

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 May 2014

CASE NO.: 2013-RIS-00002

EBSA NO.: 12-1654D

In the Matter of:

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

vs.

PLAN ADMINISTRATOR FOR
GOLDEN DAY SCHOOLS, INC. RETIREMENT PLAN AND
GOLDEN DAY SCHOOLS, INC.,
Respondent.

DECISION AND ORDER

This case arises under Section 502(c)(2) of the Employee Retirement Income Security Act of 1974 (“ERISA,” or the “Act”), 29 U.S.C. §§ 1132 and 1135, the applicable regulations issued at 29 C.F.R. Parts 2520, 2560, and 2570, and the Secretary’s Order, 1-87, 52 Fed. Reg. 13, 139 (1987). A formal hearing occurred in Long Beach, California, on August 20, 2013. Gail Perry, Attorney at Law, represented the U.S. Department of Labor, Office of the Solicitor, Employee Benefits Security Division (“EBSA”). Clark E. Parker, Attorney at Law, represented Respondent Golden Day Schools, Inc. and the Plan Administrator (together, “Respondent”).

At hearing, Complainant’s and Respondent’s pre-hearing statements were marked as ALJ Exhibits (“AX”) 1 and 2, respectively. Complainant’s Exhibits (“CX”) 1 through 11 and 13 through 15, and Respondent’s Exhibits A through F and I through N were admitted into evidence.

As explained below, I find that EBSA did not abuse its discretion or act in an arbitrary and capricious manner when it assessed a \$5,000 civil penalty on Respondent for failure to file an annual report in a timely manner and for providing inadequate justification in its Reasonable Cause Statement. Thus, I assess the \$5,000 civil penalty for late filing of the independent qualified public accountant (“IQPA”) report in the fiscal year ending 2010.

STIPULATION

1. Respondent failed to comply with Sections 101(b)(1) and 104(a)(1) of the Act, 29 U.S.C. 1021(b)(1) and 1024(a)(1), as amended, and 29 C.F.R. §§ 2520.103-1 and 2520.104(a)(1), as amended, by failing to file an annual report in a timely manner, in which a penalty would not be assessed.

TR at 9-11.

ISSUES

1. Did EBSA abuse its discretion and act in an arbitrary and capricious manner when it assessed an abated \$5,000 civil penalty on Respondent for reporting violations during the fiscal year ending December 31, 2010?
2. Should Respondent be assessed a \$5,000 civil penalty for late filing of IQPA report in the fiscal year ending 2010, or has Respondent shown reasonable cause to have the entire civil penalty abated?

TR at 8-9.

FACTUAL FINDINGS

Background

Golden Day Schools, Inc. is a 501(c)(3) non-profit corporation that receives the vast majority of its income from state agencies. TR at 80, 245. Mr. Clark E. Parker serves as the Fiduciary Plan Administrator for the Golden Day Schools, Inc., Retirement Plan. TR at 245. Certified actuary Henry DeSpain, from accounting firm Matthews, Gold, Kennedy & Snow, Inc., serves as the Third Party Administrator. CX 7-20.

On August 8, 2011, accountant Steven Flores sent Dr. Parker a letter of agreement to provide auditing services for the Golden Day Schools, Inc., Retirement Plan for the years ending December 31, 2010 and in 2009. RX L at 1-3. The letter outlined Mr. Flores' procedures and obligations, but reminded Mr. Parker, among other things, that he would be "responsible for making all financial records and related information available to [Mr. Flores] and for the accuracy and completeness of that information..." RX L at 3. Under Sections 101(b)(1) and 104(a)(1) of the Act, 29 U.S.C. §§ 2520.103-1, 1024(a)(1), as amended, and regulations 29 C.F.R. §§ 2520.103-1 and 2520.104(a)(1), as amended, Respondent was required to file an annual Form 5500 report and accompanying audit for each year.

On October 14, 2011, Mr. Parker submitted the 2010 Annual Report Form 5500 on behalf of Golden Day Schools, Inc. Retirement Plan. The filing, which was 19 pages long, was made without an audit report. CX 1; TR at 29-30.

