NOD"). In the NOD, EBSA informed HOE that it had "determined on the basis of your statement that there is no reasonable cause to waive the penalty with respect to the 2006 annual report because: (1) An IQPA report and amended Form 5500 were not submitted in response to the Notice of Intent to Assess a Penalty[; and] (2) The plan administrator has presented reasonable cause neither for his failure to file an acceptable report as his original nor for his failure to correct timely." Consequently, EBSA notified HOE that it had assessed a $50,000 penalty pursuant to § 502(c)(2) of ERISA. EBSA informed HOE of its option to request an administrative hearing, by filing an Answer in accordance with 29 C.F.R. § 2570.61(c), within thirty-five days of the date of the NOD. (CX 9).
15. On February 9, 2012, HOE filed an amended 2006 annual report, which included an IQPA report. (RX 182). However, the filing was not in compliance with ERISA's reporting and disclosure provisions. The only remaining deficiency for the 2006 annual report was to provide the required certification of assets and statement of assets, which HOE filed with EBSA by January 30, 2013.[4]

[4] Because EBSA's Reply does not deny that HOE filed an acceptable 2006 annual report by January 30, 2013, I consider it to be an undisputed fact.

Undisputed Facts Relevant to the 2007 Plan Year

16. Plan 001 had in excess of 100 participants during the 2007 plan year.
17. HOE filed the 2007 annual report on October 15, 2008, but the report did not include the required IQPA report. (CX 10).
18. On November 28, 2011, EBSA issued a NOR for the 2007 annual report. The NOR informed HOE that it had forty-five days to comply without incurring a penalty. (CX 11).
19. On January 30, 2012, after HOE failed to remedy the deficiency in the 2007 annual report, EBSA issued a NOI for $50,000 pursuant to ERISA § 502(c)(2). The NOI further informed HOE of its right to file a Reasonable Cause Statement within thirty-five days. (CX 12).
20. On April 16, 2012, EBSA issued an amended NOI, but EBSA did not change the amount of the penalty it intended to assess. This NOI again informed HOE of its right to file a Reasonable Cause Statement within thirty-five days. (CX 13).
21. On May 11, 2012, HOE filed a Reasonable Cause Statement requesting a waiver or reduction of the penalty pursuant to 29 C.F.R. § 2560.502c-2(d). HOE explained that it had encountered "significant difficulty" in obtaining the required documents for its accountants to complete the IQPA report. HOE elaborated that "[o]btaining the [IQPA report] for the 2007 plan year was also complicated by HOE's change in plan administrators. HOE had initially engaged Invesmart (which later changed its name to [T]he Standard) to provide plan services. During the 2006 plan year, HOE changed its service provider to Bisys (which later changed its name to Ascensus). . . . Discussions during the change from one service provider to another led HOE to believe that the new service provider, Bisys, would be able to provide all of the documentation necessary for the accountants to complete a report required by Form 5500. HOE engaged the same accounting firm it had during prior years to provide the [IQPA report]. During that process, HOE discovered that Bisys would be unable to provide all the required documentation for the accountants to compile the required report." (CX 14, RX 111).
22. On June 13, 2012, the Reasonable Cause Committee recommended the $50,000 penalty not be reduced or waived. (CX 15).
23. On July 23, 2012, EBSA issued a NOD finding that HOE failed to establish reasonable cause for its failure to file the 2007 IQPA report and assessed a $50,000 penalty. The NOD informed HOE of its option to file an Answer contesting the penalty. (CX 16).

Undisputed Facts Relevant to the 2009 Plan Year

24. Plan 001 had more than 100 participants at the beginning of the 2009 plan year.
25. HOE filed its 2009 annual report on October 15, 2010, without an IQPA report. (CX 17).
26. On November 28, 2011, EBSA issued a NOR informing HOE of its failure to file the IQPA report with its 2009 annual report. EBSA further informed HOE that it had forty-five days to avoid civil penalties by filing a conforming IQPA report. (CX 18).

