



Issue Date: 10 November 2015

Case Number: 2015-RIS-00025

In the Matter of:

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

Complainant

v.

**PLAN ADMINISTRATOR,
CAVALLO POINT LODGE 401(K) PLAN,
(Case No. 14-1374D),**

Respondent.

DECISION AND ORDER OF DISMISSAL

Background

This case arises under Section 502(c)(2) of the Employee Retirement Income Security Act (“ERISA”) of 1974, as amended, and the regulations at 29 C.F.R. §§ 2560 and 2570. The Employee Benefits Security Administration (“Complainant”) issued a Notice of Intent to Assess a Penalty (“NOI”) on March 23, 2015 assessing a \$50,000 penalty against the Plan Administrator of the Cavallo Point Lodge 401(k) Plan (“Respondent”) for failure to file a satisfactory 2012 Form 5500 annual report.¹ Respondent filed a *Request for an Administrative Hearing and Answer* (“Answer”) with the United States Department of Labor, Office of Administrative Law Judges (“Office”) on June 29, 2015, requesting a hearing and contesting the penalty issued.

In its Answer, Respondent asserted that it was “the victim of the deceptive practices and actions taken by Linda D. Lowe of LSI Consulting & Accounting who performed the prior audit for the Plan.” Respondent explained that “it appears that Ms. Lowe falsely represented to [Respondent] that she was a certified public accountant in the state of California, that she was

¹ In its NOI, Complainant details that Respondent’s Plan 2012 Form 5500 annual report was deficient because the Plan did not obtain or attach an audit from an independent qualified public accountant (IQPA).

qualified to prepare an audit and represent Respondent in matters before DOL, and that she was properly responding to and handling the audit and all matters before DOL including the DOL's March 23, 2015 Notice of Intent to Assess a Penalty, which were the reasons for [Respondent's] failure to provide a proper auditor's report or explain such failure to DOL." Respondent further explained that "upon discovery of Ms. Lowe's actions and misrepresentations, [Respondent] promptly undertook remedial actions" including the retention of a qualified certified public accountant to prepare a proper audit. Respondent asserts that any noncompliance was inadvertent and that the assessed penalty is disproportionate to any such noncompliance. (Answer at 2.)

Respondent described the circumstances surrounding DOL's audit in its Answer. The audit began in late 2013. (Answer at 3.) In August 2014, Cavallo Point authorized Ms. Lowe "to communicate and enter into agreements with the DOL," and as a result "[t]he controller was not a party to the communications." On October 7, 2014, DOL sent Cavallo Point a NOI, which the controller received. Respondent maintains that "the controller had repeatedly been assured by Ms. Lowe" that she was addressing the matter. Respondent received a second NOI dated March 23, 2015, assessing a \$50,000 penalty. Respondent states that "[t]he controller desperately sought Ms. Lowe for an explanation but received no response," and that Cavallo Point has not been able to communicate with her since that time. Respondent sought legal advice on May 3, 2015 from Strategis Professional Corporation. (Answer at 4.) Respondent received a letter from DOL dated May 20, 2015 stating that the penalty in the NOI was past due and accruing interest. Respondent states that the notice of "May 20, 2015 was the first notice sent by the DOL to Cavallo Point after its March 23, 2015 letter and was not an initial notice of assessment described in 29 C.F.R. § 2560.502c-2(g)(1)."² (Answer at 5.)

On July 9, 2015, this Office issued a *Notice of Docketing*, directing the parties to submit and exchange certain information prior to the formal hearing. On August 11, 2015, Respondent filed its prehearing exchange information. In it, Respondent contends that the assessed penalty "did not result from the exercise of discretion as required" by § 502(c)(2) of ERISA because it "does not take into consideration the degree and/or willfulness of the failure or refusal of Cavallo Point to file a proper auditor's report" On August 10, 2015, Complainant filed a *Motion to Dismiss* ("Motion") based on lack of subject matter jurisdiction and a *Memorandum in Support of the Motion to Dismiss* ("Memo in Support"). Respondent filed a *Response to Complainant's Motion to Dismiss Respondent's Request for Hearing and Answer* ("Response") on September 29, 2015.³

Complainant's Arguments

Complainant contends that this Office lacks subject matter jurisdiction because "Respondent waived any right to a hearing that could affect the outcome of this matter" by failing to comply with the regulations at 29 C.F.R. § 2560.502(c)(2)(e)-(f). (Memo in Support at

² Respondent appears to be arguing that the May 20, 2015 letter should be considered the applicable Notice of Intent to Assess a Penalty.