Notice of Rejection

On February 23, 2012, Office of the Chief Accountant Reporting Compliance Specialist Madeline Olivera sent an email to Mr. Parker, notifying him that “the U.S. Department of Labor ha[d] rejected [the] Form 5500 filing...for the Golden Day Schools, Inc. Retirement Plan for 2010 because it was filed without the report of an Independent Qualified Public Accountant.” CX 2 at 1. The email, to which Ms. Olivera attached the Notice of Rejection (“NOR”), informed the Plan Administrator that he must “correct the deficiency described in the accompanying Notice of Rejection within 45 days from the date of the Notice.” *Id.* The top of the NOR reiterated this 45-day deadline in bolded font with the word “**WARNING**” and a statement that the recipient “must follow the instructions below within 45-days of the date of the Notice to avoid potential civil penalties authorized by Title I of ERISA.” CX 3 at 1. The civil penalties could run up to \$1,100 per day from the date on which the annual report was due. *Id.* at 2. In order to avoid civil penalties, the NOR instructed Respondent to file an acceptable, amended 2010 plan year Form 5500 and notify the Office of the Chief Accountant of the completed amended filing. *Id.* The NOR further warned that the “law does not allow for extensions of time to respond to this Notice, therefore, no extensions will be granted by the Department.” *Id.* at 1.

However, when Ms. Olivera checked the DOL’s email receipts on April 10, 2012, to make sure that the email had been received, she could not find a receipt match and believed that Respondent had perhaps not received a copy of the Notice of Rejection. TR at 30-31.

Ms. Olivera notified her team leader and they decided to reissue the Notice of Rejection, as documented in her memo from April 11, 2012. CX 4 at 1. Accordingly, on April 25, 2012, Ms. Olivera reissued a Notice of Rejection that replaced and superseded the February 24, 2012 NOR. CX 5 at 1-3; TR at 31-32. The new NOR was sent via certified U.S. mail and a delivery receipt Respondent was signed on April 27, 2012. CX 5 at 4; TR 34-35.

Notice of Intent to Assess a Penalty

Ms. Olivera did not receive a corrected amended Form 5500 or response from Respondents within the 45-day period given on the second NOR. TR at 36. She checked the Department’s EFAST system to see if an amended return with an audit had been filed, but found that it had not been. TR at 37. Ms. Olivera then prepared a Notice of Intent to Assess a Penalty (“NOI”), which her supervisor, Dan Dingwall, signed and issued on July 9, 2012. CX 6 at 1-4; TR at 38-39. The NOI informed Respondent of the Department’s intent to assess a civil penalty of \$50,000 for the Plan’s deficient Form 5500 annual report filing, and warned that Respondent must file a written response within 35-days from the date of the Notice to preserve its administrative rights. CX6 at 1. The penalty calculation was based on a charge of \$150 per diem for 344 days of the missing accountant’s report.¹ *Id.* at 2. The NOI required that Respondent file a Statement of Reasonable Cause, which should:

- “State that you, as Plan Administrator, complied with the requirements of Section 101(b)(1) of the Act or state the mitigating circumstances regarding the degree or willfulness of the noncompliance;

¹ \$150 per day x 344 days = \$51,600. The maximum penalty for this type of deficiency is set at \$50,000. CX 6 at 2.

- 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 Regulations;
- 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);
- Be signed by the Plan Administrator or signed by the Plan Administrator's authorized representative where the representative has been granted that specific authority pursuant to a duly executed, notarized power of attorney..."

CX 6 at 2-3. The Statement of Reasonable Cause had to be filed with the Department within 35 days via email, mail, fax, or private service. CX 6 at 3.

Reasonable Cause Statement, Amended Form 5500, and IQPA Report

On August 13, 2012, Respondent submitted the Form 5500 Annual Return/Report of Employee Benefit Plan for 2010, along with the missing 2010 IQPA. CX 7 at 20. Respondent also submitted a Reasonable Cause Statement, signed by Mr. DeSpain, which contained only two sentences: "Due to issues beyond the control of the Trustee and Plan Administrator the auditors [sic] report was inadvertently left out of the original filing. The Plan Administrator has made every effort in the past to complete filings on a timely bases [sic]." CX 7 at 7.