27. On January 30, 2012, EBSA served HOE with a NOI for $50,000 for its failure to file the 2009 IQPA report. EBSA further informed HOE of its right to file a Reasonable Cause Statement within thirty-five days of the date of the NOI. (CX 19).
28. On April 16, 2012, EBSA issued an amended NOI assessing a $50,000 penalty for HOE's failure to file the 2009 IQPA report and informed HOE of its right to file a Reasonable Cause Statement. (CX 20).
29. On May 11, 2012, HOE filed its Reasonable Cause Statement and cited the same problems with its 2009 annual report as it had with its 2007 annual report. (CX 21; *see supra* ¶ 21).
30. On June 13, 2012, the Reasonable Cause Committee found that HOE had not established reasonable cause and recommended that the $50,000 penalty be assessed. (CX 22).
31. On July 23, 2012, EBSA issued a NOD and assessed a $50,000 penalty. The NOD informed HOE of its option to file an Answer and request a hearing. (CX 23).

<u>Additional Undisputed Facts</u>

32. Brian Cox is the Controller of HOE and the Controller of the HOE 401(k) Plan. As such, he is familiar with HOE's 2006, 2007, and 2009 annual reports. (Cox Aff. ¶ 1).
33. Prior to September 30, 2007, HOE used Invesmart for its retirement services through a branch office of Bremer Bank located in Grand Forks, North Dakota. In 2007, HOE's contact at Bremer Bank departed from the bank without HOE's knowledge, which left HOE without a contact at the bank for questions regarding retirement financial services. (*Id.* ¶ 2).
34. HOE subsequently switched servicers from Bremer Bank to Merrill Lynch. This caused HOE's 401(k) Plan account with Invesmart to be "de-converted." (RX 110). The switch from Bremer Bank to Merrill Lynch also resulted in a change in service providers from Invesmart to Bisys (which subsequently changed its name to Ascensus). (Cox Aff. ¶ 3).
35. The IQPA report for the 2006 plan year was delayed, so HOE decided to file the remaining forms without the report. (RX 186). When the 2006 IQPA report was completed, HOE mistakenly believed its accountant was going to file the report electronically. HOE filed what it later discovered to be an incomplete 2006 annual report on February 9, 2012. (RX 182). In its Reply, EBSA stated that the February 9, 2012, filing was technically deficient in that it failed to include the certification of assets and statement of assets. HOE filed the 2006 annual report, along with the certification of assets and the statement of assets, on January 29-30, 2013. (Cox Aff. ¶ 4).
36. Invesmart was required, but failed, to provide a first quarter Participant Activity Report necessary to complete the 2007 plan year reporting. (*Id.* ¶ 6).
37. Invesmart was acquired by The Standard in 2008.[5] In phone conversations with The Standard, HOE was told that no records were forwarded from Invesmart to The Standard for de-converted companies and that there was no record of HOE's activity

[5] Although HOE's Response and accompanying Affidavit state that The Standard acquired Invesmart in 2008, HOE's e-mail exhibits indicate that the acquisition must have occurred sometime prior to October 2007. (RX 121). Because EBSA's Reply does not deny the 2008 date, I consider it to be an undisputed fact.

with Invesmart. This required HOE to manually re-create the information that Invesmart should have retained. (*Id*. ¶ 7).

38. HOE uses Brady Martz for its payroll and accounting services. Due to internal conflict of interest rules, Brady Martz does not allow payroll and retirement information to be automatically shared. Brady Martz sent a field auditor to HOE, but the auditor was unable to resolve HOE's information-retrieval issues. (*Id*. ¶ 8).
39. HOE hired the accounting firm Drees, Riskey & Vallager, Ltd. to complete its 2007 IQPA report. (RX 168). This firm was eventually able to recreate all of the necessary information for the 2007 IQPA report. HOE is currently in the process of completing its unfiled 2007 and 2009 annual reports. (Cox Aff. ¶¶ 9-10).
40. Without having completed the 2007 annual report, HOE is experiencing difficulty completing the subsequent years' reports. (*Id*. ¶ 11).
41. In an attempt to meet the reporting requirements for the years subsequent to 2007, HOE tried to submit information through Ascensus's online system; however, unbeknownst to HOE and Ascensus, Ascensus's online reporting system was designed to reject information more than eighteen months old. It took a significant amount of time before Ascensus realized that the eighteen-month limitation existed. (*Id*. ¶ 12-13).
42. In an effort to work around the eighteen-month limitation, HOE tried to submit information to Ascensus via email attachments; however, Ascensus failed to make modifications to their email filters despite knowing that HOE would be submitting information via email. (*Id*. ¶ 14).
43. The 2007 annual report and subsequent reports have been complicated by Invesmart's loss of data. (RX 51). HOE provided 205 pages of e-mail as evidence of its efforts to meet ERISA's reporting requirements. (Cox Aff. ¶¶ 15-17).
44. HOE employees who have left the plan have received full payment, and HOE has received no complaints from employees regarding administration of the plan. (*Id*.).

