



**Issue Date: 06 August 2018**

**CASE NO.: 2017-RIS-00008**

*In the Matter of*

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

v.

**PLAN ADMINISTRATOR,  
MAHONEY LIMITED PARTNERSHIP,  
D/B/A MAHONEY ENVIRONMENTAL PROFIT SHARING & 401K PLAN,**  
*Respondent.*

**DECISION AND ORDER AFFIRMING  
DETERMINATION TO ASSESS CIVIL PENALTY**

This matter arises under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1132 & 1135, and implementing regulations at 29 C.F.R. Parts 2560 and 2570. Pursuant to the request of Respondent, I conducted a formal hearing into this matter on December 13, 2017, in Washington, DC. At the hearing I admitted into evidence Joint Exhibits (“JX”) One through Five and heard testimony from Ms. Lynne McMennamin and Mr. Jonathan Matzkin, both employees of the Employee Benefits Security Administration, United States Department of Labor, as well as Mr. James Blank, Controller for Mahoney Limited Partnership. I have considered all admitted evidence and testimony, even if not expressly mentioned in this decision, and make the following findings of fact and conclusions of law based thereon.

**Findings of Fact**

1. The Office of the Chief Accountant, Employee Benefits Security Administration (hereinafter “EBSA”), is responsible for overseeing the reporting and audit requirements under Title I of ERISA, including the imposition of civil penalties against plan administrators when filings by employers are rejected. This oversight authority includes the ability to inspect records and conduct investigations. Transcript (Tr) 10.

2. On October 15, 2015, Respondent filed with the EBSA the Form 5500 Annual Report for its Profit Sharing and 401(k) Plan concerning the reporting year 2014 (hereinafter “Annual Report”). JX 1.

a. The Annual Report indicated that it was for a multiple-employer plan with 191 participants at the end of the plan year. *Id.* at 2.

b. Part III, Schedule H of the Annual Report concerning the “Accountant’s Opinion” was blank except for the name of an accounting firm. JX 1, Schedule H, at 3. The Annual Report did not include a report of an independent qualified public accountant (hereinafter “IQPA Report”). An IQPA report consists of audited financial statements, notes to those financial statements, any required supplemental schedules, as well as the opinion of the independent qualified public accountant. Tr 10.

3. On December 3, 2015, EBSA issued a “Notice of Rejection” of the Annual Report citing as the basis for rejection Respondent’s failure to attach an IQPA Report. JX 2.

4. On September 12, 2016, EBSA issued a “Notice of Intent to Assess a Penalty” based upon Respondent’s failure file an amended Annual Report with an IQPA Report. JX 3. The penalty in this matter was assessed in accordance with EBSA policy at \$150 a day, starting with the day after the Form 5500 was due, i.e., August 1, 2015, and concluding on the date of the “Notice of Intent to Assess a Penalty,” i.e., September 12, 2016. Although this amounted to a total penalty of \$61,000, the amount due was capped at \$50,000 as a matter of EBSA policy since 1988. Tr 16 & 22.

5. On October 17, 2016, Respondent submitted to EBSA a “Statement of Reasonable Cause” in which was stated, under penalty of perjury, that the “Notice of Rejection” issued on December 3, 2015, “was not delivered to the attention of a representative in the employment of the Company at that time. The notice issued September 12 was the first written notification received of our deficiency, and the severity thereof.” As to the deficiency itself, Respondent asserted that it had “engaged our outside auditors to complete the required audit for the year ended December 31, 2014 so that we may amend and refile our return accurately and at the earliest possible date.” Respondent further requested “a reduction or forgiveness of the proposed penalties as we work in good faith to comply with the requirements and regulation as put forth by the Department of Labor.” JX 4.

6. An EBSA analyst reviewed the “Statement of Reasonable Cause” submitted to EBSA by Respondent and recommended that the assessed penalty of \$50,000 be imposed. The analyst’s recommendation was then considered by a “Reasonable Cause Committee” within EBSA, which adopted the recommendation of the analyst after

considering whether waiver of the penalty was appropriate. Tr 17. The Committee included an auditor, two team leaders from the Division of Reporting Compliance in EBSA, and a staff attorney serving as senior technical advisor. Tr 24.

7. On November 7, 2016, EBSA issued a "Notice of Determination on Statement of Reasonable Cause," which gave notice to Respondent that an individual named Ian Dingwall, identified in the document as "Chief Accountant" for EBSA, had determined to assess a \$50,000.00 penalty against Respondent for failure to file an amended Annual Report that included an IQPA Report, and informed Respondent that the penalty was due unless a hearing was requested within 35 days. JX 5; Tr 18.