Ms. Olivera did not accept Mr. DeSpain's letter as a Reasonable Cause Statement because it did not contain a declaration that it was made under penalty of perjury and was signed by someone who was not the Plan Administrator and did not have the power of attorney. TR at 45. She called Vicky Jones² to inform her of these problems, and explained that the amended Form 5500 with IQPA report needed to be filed electronically. TR at 48; CX 12 at 2. Mr. Parker then resubmitted a signed letter with identical language, which Ms. Olivera accepted as a Reasonable Cause Statement. TR at 49; CX 7 at 1. However, Respondent did not submit a copy of the amended 2010 Form 5500 and IQPA report with Mr. Parker's letter. TR at 49-50. Indeed, though the Form 5500 and audit were completed around August 13, 2012, these accompanying documents were not filed electronically with the Department until August 23, 2012. CX 8 at 30; TR at 56.

Reduced Penalty and Notice of Determination

After reviewing Respondent's Reasonable Cause Statement, Ms. Olivera determined that the civil penalty should be reduced from \$50,000 to \$5,000. TR at 64. Ms. Olivera testified that, based Respondent's Reasonable Cause Statement, she did not have enough factual information to recommend a 100% abatement of the penalty. TR at 64. Instead, she advised that Respondent be required to pay 10% of the original penalty because the "Plan Administrator has the fiduciary responsibility to assure himself/herself that all reporting requirements are met." CX 10 at 1. She compiled her findings and recommendation for a reduced penalty into a Reasonable Cause Analysis & Committee Notes form, which her supervisor, Steve Schott, signed on August 23,

² The record does not formally identify Vicky Jones, but she appears to be Mr. Parker's assistant or receptionist.

2012. CX 10 at 1; TR at 59-60. Per the Department's procedure, Ms. Olivera's recommendations were then submitted for review to the Reasonable Cause Committee, which also approved the partial penalty of \$5,000. CX 10 at 1.

After receiving the Reasonable Cause Committee's decision, Ms. Olivera drafted a Notice of Determination ("NOD"), which her team leader reviewed and approved. TR at 65. The NOD and case file were then given to EBSA's Chief Accountant, Ian Dingwall, who signed and issued the NOD on September 4, 2012. *Id.*; CX 11 at 1-4; RX I at 1-4. The NOD acknowledged that a portion of the original \$50,000 penalty should be waived because EBSA had received the requisite IQPA report and because the Plan Administrator had taken reasonable steps to come into compliance after receiving the NOI. CX 11 at 2. Yet, EBSA further determined that there was no reasonable cause to waive the remaining \$5,000 of the intended penalty, as the Plan Administrator had not presented reasonable cause for his failure to file an acceptable annual report as his original filing or for his failure to timely correct his filing deficiencies, and because the Plan Administrator has a fiduciary responsibility to assure himself that all reporting requirements were met. *Id.*

Request for Hearing and Detailed Explanation

On September 27, 2012, Respondent submitted a letter to the Office of Administrative Law Judges ("OALJ"), requesting a hearing and attaching an answer to explain his belief that the \$5,000 penalty should be waived or set aside. RX A at 1; *see also* RX F. The attached letter, which was sent to both the OALJ and Ms. Olivera, claimed that there were mitigating circumstances beyond the Plan Administrator's control that caused the late filing. RX A at 3. Mr. Parker explained that the new audit reporting requirements for 2010 regarding disclosure of investment assets caused unforeseen delays for Respondent. *Id.* Respondent's Investment Advisor Bryan Wollheim had moved his employment from Morgan Stanley to Merrill Lynch during the period for which the auditor was trying to obtain comparative information. *Id.* "As a result, the statements were difficult to obtain and reconcile from the beginning of the year to the end of the year, which is required under the audit standards." *Id.* at 4. Mr. Parker explained that he had made every effort to come into compliance and to obtain the necessary information for the audit, and requested an abatement of the \$5,000 penalty. *Id.* This letter was signed by Mr. Parker, Mr. DeSpain, Mr. Flores, and Mr. Wollheim. *Id.*