Discussion and Applicable Law

Summary Decision Standard

In cases involving the assessment of civil penalties under § 502(c)(2) of ERISA, an administrative law judge may issue a final decision "[w]here no issue of material fact is found to have been raised."[6] The standard for summary decision under the Rules of Practice and Procedure for administrative hearings is essentially the same as that contained in Federal Rule of Civil Procedure 56, the rule governing summary judgment in federal courts.[7] Summary decision is appropriate where "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."[8] A material fact is one that might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable fact-finder could return a verdict for either party.[9] The moving party has

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6 29 C.F.R. § 2570.67(a)(1).

7 *Saporito v. Cent. Locating Servs., Ltd.*, ARB No. 05-004, slip op. at 6 (ARB Feb. 28, 2006) (CAA).

8 29 C.F.R. § 18.40(d); *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322 (1986).

9 *Saporito*, ARB No. 05-004, slip op. at 5 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

the initial burden of demonstrating the absence of a genuine issue of material fact.[10] Once the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts showing there is a genuine issue for trial.[11] The party opposing the motion "may not rest on the mere allegations or denials of [the] pleadings. Such response must set forth specific facts showing there is a genuine issue of fact for the hearing."[12] For purposes of a motion for summary decision, I must view the evidence in the light most favorable to the non-moving party.[13]

ERISA § 502(c)(2)

ERISA protects the security of employees and dependents affected by employee benefit plans by requiring administrators of covered employee welfare and pension plans to comply with extensive reporting and disclosure provisions.[14] Section 101(b)(1) of ERISA requires the plan administrator to file an annual report of the plan with the Secretary.[15] An annual report must contain all information required by ERISA, including, where applicable, the opinion report of an independent qualified public accountant who conducts an examination of the plan's books and records to verify that the financial statements and schedules contained within the annual report are "in conformity with generally accepted accounting principles."[16] The annual report, including the IQPA report, is to be filed within 210 days after the close of the plan year.[17]

Upon a finding that an annual report is incomplete or the accountant's opinion contains a material qualification, the Secretary may reject the annual report.[18] If a revised filing is not made within forty-five days of rejection, the Secretary may, among other things, assess civil penalties against the plan of up to $1,100 per day from the initial due date.[19] It is current EBSA policy to assess a penalty of $150 per day, to a maximum of $50,000, for unfiled or unsatisfactory IQPA reports. EBSA treats rejected annual reports as if they had not been filed.[20]

It is the responsibility of plan administrators to ensure that the annual report and any required IQPA report are properly completed and timely filed,[21] and administrators bear liability for civil penalties assessed by EBSA for failure to file a compliant annual report.[22] The regulations entitle an administrator subject to penalties under § 502(c)(2) to: (1) a written notice indicating EBSA's intention to assess a penalty, the penalty amount, the period of time to which the penalty applies, and the reasons for the penalty;[23] (2) an opportunity to timely file a corrected annual report and/or to provide a statement of reasonable cause explaining why the proposed

[10] *Celotex*, 477 U.S. at 323.
[11] *Anderson*, 477 U.S. at 250.
[12] 29 C.F.R. § 18.40(c).
[13] *Lee v. Schneider Nat'l, Inc*., ARB No. 02-102, slip op. at 2 (ARB Aug. 23, 2003) (STA).
[14] 29 U.S.C. §§ 1002(1), 1002(2)(A), & 1003(a)(1).
[15] *Id*. § 1021(b)(1).
[16] *Id*. § 1023(a)(3)(A).
[17] *Id*. §§ 1023(a)(3)(A) and 1024(a)(1).
[18] *Id*. § 1024(a)(4).
[19] *Id*. § 1024(a)(5); 29 C.F.R. §§ 2575.100 and 2575.502c-2.
[20] 29 U.S.C. § 1132(c)(2).
[21] *Id*. §§ 1021(b) and 1024(a)(1).
[22] 29 C.F.R. § 2560.502c-2(a).
[23] *Id*. § 2560.502c-2(c).

