



Issue Date: 03 February 2017

Case Number: 2013-RIS-00055

In the Matter of:

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

v.

**PLAN ADMINISTRATOR
HAGO MANUFACTURING CO., INC. RETIREMENT PLAN,
HAGO MANUFACTURING CO., INC.,**
(Case No. 12-1027D),
Respondent.

DECISION AND ORDER APPROVING CIVIL MONEY PENALTY

This case is between the United States Department of Labor, Employee Benefits Security Administration (“EBSA” or “Complainant”), and Tara Cichetti, the Plan Administrator for the Hago Manufacturing Co., Inc. Retirement Plan (“Respondent” or “Cichetti”), and comes before the court pursuant to Section 502(c)(2) of the Employee Retirement Income Security Act (“ERISA”) of 1974, as amended, and the regulations at 29 C.F.R. Parts 2560 and 2570. Respondent appeals EBSA’s decision to assess a civil money penalty (“CMP”) against it under ERISA.

Background

On October 17, 2011, Respondent filed a Form 5500 Annual Report with EBSA for the 2010 plan year, but did not include a report of an independent qualified public accountant (“IQPA”). After several failed attempts to get Respondent to submit an IQPA report, EBSA eventually assessed a \$50,000.00 civil money penalty against Respondent, who subsequently requested a formal hearing before the Department of Labor, Office of Administrative Law Judges (“OALJ”) to contest the penalty assessment. On December 19, 2016, I conducted a hearing in Cherry Hill, New Jersey.¹ Marcia E. Bove, Esq., a trial attorney with the Office of the

¹ The hearing was originally scheduled for September 9, 2014 in Washington, D.C. but was continued on at least eight occasions, largely due to Respondent’s requests for additional time to complete the required audit and bring its 2010 Form 5500 Annual Report into compliance. Respondent also requested the hearing be held in a location in

Solicitor, U.S. Department of Labor, represented Complainant. Despite sufficient notice, neither Ms. Cichetti nor anyone representing Respondent appeared at the hearing, where I heard testimony from one witness and admitted exhibits CX 1-8c, 9-12. (Tr. 9, 43).²

As set forth in greater detail below, I find that the Hago Manufacturing Co. Inc. Retirement Plan had more than 100 participants at the beginning of the 2010 plan year and held assets in trust. Consequently, I find that the Plan Administrator was required to include an audit report from an IQPA with its 2010 Form 5500 Annual Report, but has continually failed to submit an IQPA report to EBSA through the date of this decision. Finally, I find that there is no evidence that EBSA did not follow the law and implementing regulations in assessing a \$50,000.00 civil penalty for failure to submit the required IQPA audit report.

Testimony

Michael Campbell (Tr. 11-41)

Michael Campbell, a reporting compliance specialist in the Office of the Chief Accountant, U.S. Department of Labor, testified regarding the auditing requirements in this case. He stated as follows:

I reviewed the 2010 plan year for the Hago Manufacturing Company, which was electronically signed by the Plan Administrator, Tara S. Cichetti, and filed on October 17, 2011. (CX 2). They had 202 participants at the end of Plan Year 2009. They also had the same number of plan participants at the beginning of plan year 2010, so they were required to attach an IQPA audit report, which was missing. An IQPA is an audit report of the plan conducted by an independent public accountant. (Tr. 14). We mailed Ms. Cichetti a Notice Of Rejection (NOR) of the Form 5500 Annual Report for plan year 2010 (CX 3), and informed her the filing lacked the required IQPA audit report and that she had 45 days to file an acceptable amended 2010 report. When Ms. Cichetti did not submit anything, we emailed to remind her that we had not received the amended filing. (CX 4). Again, we did not get an amended filing, so we sent a First Amended NOR by certified mail on April 2, 2012. (CX 5). We still did not receive an audit report so we sent additional emails to Ms. Cichetti and had some more telephone contacts, but still no amended filing. (Tr. 22). So, on August 20, 2012, we issued a Notice of Intent to Assess a Penalty (NOI). (CX 6). The purpose of the notice was to get a Statement of Reasonable Cause from Ms. Cichetti regarding the penalty, which we did. (CX 7). Ms. Cichetti

closer proximity to her residence in or around Mountainside, New Jersey to “arrange . . . child care for my school age children if needed.” 29 C.F.R. § 18.41. The Court accommodated Respondent’s request, moving the hearing from Washington, D.C. to Cherry Hill, New Jersey. However, Respondent did not appear and the hearing was held in her absence.