Mr. Clark also included a separate letter from Mr. Wollheim, in which the investment advisor further detailed how transferring his practice from Morgan Stanley to Merrill Lynch had created significant delays in getting information for the Golden Day Schools, Inc. account. RX A at 5; *see also* RX F at 1. The letter explained that Mr. Parker had decided on December 4, 2009 to transfer his personal and business accounts to Merrill Lynch to follow Mr. Wollheim's move. *Id.* The majority of Golden Day's assets were delivered to Merrill Lynch by December 31, 2009, but "certain assets and valuations were delayed in the transfer process due to circumstances beyond [Parker] or Merrill Lynch's control." *Id.* Mr. Wollheim stated that he continued working with Morgan Stanley on the asset valuations, but most of the data had to be manually entered and the final transfer of assets to Merrill Lynch did not occur until April 29, 2010.³ *Id.*

³ In his testimony with respect to RX F, Mr. Wollheim clarified that the statement "certain assets and valuations were delayed in the transfer process, due to circumstances beyond yours or Merrill Lynch's control," refers to the

At the hearing, Ms. Olivera testified that she had not read Mr. Parker's September 27, 2012 letter, despite having received a copy, because "[o]nce we issue a Notice of Determination, the case is out of my hand and it goes to the ALJ process...I don't have control over the case." TR at 73-74. Upon reading the letter at the hearing, Ms. Olivera stated that the information in Mr. Parker's September 27, 2012 letter would not have changed her determination about the abatement of the penalties because the information came after the Notice of Determination. *Id.* at 74-75. When asked whether Mr. Parker's explanation would have changed her determination had it been attached to the original Reasonable Cause Statement, Ms. Olivera refused to speculate, emphasizing that a detailed explanation of Mr. Parker's troubles had not been timely filed. *Id.* at 75. At the time that Ms. Olivera made the penalty determination, she had been given no information beyond the vague statement that the delay had been caused by "issues beyond the control of the trustee and plan administrator." TR at 106.

Bryan Wollheim Testimony

Bryan Wollheim has served as financial advisor for Golden Day Schools, Inc. Retirement Plan for the last six or seven years. TR at 110. Mr. Wollheim worked for Morgan Stanley for 11.5 years before moving to Merrill Lynch at the end of 2009. *Id.* When Mr. Wollheim moved to Merrill Lynch, most of the Golden Day Schools, Inc. assets transferred with him. *Id.*

Mr. Wollheim testified that in March or April 2011, Henry DeSpain contacted him about certifying the assets for Golden Day School's investments. TR at 113. Mr. Wollheim was then notified by Golden Day's accountant, Mr. Flores, that the previous information he had sent for 2009 was not sufficient due to recent changes in the Act's audit requirements. TR at 114-115. Mr. Wollheim had not provided anything beyond basic detail for the 2009 audit, but Mr. Flores indicated to him that the new requirements required a much more detailed breakdown. TR at 115-116. Because Wollheim had moved over from Morgan Stanley at the end of 2009, he had to go back to that company to provide the year-end data. *Id.* Mr. Wollheim stated that his former office staff and operations had been displaced through a combination with Smith Barney, so it took him numerous attempted contacts over several weeks to get the data. TR at 116.

Mr. Wollheim testified that during this time, he was on the phone with the Plan Administrator or Mr. Flores' office anywhere from monthly to weekly to multiple times daily, depending on the time sensitivity of the issue. TR at 117. The requested 2009 information came from Morgan Stanley in pieces. One asset in particular, a proprietary fund-to-fund hedge fund, had to be liquidated because it could not be moved over. TR at 118. Mr. Wollheim explained that this could not have been done by the auditors themselves because no one in that firm is licensed to segment the assets and had to rely on the trustees to provide the data for them. TR at 119. He concluded that because almost all of the asset class breakdown for 2009 had to be done manually, Mr. Wollheim's midyear transfer from Morgan Stanley to Merrill Lynch created a significant delay in compiling Golden Day Schools' financial information. TR at 127.