penalty should be reduced or not assessed;[24] (3) a written notice of determination following a review by EBSA of the circumstances and the statement of reasonable cause, if one was submitted;[25] and, (4) an opportunity to request a review hearing with the Office of Administrative Law Judges.[26]

In making its initial penalty assessment, EBSA shall consider "the degree and/or willfulness" of the administrator's failure to file the annual report.[27] Upon receiving the administrator's Reasonable Cause Statement, EBSA may determine that "mitigating circumstances regarding the degree or willfulness of the noncompliance" exist such that the proposed penalty should be reduced.[28] EBSA may be lessen or waive penalties based upon the materiality of the administrator's failure to file or upon the level of "good faith and diligent efforts" demonstrated by the administrator notwithstanding its failure to file.[29] Determining reasonable cause based on the above considerations is meant to be a flexible inquiry, and the regulations "do not define particular circumstances under which reasonable cause may exist."[30]

Standard of Review

The appropriate standard of review in § 502(c)(2) penalty proceedings is *de novo*.[31] This standard of review reflects the fact that the "ALJ is not an appellate court, but rather functions in many ways as a court of original jurisdiction,"[32] and gives effect to the regulatory purpose of developing an extensive evidentiary record when reviewing EBSA's penalty determinations.[33] A *de novo* review "includes taking into consideration mitigating circumstances and events that transpired after the Statement of Reasonable Cause was issued,"[34] as well as any additional evidence the parties may present.[35] Nonetheless, an ALJ is bound by the governing statutory and

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[24] *Id*. § 2560.502c-2(e).
[25] *Id*. § 2560.502c-2(g).
[26] *Id*. § 2560.502c-2(h)-(i).
[27] *Id*. § 2560.502c-2(b)(1).
[28] *Id*. § 2560.502c-2(d)-(e).
[29] *U.S. Dep't of Labor, EBSA v. Callaghan & Callaghan, Inc.*, 2005-RIS-99, slip op. at 3 (ALJ, Apr. 24, 2006).
[30] *U.S. Dep't of Labor, EBSA v. Synergy Manufacturing Technology, Inc.*, 2005-RIS-20, slip op. at 6 (ALJ, Feb. 21, 2007).
[31] *U.S. Dep't of Labor, PWBA v. Spalding and Evenflo Companies, Inc.*, 1992-RIS-19 (PWBA, Nov. 18, 1994); *U.S. Dep't of Labor, EBSA v. Team Laurino 401(k) Plan*, 2008-RIS-50 (ALJ, Dec. 9, 2008); *U.S. Dep't of Labor, EBSA v. Dutch American Import Co.*, 2009-RIS-14 (ALJ, Jan. 6, 2010); *U.S. Dep't of Labor, EBSA v. P.E.C. Contracting Engineers*, 2009-RIS-80 (ALJ, Nov. 15, 2010); *U.S. Dep't of Labor, EBSA v. Thibeault Corp. of NE/T-Quip*, 2009-RIS-68 (ALJ, July 19, 2011). A survey of relevant cases reveals that a *de novo* standard of review has not been universally applied. *See, e.g., U.S. Dep't of Labor, EBSA v. All Glass, Inc.*, 2012-RIS-42 (ALJ, Dec. 6, 2012); *U.S. Dep't of Labor, EBSA v. Frontier Contracting Inc.*, 2010-RIS-72 (ALJ, Feb. 8, 2012); *U.S. Dep't of Labor, EBSA v. Product Management, Inc.*, 2007-RIS-113 (ALJ, Feb. 23, 2009). However, the decisions of the senior policy advisor of EBSA (formerly PWBA) "constitute the entire body of administrative-appellate authority on ERISA adjudications within the Department of Labor," and the senior policy advisor has "ruled that the stand[ard] of review is de novo." *U.S. Dep't of Labor, EBSA v. Team Laurino 401(k) Plan*, 2008-RIS-50, slip op. at 4 n.6 (ALJ, Dec. 9, 2008).
[32] *U.S. Dep't of Labor, PWBA v. Northwestern Institute of Psychiatry*, 1993-RIS-23, slip op. at 10 (PWBA, July 26, 1995).
[33] *U.S. Dep't of Labor, EBSA v. Team Laurino 401(k) Plan*, 2008-RIS-50, slip op. at 4 n.6 (ALJ, Dec. 9, 2008).
[34] *U.S. Dep't of Labor, EBSA v. Dutch American Import Co.*, 2009-RIS-14, slip op. at 7 (ALJ, Jan. 6, 2010).
[35] Given the weight of the relevant case law and the general definition of "*de novo* judicial review," I do not find persuasive EBSA's argument that facts and events arising after the NODs should be excluded from consideration. I