² On December 14, 2006, Respondent requested a continuance of the December 19, 2016 hearing asserting that she required additional time to seek legal counsel and prepare the necessary paperwork. I denied the request, finding Respondent had sufficient time to obtain legal counsel and bring the 2010 Plan Form 5500 into compliance and any additional continuance would be futile under the circumstances. The denial was faxed to Respondent the same day. To date, Respondent has provided no explanation why she did not attend the December 19, 2016 hearing.

indicated that because there were approximately 70-75 active employees in the Plan in 2010, no audit report was required. However, there is a difference between active employees and total plan participants. Line 5 of the Form 5500 reflects the opening eligible participant count, not just the participants currently employed in the company. Ms. Cichetti eventually filed an amended Form 5500 for Plan Year 2010 on September 27, 2012. (CX 8). She dropped the opening count to 95, which was a significant difference from the original filing. (Tr. 27). I compared Schedules H and I. Given the change in the number of plan participants, I would have expected a change in the financial figures and net assets, but they were basically the same. (Tr. 29). In other words, if as many people left the plan as Ms. Cichetti indicated, I would have expected a decrease through benefits payouts and rollover activity. But on the original schedule I, the dollar amount was \$2,083,189.00. The dollar amount on the amended Schedule I was actually \$2,249,875.00, an increase of \$165,696.00. Even with a drop of about 50% of all plan participants, I did not see a drop in corresponding payouts. (Tr. 31). The original opening number of participants for the 2011 plan year original filing is 96. (CX 8a). The opening number for the plan year 2012 is 98. (CX 8c). The ending number of participants is 180. But the account balances were substantially the same for 2010, 2011 and 2012. That led me to infer the number of participants did not change.

In May 2012, I asked Ms. Cichetti to explain how she had similar closing information in 2009 to opening information in 2010 and that participant account balances for 2010 went from 195 to 96. On May 20, 2013, we had a conference call and discussed how the figures did not match. During the course of the conversation, Ms. Cichetti indicated to us that she did not understand how to come up with the figure for total opening participants. She did not understand the difference between active participants, eligible participants and those with balances. So we basically had her go to the EBSA website for the 2010 plan year and learn on how to complete the form. She also told us that she had changed the figures that had been provided by Prudential Financial, which was Hago Manufacturing's record keeper. (Tr. 36-39). The industry standard is for the record keeper to prepare a signature-ready Form 5500. Prudential was the record keeper servicing the Hago Plan. So they provided a signature-ready 5500. But Ms. Cichetti told us she had changed the figures because her understanding of active, eligible and account balances was different. We wanted to make sure she was clear about the information. At the conclusion of the call, Ms. Cichetti told us she would engage an auditing firm and get an audit report. (Tr. 39). But an audit report was not forthcoming. We finally sent a Notice of Determination on June 3, 2013, which is basically a decision on our Statement of Reasonable Cause. (CX 10). We still did not receive an audit report. (Tr. 40). We then sent an Amended Notice of Determination, which extended the time for Ms. Cichetti to respond. We still did not and have not received an IQPA audit report.

Standard of Review

OALJ's standard of review in Section 502(c)(2) cases is de novo for fact-finding, but deferential for EBSA's calculation of the penalty. The burden of proof is on the Complainant to establish that the Respondent violated ERISA and on the Respondent to show that the Complainant did not properly take into account the degree and/or willfulness of its failure or refusal to file a compliant annual report. Accordingly, EBSA must demonstrate that the Plan Administrator for the Hago Manufacturing Retirement Plan was required to file a Form 5500 for

Plan Year 2010, and that it did not file a compliant report. The burden then shifts to the Plan Administrator to demonstrate that EBSA did not properly take into account the degree and/or willfulness of its failure or refusal to file the compliant annual report for the 2010 plan year in calculating the assessed penalty.