Absolute Return Fund, comprising about 10-12% of the account of the plan. TR at 143-144. He further stated that 97% of the assets were received in April 2010. *Id.* at 146. At that time, the liquidated amount for the hedge fund was \$169,052.58. *Id.* at 153.

Steven Flores Testimony

Steven Flores has worked as a licensed account in California since 1976, and has performed multiple pension fund audits for several years, including audits for Golden Day Schools, Inc. TR at 213. Much of Mr. Flores' testimony centered on an explanation of the changes in the 2010 audit requirements, which required him to classify investments by category and then, more specifically, by class – whereas audits previous to the 2010 change only required that investments be presented by category. TR at 215-216. Mr. Flores testified that it was his belief, based on a reading of the requirements and his professional discretion that the 2009 financial information referenced in the 2010 audit needed to be presented by class as well for comparative purposes. TR at 228. Based on this interpretation, Mr. Flores believed that the information he had used for Golden Day's 2009 audit was not sufficient, and began asking for additional information about the 2009 plan year sometime after August 8, 2011. TR at 232-33.

Mr. Flores testified that he was aware of the October 15, 2011 due date for filing of the 2010 Form 5500. TR at 233. He realized several days before October 15, 2011 that he would not be able to get all the necessary information for the 2009 assets in order to meet the deadline, so he and some of his colleagues spoke with DeSpain, Wollheim, and Parker about the situation. TR at 233-234. Mr. Flores indicated that once his team got the requisite 2009 information, they worked on the audit "pretty much continuously" to finish it and were "painfully aware" of the circumstances involving the lateness of the filing. TR at 220. Ultimately, however, the 2010 audit that Respondent submitted on August 13, 2012, submitted both the 2009 and 2010 investment information by categories, rather than classes. TR at 235-36; RX B at 4. When asked why he did not just timely submit the 2010 audit with 2009 information in category form and 2010 information in class form, Mr. Flores stated, "[m]y office adheres to very high standards of quality, professional standards... Therefore, we were optimistic and hopeful that Bryan Wollheim would prevail in acquiring the requisite information with respect to '09. Therefore, collectively, we chose to defer the issuance of the report. I do not... like to issue amended audited... reports, because that's a reportable issue with the California Board of Accountability." TR at 236.

Marcus Aron Testimony

Marcus Aron, a Senior Auditor in the Office of the Chief Accountant, also testified regarding the changes to the 2010 auditing requirements. TR at 166. Mr. Aron has worked as a Senior Auditor for 24 years in the division that handles the audits that accompany Form 5500 filings. *Id.* He referred the Court to Complainant's Exhibit 15, also known as Accounting Standards Update-2010-06, which described the new rules for the purposes of audits and the changes of Statement 157. TR at 175; CX 15. The disclosure changes and clarifications set out in ASU-2010-06 became effective for annual reporting periods beginning after December 15, 2009.⁴ CX 15 at 8. Mr. Aron explained that the main difference after December 15, 2009 was in the way that assets were categorized. TR at 177-78. Previously, the assets had been described as "categories," which was very broad – mutual funds or stocks, bonds, etc., but the 2010 changes required a more specific breakdown of disclosures by the "class" of investment. *Id.*

⁴ Except for the disclosures about purchases, sales, issuances, and settlements in the roll forward of activity in Level 3 fair value measurements. Those disclosures are effective for fiscal years beginning after December 15, 2010, and for interim periods within those fiscal years. CX 15 at 8.

When asked whether the 2009 financial information in the 2010 audit needed to be described accorded to “class” for comparative purposes, Mr. Aron explained, “[b]asically, the balance sheet has to be comparative, the current year to the prior year. . . .that is the requirement of presenting comparative information. There’s not a requirement in the accounting literature, that if you audit a year. . .you have to present prior year numbers comparatively.” TR at 178. He pointed to Subtopic 802-10-65-7(b) of the ASU-2010-06, which states, “In the period of initial adoption, the reporting entity shall not be required to provide the disclosures otherwise required by the pending content that links to this paragraph, for any previous periods presented for comparative purposes.” CX 15 at 27; TR at 183-184. Mr. Aron clarified this to mean that that “there was no work that would need to be done with respect to the ’09 numbers,” additional to the way they had been given in the 2009 audit. TR at 187.