regulatory provisions and may not set aside EBSA's method of calculating § 502(c)(2) penalties, except to the extent that the ALJ finds them to be invalid.[36]

Discussion

EBSA contends that HOE has not complied with ERISA's reporting requirements and has not demonstrated reasonable cause for its failure to do so. EBSA argues that HOE's own evidence illustrates that HOE was dilatory in meeting its legal duties under ERISA. According to EBSA, the problems caused by HOE's change of service providers do not constitute a sufficient excuse for HOE's failure to correctly and timely file its annual reports, because it is the plan administrator's responsibility to ensure adequate recordkeeping. In addition, EBSA argues that HOE has not pointed to any specific actions it is taking to mitigate its information-management problems. EBSA also notes that HOE has been extremely tardy in preparing the reports at issue.

HOE acknowledges that it failed to timely file IQPA reports for plan years 2006, 2007, and 2009. However, according to HOE, there are material facts that bear on the degree and willfulness of its failure to comply with ERISA. HOE alleges the following mitigating facts: (1) HOE's contact at its service-providing bank left without HOE's knowledge sometime during 2007; (2) HOE subsequently switched service providers in 2007;[37] (3) because HOE's account with its previous service provider was "de-converted," it experienced significant difficulties in obtaining the information necessary for its new service provider to complete the IQPA reports; (4) HOE's alternative attempts to obtain information from its accounting firm were frustrated by the fact that the firm's conflict-of-interests policy prevented payroll and retirement information from being automatically shared; (5) because HOE's new service provider's computer system automatically rejects information that is more than eighteen months old, HOE has had difficulty completing the IQPA reports that are now several years late; (6) because the information contained in the reports is cumulative, difficulties that arise in completing one report affect all subsequent report years; and, (7) notwithstanding these problems, HOE is meeting its ongoing obligations to its employees.

Because a *de novo* standard of review entails consideration of all admissible record evidence, an ALJ reviewing a § 502(c)(2) determination is not confined to only evidence considered by EBSA in making its penalty decision.[38] Nonetheless, a party opposing a motion for summary decision must come forward with specific evidence showing that there are factual issues appropriate for judicial resolution. I find that EBSA has shown a lack of genuine issues of material fact. Therefore, it is not enough to say that HOE could conceivably present additional

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will therefore consider all evidence presented by HOE regardless of whether that evidence was presented in HOE's earlier Reasonable Cause Statements.

[36] *U.S. Dep't of Labor, PWBA v. Spalding and Evenflo Companies, Inc.*, 1992-RIS-19, slip op. at 8 (PWBA, Nov. 18, 1994).

[37] The Reasonable Cause Statements and subsequent trial materials are inconsistent with respect to precisely when HOE changed service providers. In its Reasonable Cause Statements, HOE stated that it changed service providers "in the middle" of the 2006 plan year. (CX 7, 14, 21). Yet HOE's Response, Affidavit, and e-mail exhibits indicate that HOE changed service providers on or near September 30, 2007, which was approximately 270 days after the conclusion of the 2006 plan year. (RX 110).

[38] *See U.S. Dep't of Labor, EBSA v. Dutch American Import Co.*, 2009-RIS-14, slip op. at 7 (ALJ, Jan. 6, 2010).

mitigating facts at a hearing; once the burden shifts to HOE, it must respond by presenting facts that might actually affect the outcome of the suit under the governing law.