³ On September 11, 2015, this Office faxed counsel for Respondent Complainant's Motion and Memo in Support after counsel indicated during a telephone conversation with a member of my staff that it had not received those documents.

6-7). Complainant states that on March 23, 2015, it issued a NOI notifying Respondent of its intent to assess a \$50,000.00 penalty for its failure to obtain or attach an audit from an IQPA. (Memo in Support at 1-2.) Complainant states that it explained in the NOI: (i) that “it appeared that Ms. Linda D. Lowe does not possess a license to practice accountancy in the State of California;”⁴ (ii) that Ms. Lowe does not qualify as an IQPA; (iii) the language in ERISA that defines an IQPA; (iv) how, where, and when to file a statement of reasonable cause; and (v) that failure to file a statement of reasonable cause would result in the NOI becoming a final order. (Memo in Support at 2-3.)

Complainant contends that because Respondent failed to submit a Statement of Reasonable Cause as detailed in 29 C.F.R. §2560.502c-2(e), Respondent has admitted the facts alleged in the NOI, and the NOI has become a final agency action not subject to appeal before this Office. (Memo in Support at 3-4.) Complainant cites 29 C.F.R. § 2560.502c-2(f), which provides:

Failure of an administrator to file a statement of reasonable cause within the thirty (30) day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(2) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.61(g) of this chapter, forty-five (45) days from the date of service of the notice.

Complainant points out that “Respondent had several months to obtain the services of an IQPA,” and that “Respondent Plan Administrator failed to properly select and monitor its service provider.” (Memo in Support at 5.)

Respondent’s Arguments

Respondent argues in its Response that “the DOL did not follow . . . its own regulations and that the Administrative Law Judge has authority within the regulations to proceed with the administrative hearing.”⁵ (Response at 2.) Respondent argues that the DOL abused its discretion by failing to consider “the degree and/or willfulness” of the violations. Respondent cites two provisions of the regulations. First, Respondent quotes 29 C.F.R. § 2560.502c-2(b)(1), which states that the penalty assessed “shall be determined . . . taking into consideration the degree and/or willfulness of the failure or refusal to file the annual report.” Respondent also cites § 2560.502c-2(d), which provides that “[t]he Department may determine that all or part of the penalty amount in the [NOI] shall not be assessed on a showing . . . of mitigating circumstances regarding the degree or willfulness of the noncompliance.” (Response at 8.)

⁴ Complainant also states that the NOI was “mailed to the Plan Administrator at the company address and to the attention of the Company’s Accounting Department and, thus, the Plan Administrator had actual notice of Ms. Lowe’s status.” Complainant asserts that it had also alerted Respondent to this issue in a letter earlier in the process, dated July 24, 2014, also mailed to the Plan Administrator. (Memo in Support at 4-5.)

⁵ Respondent also includes many of the details given in its Answer regarding the DOL audit of the 2012 Form 5500 and its use of Ms. Lowe as the plan’s accountant. (Response at 2-7.)

Respondent makes a distinction between “seeking a determination that it did not provide a proper auditor’s report with its 2012 Form 5500” and “seeking a determination that the amount of the penalties imposed by the DOL is disproportionately excessive and that the DOL failed to comply with its regulations” in its imposition of the penalty. (Response at 7.) Respondent argues that failure to file a statement of reasonable cause results only in the waiver of the right to contest the facts alleged in the NOI, and states that § 2560.502c-2(f)

makes clear that while Cavallo Point may not contest whether it had filed a proper auditor’s report, it is not precluded from requesting an administrative law hearing on the issues of the size of the penalties and whether the DOL followed the procedures laid out in its regulations.

(Response at 8-9.)

Respondent argues that the DOL did not comply with the procedures in § 2560.502c-2(g) because the letter dated May 20, 2015 was “the first communication by the DOL to Cavallo Point that an assessment had been made and it was applied retroactively with accrued interest.”⁶ (Response at 9-10.) Respondent argues that the DOL’s May 20, 2015 letter was an initial assessment, and therefore the request for an administrative hearing was timely because it was made within 35 days of the letter.⁷ (Response at 10.)