Clark E. Parker Testimony

In addition to representing Respondent, Clark Parker is the Fiduciary Plan Administrator for Golden Day Schools, Inc. Retirement Plan. TR at 245. He explained that, typically, he sends information about all the employees who worked for Golden Day Schools, Inc. in the prior year directly to the third party administrator, who then prepares the Form 5500 through constant contact with the auditor. *Id.* at 246. Once the Form 5500 is done, an engagement letter is sent out and taken before the Board for approval before Mr. Parker signs and hires them. *Id.*

Mr. Parker discussed the concerns about the availability of the 2009 financial data, claiming that Mr. Flores had told him that the audit could not be signed without the specific classes of disclosure for 2009 because the audit would be rejected, and Respondent would have to pay additional accounting fees for a new report. TR at 246-47. Mr. Parker understood that Morgan Stanley had agreed to breakdown all the 2009 information, but had to have people do it manually, which caused delays. *Id.* at 247-248. With respect to Mr. Flores’ decision, he stated, “I could not force him to sign his name. It was his license, his certification, that I had to rely on.” *Id.* at 251. He testified that he tried to call Ms. Olivera, but always received her voicemail.⁵ *Id.* When Mr. Parker finally did file the 2010 audit in August 2012, there was additional delay due to confusion as to whether he had to re-file the Form 5500. *Id.* at 248-49.

With respect to timeliness, Mr. Parker acknowledged that he was aware of the October 2011 deadline and claimed he was in constant communication with Flores and Wollheim to try to speed up the process. TR at 258. Mr. Parker also knew that, following the Notice of Rejection, he would need to file an audit in 45 days to cure the deficiency, but stated that Mr. Flores never told him that they would not make the 45-day deadline because they all expected the data from Morgan Stanley “hopefully any day, or any moment. . .” TR at 265-66. As early as June or July 2012, Mr. Parker testified that he and the others began discussing their difficulty in receiving the raw data and the belief that they had reasonable cause/mitigating circumstances that would probably eliminate any fee. TR at 267-268.

⁵ Ms. Olivera’s phone records at CX 12 do reflect three calls from Mr. Parker. It appears that she called back the next day each time, but had to speak with an assistant or leave a voicemail. CX 12 at 1-4.

When asked about the brevity of his Reasonable Cause Statement, Mr. Parker explained his belief that EBSA did not “[w]ant a whole lot of paper itself on the statement of reasonable cause...and if they wanted additional information, they would ask for it.” TR at 249. He interpreted the regulations at 26 CFR § 2530.200(A)-2 as to require him only to “state if [the delay] was beyond the control of the Plan Administrator or the filer.” TR at 272. He believed that his August 13, 2012 Reasonable Cause Statement “set forth all alleged facts as to why the penalty, as calculated, should be reduced or not be assessed based on Section 2560.502(c)(2) of the regulation,” as required by the Notice of Intent. TR at 274; CX 6 at 2.

APPLICABLE LAW

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. § 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 to waive the penalty – in whole or in part – and/or to assess a penalty, 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 the determinations of the Department's Employee Benefits Security Administration is abuse of discretion and whether the decision was arbitrary and capricious. *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." *Id.* The ALJ reviews the record de novo to make factual determinations regarding the assessment and calculation of the penalty, and reviews the mitigating factors cited by the Respondent. *U.S. Dept. of Labor, PWBA v. Spaulding & Evenflo Companies, Inc.*, No. 92-RIS-19, slip op. at 7 (PWBA Nov. 18, 1994); *US Dept. of Labor, EBSA v. Plan Administrator, Dutch American Import Co., Inc. Employee Stock Ownership Plan*, 2009-RIS-00014, slip op. at 6-7 (ALJ Jan. 6, 2010); *US Dept. of Labor, EBSA v. Plan Administrator, Team Laurino 401(k) Plan*, 2008-RIS-00050, slip op. at 4 (ALJ Dec. 9, 2008). The ALJ is bound by the governing statute and regulations, and cannot set aside the penalty calculation by Complainant except if the ALJ finds them invalid. *Spaulding*, slip op. at 7; *Dutch American Import*, slip op. at 6.