HOE has only proffered evidence that, taken as true, would not alter the outcome of this dispute. The crux of HOE's defense is that when it changed service providers in September 2007 it lost access to vital information, which had a "cascading" effect in that it required HOE to pursue different methods of information retrieval and complicated HOE's ability to complete IQPA reports for subsequent plan years. Although the decision to switch service providers mid-year had an unusually negative impact on HOE's ability to comply with ERISA's reporting requirements, ERISA places the duty of compliance on plan administrators—not their service providers.[39] HOE, as plan administrator, must be held accountable for the consequences of its own business decisions. As a general matter, "corporate restructuring," such as changes in company size or location, or turnover in plan administrators and trustees, does not constitute reasonable cause for lack of ERISA compliance.[40]

As a fiduciary of the 401(k) Plan, HOE "knew or should have known that it needs to retain and segregate all pertinent documents and financial statements in order to complete the audits."[41] A change in service providers, and the information-management consequences flowing from that change, cannot serve as a legitimate excuse for noncompliance, because HOE itself is legally responsible for gathering and maintaining all of the information necessary to complete its annual reports.[42] The fact that HOE wholly relied upon third parties for its information management in this area, and neither properly monitored the service-provider transition nor independently maintained vital records, does not demonstrate good faith or diligence in the performance of its responsibilities as plan administrator.[43] Because the consequences arising from a voluntary, mid-year change in service providers do not constitute reasonable cause for HOE's failure to comply with ERISA, the vast majority of HOE's arguments are unavailing.

HOE also fails to demonstrate good faith, diligence, or lack of willfulness considering its continued failure to file IQPA reports altogether. To date, HOE has not filed its 2007 or 2009 annual reports.[44] A review of § 502(c)(2) cases reveals that EBSA's motions for summary decision have been granted where the respondent fails to file any report whatsoever prior to the filing of decision.[45] Even construing all the evidence in a light most favorable to HOE, there is

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[39] 29 U.S.C. §§ 1021(b) and 1024(a)(1).

[40] *U.S. Dep't of Labor, EBSA v. Frontier Contracting Inc.*, 2010-RIS-72, slip op. at 3 (ALJ, Feb. 8, 2012); *U.S. Dep't of Labor, EBSA v. Synergy Manufacturing Technology, Inc.*, 2005-RIS-20, slip op. at 3 (ALJ, Feb. 21, 2007); *U.S. Dep't of Labor, EBSA v. Product Management, Inc.*, 2007-RIS-113, slip op. at 3 (ALJ, Feb. 23, 2009).

[41] *U.S. Dep't of Labor, EBSA v. Frontier Contracting Inc.*, 2010-RIS-72, slip op. at 3 (ALJ, Feb. 8, 2012).

[42] *U.S. Dep't of Labor, EBSA v. Tile Finishers Local 88 NY*, 2008-RIS-20, slip op. at 5 (ALJ, June 3, 2008).

[43] *U.S. Dep't of Labor, EBSA v. Precision Wire Products, Inc.*, 2007-RIS-141, slip op. at 9 (ALJ, Sept. 10, 2008) ("If Respondent had properly monitored its service providers, then they would not have been subject to any assessed penalties.").

[44] It is the responsibility of the parties to keep OALJ apprised of any changed circumstances relevant to this dispute. Having received no evidence to the contrary, I find that corrected 2007 and 2009 annual reports have not been filed since HOE submitted its Response on February 14, 2013, and EBSA submitted its Reply on March 13, 2013.

[45] *See U.S. Dep't of Labor, EBSA v. All Glass, Inc.*, 2012-RIS-42 (ALJ, Dec. 6, 2012); *U.S. Dep't of Labor, EBSA v. LFC Group Employees Retirement Plan*, 2009-RIS-18 (ALJ, May 20, 2010); *U.S. Dep't of Labor, EBSA v. Product Management, Inc.*, 2007-RIS-113 (ALJ, Feb. 23, 2009); *U.S. Dep't of Labor, EBSA v. Stover Industries, Inc.*, 2006-

still no explanation for why it has taken nearly five years for HOE to rectify the problems with its recordkeeping. It would be unreasonable to excuse several years of noncompliance due to a single, mid-year change in service providers. To the extent that missing data from one year was impeding the annual reports for subsequent years, a diligent effort to retrieve the missing data should have led to all of the overdue reports being filed within a reasonable time.