Findings of Fact and Conclusions of Law

After deliberation on all the submissions, and a thorough review of the case law, statutes and regulations pertinent to the Act, I find that:

1. Under ERISA, a plan administrator for an employee benefits plan must file a Form 5500 annual report with EBSA within 210 days after the end of the plan year. 29 U.S.C. § 1023. A plan with more than 100 participants at the beginning of the plan year is required to include an audit report from an Independent Qualified Public Accountant (“IQPA”). 29 C.F.R. § 2520.104-20(b).
2. Tara Cichetti is the Plan Administrator for the Hago Manufacturing Retirement Plan. (CX-12, exhibit 1). The Hago Manufacturing Retirement Plan had 215 plan participants at the beginning of the 2009 plan year and 202 participants with account balances as of the end of the 2009 plan year. (CX-8b).
3. Respondent filed its 2010 Form 5500 Annual Report with EBSA on October 17, 2011, reflecting the 202 total number of participants at the beginning of the 2010 plan year and 195 at the end of the 2010 plan year. (CX-2a). The 202 total number of participants at the beginning of the 2010 plan year is the same number of participants at the end of plan year 2009. On the Schedule H attached to the 2010 Form 5500, net assets were \$2,083,189.00 at the beginning of the plan year and \$2,249,875.00 at the close of the plan year. Participant contributions were \$29,065.00 and employee contributions were zero. Benefits paid, including rollovers, were \$61,269.00. Respondent did not include an audit report from an IQPA with its 2010 Form 5500.
4. On December 12, 2011, EBSA issued a *Notice of Rejection of the Form 5500 Annual Report of the Hago Manufacturing Co. Inc. Retirement Plan for 2010* (“NOR”) requesting that Respondent provide the required IQPA audit report and file an amended Form 5500 for plan year 2010, and advising that failure to do so within 45 days may result in assessment of a civil penalty of up to \$1,000 per day. (CX-3). When Respondent did not file the required IQPA report, EBSA emailed a *Reminder* on January 10, 2012. (CX-4). Respondent did not file the IQPA audit.
5. On April 2, 2012, EBSA issued a *First Amended Notice of Rejection of the 2010 Form 5500 Annual Report* (“ANOR”) which superseded the December 12, 2011 NOR, again requesting Respondent provide the required IQPA report and file an amended 2010 Form 5500, and advising Respondent that it had 45 days to comply without incurring a penalty. (CX-5).

6. When Respondent did not file the requested documents, EBSA issued a *Notice of Intent to Assess a Penalty* (“NOI”) on August 20, 2012, informing Respondent that it intended to assess a \$50,000 penalty for failing to file the required IQPA audit and amended 2010 annual report. (CX-6). EBSA advised Respondent that it had 35 days to submit a *Statement of Reasonable Cause* addressing why the \$50,000.00 penalty should be reduced or not assessed based on Section 2560.502c-2 of the regulations.

7. On or about September 19, 2012, Respondent filed a *Statement of Reasonable Cause*, asserting that Hago Manufacturing Co. “only employed actively 70-75 employees these (sic) calendar year” and was not required to file an IQPA audit report. (CX-7).

8. On September 27, 2012, Respondent filed an amended 2010 annual report, reflecting that the Plan had 95 participants at the beginning of the 2010 plan year and 96 participants with account balances at the end of the 2010 plan year. On the Schedule I attached to the amended 2010 report, net assets were \$2,083,189.00 at the beginning of the plan year and \$2,249,875.00 at the close of the plan year. Participant contributions were \$29,065.00 and employee contributions were zero. Benefits paid, including rollovers, were \$61,269.00. (CX-8). Respondent did not file an amended 2009 annual report reflecting a change in the 202 plan participants at the end of plan year 2009.

9. The net assets, participant and employee contributions, and benefits on the amended 2010 annual report were identical to the net assets, participant and employee contributions, and benefits paid reflected on the original 2010 annual report, though the amended report reflected 107 fewer plan participants at the beginning of the plan year and 99 fewer plan participants at the end of the plan year.

10. On May 2, 2013, EBSA emailed Respondent and reminded her that prior filings indicated participant counts in the same range as the original 2010 annual report numbers of 202 participants at the beginning of the plan year and 195 participants with account balances at the end of the plan year, specifically referencing the 2009 figures. (CX-9). Respondent did not have an explanation for the discrepancy.