ANALYSIS

A. Abuse of Discretion

Based on the evidence presented, I find no evidence that Complainant abused its discretion and acted in an arbitrary and capricious manner when it assessed a \$5,000 civil penalty on Respondent for reporting violations during the fiscal year ending December 31, 2010. There is no dispute that Respondent failed to timely file an annual report for the fiscal year ending December 31, 2010; the parties have stipulated to this fact. The sole contention remains the \$5,000 civil penalty set forth in Complainant's September 4, 2012 Notice of Determination. This penalty represents a 90% reduction from the \$50,000 penalty originally assessed against Respondent. Respondent has argued that, in light of mitigating circumstances, the entire penalty should be abated.

I find no evidence that Complainant failed to follow standard processes in arriving at its penalty decision. The language of the April 25, 2012 Notice of Rejection clearly warned Respondent in bolded font of the 45-day deadline to correct its deficiency and the possibility of significant civil penalties if it did not do so. CX 5. Ms. Olivera was conscientious in making sure that a violation of the 45-day deadline had actually occurred, and double checked the EFAST system to make sure that she had not overlooked an amended return from Respondent before considering a penalty. TR at 37. Ms. Olivera also made numerous attempts to contact Respondent about coming into compliance with the filing requirements under the Act. *See* CX 12. When Respondent did file its Reasonable Cause Statement letter, as well as the 2010 audit and amended Form 5500, Ms. Olivera carefully considered the letter – even catching that it had not been signed by the Plan Administrator, and requiring Respondent to resubmit it with the proper signature. TR at 45-49. Her recommendation that the penalty be significantly reduced to \$5,000 was first reviewed by her supervisor, who signed off on her findings. TR at 59-60, 64;

CX 10 at 1. The recommendation was then considered by the Reasonable Cause Committee, a body of four additional Department employees, who also approved the \$5,000 penalty. RX M at 1. The record contains ample evidence that the \$5,000 penalty decision was carefully considered, made, and reviewed.

Moreover, the evidence in the record supports Complainant's reasoning for not completely abating the fee. In its Notice of Determination, Complainant explained that Respondent had not presented reasonable cause for his failure to file an acceptable annual report as his original filing or for his failure to timely correct his filing deficiencies, and because the Plan Administrator has a fiduciary responsibility to assure himself that all reporting requirements are met. CX 11 at 2. At the time the NOD was issued, the only information Complainant had for Respondent's delay came from the Reasonable Cause Statement, which only said that "[d]ue to issues beyond the control of the Trustee and Plan Administrator the auditors[sic] report was inadvertently left out of the original filing." CX 7 at 7.

The Notice of Intent specifically explained that the Reasonable Cause Statement should "state the mitigating circumstances regarding the degree or willfulness of the noncompliance" and "[s]et 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 Regulations," yet Respondent included absolutely no factual information that would mitigate or explain its filing delay. CX 6 at 2-3. The record contains ample evidence that Mr. Parker was well aware of the difficulties in obtaining the 2009 financial information from Morgan Stanley at the time the Reasonable Cause Statement was filed with Complainant; indeed, Mr. Parker testified of his belief that the situation would result in a complete abatement of the penalty. TR at 267-68. When asked, then, why he did not explain or even mention these circumstances in his Reasonable Cause Statement, Mr. Parker explained his belief that he only needed to state that the circumstances were beyond his control, and that Complainant would ask if it needed further details. TR at 272-74. I do not find this to be a reasonable reading of the Notice of Intent or of Section 2560.502c-2. 29 C.F.R. § 2560.502c-2. It was impossible for Ms. Olivera, her supervisors, or the Reasonable Cause Committee to determine that mitigating circumstances existed to abate the entire penalty when they had absolutely no information as to the reason behind Respondent's delay. While the regulations do allow for the abatement of a penalty upon a showing of mitigating circumstances, Respondent made no such "showing" in its August 13, 2012 Reasonable Cause Statement. 29 C.F.R. § 2560.502c-2(d)-(e).