Unlike the 2007 and 2009 annual reports, the facts indicate that the annual report for the 2006 plan year was corrected and filed during the pendency of these proceedings. In recent years, ALJs applying a *de novo* standard of review have held that the filing of a late but compliant report while the case is pending "is a mitigating circumstance that obviously could not be considered at the time the Determination of Reasonable Cause was made."[46] While I agree that HOE's eventual filing of its 2006 annual report is an additional piece of evidence that merits consideration under a *de novo* standard of review, I do not believe that the late filing has any bearing on the outcome of this case.

Although the regulations do not define precisely what constitutes reasonable cause or mitigating circumstances, "when Congress added § 502(c)(2) to ERISA, it also commented that the penalty needs to reflect the materiality of the failure."[47] One important materiality consideration in some recent § 502(c)(2) cases has been the eventual filing of a compliant annual report. Because "plan participants and beneficiaries, as well as EBSA, continue to have an interest in obtaining annual reports even after penalties are assessed . . . the Plan should be given an incentive to file reports while their cases are pending before the administrative law judge."[48] However, the mitigating effect of a late filing must have some outer limit.[49] While participants and beneficiaries may well have an interest in obtaining even late-filed annual reports, it is difficult to imagine that by 2013 a plan participant would significantly benefit from receiving compliant 2006 report data. EBSA's interest in late-filed reports also becomes more attenuated with each passing year. EBSA's goal of ensuring the *present* integrity of employee benefit plans is not substantially furthered when a plan administrator files a corrected annual report more than five years after its initial due date. These interests are better served when a plan administrator understands that even a late-filed annual report must be submitted within a reasonable period of time.[50] At some point an annual report is so late, and so many intervening plan years that require updated IQPA reports have passed, that the damage of noncompliance cannot effectively be undone. And while it is true that plan administrators must have some incentive to complete annual reports even after proceedings have been initiated, the strongest incentive administrators

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RIS-7 (ALJ, Mar. 15, 2007); *U.S. Dep't of Labor, EBSA v. Mascon Information Technologies, LTD*, 2005-RIS-00115 (ALJ, Oct. 19, 2006); *U.S. Dep't of Labor, PWBA v. Compgraphix, Inc.*, 1999-RIS-53 (ALJ, Oct. 14, 1999).

[46] *U.S. Dep't of Labor, EBSA v. Dutch American Import Co.*, 2009-RIS-14, slip op. at 9 (ALJ, Jan. 6, 2010); *see also U.S. Dep't of Labor, EBSA v. P.E.C. Contracting Engineers*, 2009-RIS-80 (ALJ, Nov. 15, 2010).

[47] *U.S. Dep't of Labor, PWBA v. Cinpac, Inc./Libby Lee Toys, Inc.*, 1994-RIS-17, slip op. at 5 (ALJ, Mar. 20, 1995) (citing H. Conf. Rept. No. 100-495, p. 889, accompanying H.R. 3545, *reprinted in* 4 U.S. Cong. News 1987, pp. 2313-1635).

[48] *U.S. Dep't of Labor, EBSA v. P.E.C. Contracting Engineers*, 2009-RIS-80, slip op. at 6 (ALJ, Nov. 15, 2010).

[49] *See, e.g., U.S. Dep't of Labor, EBSA v. Thibeault Corp. of NE/T-Quip*, 2009-RIS-68, slip op. at 17 (ALJ, July 19, 2011).

[50] *See, e.g., U.S. Dep't of Labor, PWBA v. Northwestern Institute of Psychiatry*, 1993-RIS-23, slip op. at 7 (ALJ, Dec. 21, 1993) ("Considering the extraordinary length of time that transpired . . . and the severity of the omissions, including the absence of a proper IQPA opinion letter, the Court can find no basis to set aside the DOL assessment of penalty . . .").

have for complying with ERISA's reporting requirements is that they will continue to be penalized anew each report year until their accounting and reporting practices conform to the requirements set forth in ERISA.