Respondent asserts that this Office has “broad authority to review the assessment of the penalties.” (Response at 10). Respondent states that imposing the \$50,000.00 would be “inequitable”; would create “an undue hardship”; would “compound the harm suffered by Cavallo Point as an innocent victim of Ms. Lowe’s egregious conduct”; and would be “disproportionate to any errors committed by Cavallo Point.” (Response at 10-11.) Respondent also states that it has: (i) obtained and submitted a corrected auditor’s report as of August 12, 2015; (ii) filed an amended 2013 form 5500; (iii) “ascertained that no accounts have suffered losses”; and (iv) “initiated an investigation of Ms. Lowe with the California Board of Accountancy and may pursue legal action” (Response at 7.)

Discussion

This Office is an administrative tribunal of limited jurisdiction. This Office’s subject matter jurisdiction over civil money penalties assessed by EBSA for violations of Section 502(c)(2) of ERISA originates from the regulations at 29 C.F.R. § 2560.502c-2(e)-(h). Pursuant to those regulations, this Office has subject matter jurisdiction to adjudicate claims only after the administrator has properly filed a Statement of Reasonable Cause and EBSA has issued a Notice of the Determination on the Statement of Reasonable Cause. Respondent was required to file a Statement of Reasonable Cause in order to preserve the right to an administrative hearing. 29 C.F.R. § 2560.502c-2(e)-(f).

⁶ Respondent states elsewhere that “in a letter dated March 23, 2015, the DOL sent a [NOI] notifying Cavallo Point that the DOL intended to assess a \$50,000 penalty on Cavallo Point as the administrator of the Plan.” (Response at 4-5.)

⁷ Respondent states that the 30-day filing deadline provided for in 29 C.F.R. § 2560.502c-2 “is extended by 5 days because the DOL’s notice was sent by U.S. mail.”

The regulations at 29 C.F.R. § 2560.502c-2(f) provide that the NOI becomes a final agency action if the administrator fails to file a statement of reasonable cause within the time period given in subpart (e):

Failure of an administrator to file a statement of reasonable cause within the thirty (30) day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(2) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.61(g) of this chapter, forty-five (45) days from the date of service of the notice.

Contrary to Respondent's arguments, Complainant was not required to notify Respondent of its determination to assess a penalty pursuant to 29 C.F.R. § 2560.502c-2(g) because that section, labeled *Notice of the determination on statement of reasonable cause*, only applies if a statement of reasonable cause has been timely filed. Instead, subpart (f), quoted above, applies and the March 23, 2015 NOI automatically became a final order 45 days after service.

This Office does not have jurisdiction to adjudicate the issues already determined in a final order. The definition of the term 'final order' in 29 C.F.R. § 2570.61(g) makes clear both that: (i) an administrative law judge does not have the authority to review either the underlying facts or the appropriateness of the penalty in this case; and (ii) Complainant was not required to issue a Notice of Determination in order to finalize the NOI. Section 2570.61(g) states that:

Final Order means the final decision or action of the Department of Labor concerning the assessment of a civil penalty under ERISA section 502(c)(2) against a particular party. Such final order may result from a decision of an administrative law judge or the Secretary, the failure of a party to file a statement of reasonable cause described in § 2560.502c-2(e) within the prescribed time limits, or the failure of a party to invoke the procedures for hearings or appeals under this title within the prescribed time limits. Such a final order shall constitute final agency action within the meaning of 5 U.S.C. 704.

Therefore, this tribunal cannot evaluate Respondent's contentions that the penalty is inequitable, creates undue hardship, and is disproportionate to any errors committed. Nor can this tribunal evaluate whether the circumstances and remedial actions should have mitigated the violations. While those arguments would have been appropriate in a hearing pursuant to 29 C.F.R. § 2560.502c-2(h), this tribunal lacks the subject matter jurisdiction to entertain them in this case.⁸

Order

Based on the foregoing, I find that Respondent's failure to timely file a Statement of Reasonable Cause within the 30 day period described in Section 2560.502c-2(e) resulted in waiver of the right to contest the penalty and that the NOI subsequently became a final agency

⁸ This decision does not preclude the parties from negotiating an acceptable resolution of this matter.

action. Accordingly, as this Office does not have jurisdiction over this matter, Complainant's Motion is hereby **GRANTED** and the above-captioned matter is **DISMISSED** for lack of subject matter jurisdiction.

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 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.