



**Issue Date: 08 August 2019**

**Case Number: 2017-RIS-00031**

*In the Matter of:*

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

v.

**PLAN ADMINISTRATOR,  
GORDON & SILVER, LTD. 401(K) PROFIT  
SHARING PLAN,  
(Case No. 17-2271D)**  
*Respondent.*

**ORDER GRANTING SUMMARY DECISION  
AND APPROVING CIVIL MONEY PENALTY**

This matter 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. Parts 2560 and 2570.

On April 24, 2017, the Employee Benefits Security Administration (“Complainant”) issued a Notice of Determination against the plan administrator of Gordon & Silver, Ltd. 401(k) Profit Sharing Plan<sup>1</sup> (“Respondent”), assessing penalties totaling \$30,750.00 for failure to file a satisfactory 2015 Form 5500 annual report.<sup>2</sup> Respondent filed an Answer with the Office of Administrative Law Judges (“Office”) on May 26, 2017, requesting a hearing and contesting the penalty issued.

On June 2, 2017, I issued a *Notice of Docketing*, directing the parties to exchange and file information regarding, among other items, the issues in dispute, the witnesses to be called at the hearing, and an estimation of the length of the hearing. Those requirements having been

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<sup>1</sup> It is undisputed that Gordon & Silver, Ltd. is the plan sponsor and administrator of the Gordon & Silver, Ltd. 401(k) Profit Sharing Plan, and the sole Respondent in this matter.

<sup>2</sup> Complainant found that Respondent did not submit an acceptable report of an Independent Qualified Public Accountant (IQPA). Complainant further found that there was no reasonable cause to waive the penalty.

complied with, the matter was scheduled for hearing on December 5, 2017 but continued on two occasions. By Order issued April 27, 2018, I eventually held the matter in abeyance as the Plan's sponsor was apparently working towards seeking relief under the United States Bankruptcy Code. However, by Order issued on April 29, 2019, I lifted the stay and rescheduled the hearing to begin on August 19, 2019, when Respondent had yet to file a bankruptcy petition.

On July 19, 2019, counsel for Complainant filed *Motion for Summary Decision* ("Motion"), with a Memorandum in Support, Statement of Issues and Undisputed Facts and Exhibits. Complainant seeks an order affirming the penalty assessment as set forth in the Notice of Determination and a finding that the assessment was not an abuse of discretion. Complainant also seeks an order compelling Respondent to file the required amended Form 5500 for Plan Year 2015 and to comply with the applicable ERISA reporting requirements. Respondent does not oppose the Motion.

I adopt the following material facts set forth in Complainant's Statement of Issues and Undisputed Facts and Exhibits.

1. Respondent Gordon & Silver, Ltd. 401(k) Profit Sharing Plan is an employee pension benefit plan established or maintained by an employer to provide retirement income to employees and is covered by ERISA.
2. Respondent was required to file a 2015 Form 5500 with an Independent Qualified Public Accountant ("IQPA") report on or before July 31, 2016.
3. Respondent filed its Form 5500 for Plan Year 2015 on October 14, 2017, but failed to attach an IQPA report.
4. As of July 19, 2019, Respondent has not filed an IQPA report for Plan Year 2015.
5. On December 27, 2016, the Employee Benefits Security Administration ("EBSA") issued a Notice of Rejection ("NOR") informing Respondent that it had rejected the Plan's 2015 Form 5500 because it did not contain an IQPA report and that Respondent had 45 days to correct the deficiency.
6. Respondent did not respond to the NOR and did not file an amended 2015 Form 5500 and IQPA report within 45 days of the NOR issue date.
7. On February 21, 2017, EBSA issued a Notice of Intent to Assess a Penalty ("NOI"), setting a proposed penalty amount of \$30,750.00, calculated on the basis of \$150/day for 205 days.
8. The NOI explained that the 2015 Form 5500 was deficient because an IQPA report was not attached and informed Respondent it had 35 days to respond to the NOI and submit a statement of reasonable cause.

9. On March 27, 2017, Respondent submitted a statement of reasonable cause in which Respondent acknowledged its obligation to file an IQPA report with its 2015 Form 5500 and that an auditor had been retained to prepare an audit report.
10. On April 24, 2017, EBSA issued a Notice of Determination (“NOD”) assessing a \$30,750.00 penalty for Respondent’s failure to file an amended 2015 Form 5500 with an IQPA report.
11. As of July 19, 2019, Respondent has not filed an amended Form 5500 and IQPA report for Plan Year 2015.

#### 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 Gordon & Silver 401(k) Profit Sharing Plan was required to file a Form 5500 for Plan Year 2015, 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 2015 plan year in calculating the assessed penalty.

#### 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 \$2,063.00 per day from the date a plan administrator fails or refuses to file a satisfactory annual report. 29 C.F.R. 2575.2(b). 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).

Respondent was required to file a Form 5500 Annual Report for 2015 with an IQPA audit report. Although Respondent filed a Form 5500 Annual Report for plan year 2015 on October 14, 2017, it did not include the required IQPA audit report.

EBSA informed Respondent on several occasions that it intended to assess a \$30,750.00 civil money penalty if it did not submit the required IQPA audit report. Despite numerous opportunities to do so, Respondent failed to file an amended 2015 annual report with an attached IQPA audit report and EBSA declined to waive or reduce the \$30,750.00 penalty.

EBSA has demonstrated that Respondent did not file a compliant 2015 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. That Respondent retained an accounting firm and paid them in advance to prepare the 2015 audit, does not excuse the failure to file the required IQPA audit report.

I find that the Gordon & Silver, Ltd. 401(k) Profit Sharing Plan was required to include an audit report from an IQPA with its 2015 Form 5500 Annual Report, but has failed to submit such a report to EBSA through the date of this decision. I find that there is no evidence that EBSA did not follow the law and implementing regulations in assessing a \$30,750.00 civil penalty for failure to submit the required IQPA audit report. Accordingly,

### **Order**

within 90 days of the date of this Order, Gordon & Silver, Ltd., as the Plan Administrator<sup>3</sup> for the Gordon & Silver, Ltd. 401(k) Profit Sharing Plan, shall pay a \$30,750.00 civil money penalty to the U.S. Department of Labor for failing to file its IQPA audit report for the year ending December 31, 2015.<sup>4</sup>

The August 19, 2019 hearing in Las Vegas, Nevada is CANCELLED.

SO ORDERED:

**STEPHEN R. HENLEY**  
Chief Administrative Law Judge

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<sup>3</sup> 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).

<sup>4</sup> Given Respondent is apparently no longer in active operation, I do not grant that part of Complainant’s Motion seeking an Order compelling Respondent to file the required IQPA audit report for the Plan Year ending December 31, 2015 or that it be ordered to prospectively comply with ERISA reporting requirements.

**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 the Director of the Office of Policy and Research at Employee Benefits Security Administration, 200 Constitution Ave, NW, Room 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.