In *Dutch American Import Co.*, the ALJ reduced a $49,000 penalty by 50% after the respondent filed an annual report approximately one year after receiving a NOI and twenty-one months after the initial due date.[51] In *P.E.C. Contracting Engineers*, the ALJ reduced a $180,000 penalty by 50% after the respondent filed three years' worth of annual reports approximately ten months after receiving a NOI and two to four years after their initial due dates.[52] In this case, by contrast, HOE filed its 2006 annual report nearly four years after receiving the NOI and over five years after its initial due date. Even among cases that deal with late-filed reports, HOE's 2006 annual report is virtually unprecedented in its lateness.[53] Most importantly, HOE has failed to put forward specific facts showing any mitigating effect the late filing had. While the filing of an annual report during OALJ proceedings may be a mitigating factor in certain circumstances, HOE's exceptionally late filing and failure to provide any evidence that the filing had a mitigating effect on its noncompliance precludes a finding that HOE has demonstrated good faith, diligence, or a lack of willfulness.[54]

Finally, HOE contends that it is continuing to meet its obligations to current and former employees. However, this argument does not reflect a correct understanding of the ERISA provisions at issue. HOE's employees may not be suffering an "injury" in the sense that the 401(k) Plan lacks the funds to operate as intended, but "[w]ithout an independent audit, it is impossible to ascertain whether there were fiduciary bre[a]ches in the administration" of the plan.[55] Proper recordkeeping and timely reporting are ongoing obligations that HOE has to its employees. By failing to complete and file the necessary IQPA reports in order to verify the integrity of the 401(k) Plan, HOE is not fulfilling its fiduciary obligations. Plan participants may not be feeling the practical effects of HOE's noncompliance at this point, but that fact cannot possibly be considered a mitigating circumstance. ERISA's reporting mandates exist to protect employees from harm long before the average employee would likely notice that anything is amiss in his or her 401(k) Plan. The provisions enforced by EBSA "are important measures designed to promote the purpose of ERISA, that is, a remedial statute designed to protect valuable employee benefit plans, through *careful administration* and regulation."[56]

I find that there exist no genuine issues of material fact and that, viewing all the evidence in the light most favorable to HOE, EBSA's penalty assessments are in accord with ERISA §

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[51] *U.S. Dep't of Labor, EBSA v. Dutch American Import Co.*, 2009-RIS-14 (ALJ, Jan. 6, 2010).
[52] *U.S. Dep't of Labor, EBSA v. P.E.C. Contracting Engineers*, 2009-RIS-80 (ALJ, Nov. 15, 2010).
[53] *U.S. Dep't of Labor, EBSA v. Frontier Contracting Inc.*, 2010-RIS-72, slip op. at 3 (ALJ, Feb. 8, 2012) (granting summary decision in favor of EBSA, which argued that "filing a compliant 2006 return five years after the deadline does not demonstrate a willingness to comply.").
[54] *U.S. Dep't of Labor, PWBA v. Spalding and Evenflo Companies, Inc.*, 1992-RIS-19, slip op. at 5 (PWBA, Nov. 18, 1994) ("The burden, under the regulations, is not that the ALJ find that [respondent] did not proceed in good faith to comply, but rather that [respondent] must demonstrate, to the satisfaction of the ALJ, that it proceeded in good faith to comply.").
[55] *U.S. Dep't of Labor, PWBA v. Compgraphix, Inc.*, 1999-RIS-53, slip op. at 8 (ALJ, Oct. 14, 1999).
[56] *U.S. Dep't of Labor, EBSA v. Nebraska Meat Corporation*, 2010-RIS-17, slip op. at 9 (ALJ, Aug. 30, 2010) (emphasis added).

502(c)(2), 29 U.S.C. § 1132(c)(2), and the implementing regulations contained at 29 C.F.R. Parts 2560 and 2570. EBSA is therefore entitled to summary decision with respect to these three $50,000 penalty assessments.

ORDER

EBSA's Motion for Summary Decision is hereby **GRANTED**. It is further ordered that within 45 days of the date this Decision and Order is issued, the respondent shall pay to the U.S. Department of Labor a civil penalty in the amount of $150,000.00. 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 regulation have provided.

Digitally signed by JOSEPH KANE
DN: CN=JOSEPH KANE,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

Joseph E. Kane
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 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.