11. On May 20, 2013, EBSA informed Ms. Cichetti that it is the number of plan participants in Hago Manufacturing’s Retirement Plan at the beginning of the plan year which determines whether a plan must file an IQPA audit report and not the number of individuals actually employed by the company. Ms. Cichetti still did not file an IQPA audit report. (Tr. 39).

12. On August 19, 2013, EBSA issued an *Amended Notice of Determination on Statement of Reasonable Cause* (“NOD”) to Ms. Cichetti rejecting her reasons for failing to provide the required IQPA audit report for plan year 2010 and concluded there were no mitigating circumstances which would reduce the \$50,000.00 civil money penalty. (CX-12, exhibit 11).

13. On May 7, 2014, Ms. Cichetti filed a request seeking a formal hearing before the OALJ to contest the penalty assessment. (CX-12, exhibit 1).

14. As of the date of this Decision, neither Respondent nor Ms. Cichetti has filed the required IQPA audit report for the 2010 plan year.

DISCUSSION

Plan Administrators must complete and file annual reports within 210 days of the end of every plan year for the plans they administer. 29 C.F.R. §§ 1021, 2024. The form and content of the annual report are set forth in ERISA, including the requirement for an annual audit of an employee benefits plan and inclusion of the report or opinion of an IQPA regarding the benefits plan. 29 U.S.C. § 1024(a)(4), (5).

DOL is authorized to assess a civil penalty of up to \$1,100 per day from the date a plan administrator fails or refuses to file a satisfactory annual report. 29 U.S.C. § 1132(c)(2). 29 C.F.R. § 2560.502c-2 sets forth the procedures for assessing civil penalties. The regulation provides 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 that there are mitigating circumstances regarding the degree of willfulness of non-compliance. 29 C.F.R. § 2560.502c-2(d).

While Hago Manufacturing Co. may have had fewer than 100 employees at the beginning of 2010, its retirement plan had more than 100 participants at the beginning of plan year 2010. Consequently, Respondent was required to file a Form 5500 Annual Report for 2010 with an IQPA audit report. Although Respondent filed a Form 5500 Annual Report for plan year 2010 on October 17, 2011, she did not include the required IQPA audit report.

EBSA informed Respondent on several occasions that it intended to assess a \$50,000.00 civil money penalty if she did not submit the required IQPA audit report. Despite numerous opportunities to do so, Respondent failed to file an amended 2010 annual report with an attached IQPA audit report and EBSA declined to waive or reduce the \$50,000.00 penalty.

EBSA has demonstrated that Respondent did not file a compliant 2010 Form 5500 Annual Report. Respondent has not demonstrated that EBSA did not take into account any mitigating circumstances or the degree and/or willfulness of its failure or refusal to file a compliant annual report in calculating the assessed penalty. While Respondent may well have been overwhelmed by her fiduciary responsibilities as Plan Administrator and found the rules pertaining to ERISA reporting requirements confusing, that does not excuse her failure to file the required IQPA audit report.

As soon as EBSA recognized the deficiency with Respondent's Form 5500 for plan year 2010, it worked extensively with her to bring the 2010 report into compliance. Despite some five years to do so, Respondent has yet to comply with the 2010 plan year reporting requirements by filing the required IQPA audit report. I find that Complainant did not abuse its discretion or act in an arbitrary or capricious manner in assessing and not subsequently reducing the

\$50,000.00 civil penalty for reporting violations during the 2010 plan year ending December 31, 2010.

ORDER

Within 90 days of the date of this order, the Plan Administrator for the Hago Manufacturing Co. Inc. Retirement Plan³ shall pay a \$50,000.00 civil penalty to the U.S. Department of Labor for failing to file its IQPA audit report for the fiscal year ending December 31, 2010.⁴

SO ORDERED:

STEPHEN R. HENLEY
Chief 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 I-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.

³ The regulations provide that the plan administrator “shall be liable for civil penalties assessed by the Secretary under Section 502c-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).

⁴ I still encourage Respondent to work with auditors to bring its 2010 Form 5500 Annual Report into compliance and file an amended 2010 Form 5500 Annual Report with an acceptable audit report of an independent qualified public accountant. If accomplished, I strongly urge Complainant to determine a reasonable reduction of the assessed penalty.