It does appear that Respondent had significant difficulties in acquiring the 2009 financial data from Morgan Stanley. These challenges were well detailed in Respondent's September 27, 2012 letter requesting a hearing, as well as Mr. Wollheim's, Mr. Flores', and Mr. Parker's respective hearing testimonies. While I do find it somewhat alarming that Ms. Olivera did not bother to read the September 27, 2012 letter until the date of the hearing, especially since the Notice of Determination required Respondent to send a copy of the request for hearing to her, her point about the timeliness of this explanation is well-taken. TR at 106. Respondent had knowledge of all the information described in the September 27, 2012 letter at the time the

Reasonable Cause Statement was filed, but failed to disclose it or provide any factual details regarding mitigating circumstances in the Statement.⁶

Complainant also based its decision to assess a \$5,000 civil penalty based on the Plan Administrator's fiduciary responsibility to assure that all reporting requirements are met, and Mr. Parker's failure to do. While Mr. Parker was in a difficult situation and could not force Mr. Flores to sign and submit the audit against his will and professional judgment, he could have communicated these difficulties to Complainant. The Plan Administrator has a fiduciary duty to take an active role in ensuring compliance with the Act's reporting requirements, which requires more than sitting back and hoping that the requisite financial information will come "any day, or any moment." TR at 265-66. As soon as Mr. Parker feared that he would not be able to make the initial filing deadline or the 45-day deadline to rectify the deficiency, he should have been in communication with Ms. Olivera. Indeed, one phone call to the Office of Chief Accountant with regard to the format of the 2009 comparative investment data needed for the 2010 audit may well have avoided this entire situation. I do not find that Complainant abused its discretion in finding that Mr. Parker fell short of his fiduciary duty in this instance.

Given the information that Respondent presented in its Reasonable Cause Statement and its failure to timely show mitigating circumstances, I find that Complainant did not abuse its discretion or act in an arbitrary or capricious manner in finding a \$5,000 civil penalty against Respondent for reporting violations during the fiscal year ending December 31, 2010.

B. Uphold or Abate Penalty

As I do not find that Complainant abused its discretion or acted in an arbitrary and capricious manner in assessing the \$5,000 civil penalty for late filing of the 2010 audit for the reasons discussed above, I see no reason to overturn or adjust the penalty. The decision was made after appropriate review and based on the information that Respondent presented to the Complainant at that time. Further, having independently reviewed the record, including the reasons offered by Respondent in further mitigation of the assessed penalty, I am not persuaded that a further reduction is warranted. The mitigating information was known and available to Respondent, but it chose not to submit the information for review when requested. Thus, I find that a \$5,000 civil penalty for late filing of IQPA report in the fiscal year ending 2010 is reasonable under the circumstances of this record.

⁶ Further, it is not clear from the evidence that, had it been timely presented in the Reasonable Cause Statement as a mitigating circumstance, the delay in waiting for the 2009 financial information would have been justified. Despite Mr. Flores' insistence that he needed to present the 2009 comparative information in class form, the 2010 audit still listed the investment information for 2009 and 2010 according to categories, rather than classes. TR at 235-36; RX B at 4. Mr. Aron's further testimony calls into question the reasonableness of Mr. Flores' actions and interpretation of the 2010 audit requirements. TR at 166-187.

ORDER

Within 30 days of the date of this Order, the Plan Administrator for the Golden Day Schools, Inc. Retirement Plan and Golden Day Schools, Inc., shall pay a \$5,000 civil penalty to the U.S. Department of Labor for late filing of its IQPA report in the fiscal year ending December 31, 2010.

RICHARD M. CLARK
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, Suite 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.