8. On December 12, 2016, Respondent filed with the Office of Administrative Law Judges (OALJ) a request for hearing in which was stated, "We have engaged our auditors to complete and finalize the audit report for the Plan year, and be in compliance. We expect the audit to be completed and filed by no later than January 16, 2017." Administrative Law Judge Exhibit (ALJX) VIII.

9. Mr. James Blank, Controller for Mahoney Limited Partnership, testified under oath at the formal hearing in this matter that the delay in completing the audit was due to difficulties in obtaining necessary information from Nationwide, the company providing recordkeeping and information management to the Plan. The Controller elaborated upon the difficulties experienced by Respondent and described an effort going forward that would allow the Plan to complete its audit by the end of December 2017:

And obviously, there's a lot of disclosures required that we've needed to go back to them and get specific disclosure information, as well as plan information, and that is what has caused the delay in getting the audit report finalized. We do intend -- you know, we have our auditors engaged, they have done their field work, they are waiting on information from Nationwide, and that was why we had requested the prior -- the last continuance to get that, so that the audit report would be completed, filed, and then that the Department of Labor would have time sufficient to review that. But like I said, I think we are very close, and it is our goal to have this completed and then have completed all the succeeding audits, as well, that are necessary for '15 and '16.<sup>1</sup>

10. When asked to explain why the Controller had made similar statements one year prior in its request for hearing, the Controller testified that "[h]aving gone through the process with the audit itself and finding, you know, specifically, what the requirements of

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<sup>1</sup> Tr 30.

auditors were, I seriously underestimated the amount of information and requirements that the auditors had.” Tr at 31.

11. Mr. Blank is a Certified Public Accountant and has at least seven years of experience as Controller with Respondent. He also has previous experience performing these duties with other companies. As Controller he oversees the retirement plan and day-to-day financial operations of the company. Tr 31-32.

12. As of the time of the issuance of this Decision and Order, Respondent has not yet filed an amended Annual Report.

13. The Secretary of Labor has delegated his authority and assigned his responsibilities under all relevant parts of ERISA to the Assistant Secretary of Labor for Employee Benefits Security.<sup>2</sup>

14. Before February 2003, the Employee Benefits Security Administration had been known as the Pension and Welfare Benefits Administration, and was overseen by the Assistant Secretary for Pension and Welfare Benefits. On August 3, 1990, the Assistant Secretary delegated authority to the Office of the Chief Accountant to assess civil penalties of up to \$1,000.00 per day against a Plan Administrator who fails or refuses to file on behalf of an Employee Benefit Plan as required by ERISA. ALJX IX.

### **Conclusions of Law**

1. The Plan Administrator of an employee benefit plan must file with the Secretary of Labor or his designee an annual report containing the information required by 29 U.S.C. § 1024(a). See 29 U.S.C. § 1021(b); 29 C.F.R. § 2520.104a-1(a).

2. Respondent is the plan administrator of an employee benefit plan and does not contest its obligation to file an annual report. JX 1.

3. A Plan Administrator must file an annual report with seven months after the end of any plan year after 1975 unless extended. 29 C.F.R. § 2520.104a-5(a)(2).

a. Respondent has not complied with this requirement.

4. The annual report must include an opinion by an independent qualified public accountant “as to whether the financial statements and schedules required to be included in the annual report are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year” and

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<sup>2</sup> Secretary's Order 1-2011; *Delegation of Authority and Assignment of Responsibilities to the Employee Benefits Security Administration*, 78 Fed. Reg. 1088 (January 9, 2012).

“whether the separate schedules . . . and the summary material required under [ERISA] present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole.” 29 U.S.C. § 1023(a)(3)(A); 29 C.F.R. § 2520.103-1(a)(1).

a. Respondent has not complied with this requirement.

5. A failure or refusal to file the annual report required to be filed under section 101(b)(1) includes a failure or refusal to file, in whole or in part, that information described in ERISA and 29 C.F.R. §2520.103-1, *et seq.*, on behalf of the plan at the time and in the manner prescribed by statute and regulation. 29 C.F.R. § 2560.502c-2(a)(2).

a. This includes failure to include in the Annual Report the IQPA Report required by 29 U.S.C. § 1023(a)(3)(A) and 29 C.F.R. § 2520.103-1(a)(1).

6. A Plan Administrator of an employee benefit plan for which an annual report is required to be filed under ERISA is liable for civil penalties of up to \$1,000.00 a day, assessed by the Secretary of Labor or his designee in each case in which there is a failure or refusal to file and annual report required under ERISA. 29 U.S.C. § 1132(c)(2); 29 C.F.R. § 2560.502c-2(a)(1).

7. The delegations of authority to the Assistant Secretary for Employee Benefits Security and, in turn, to the Office of the Chief Accountant, are lawful. As such the Assistant Secretary and the Chief Accountant would be legally competent to assess civil penalties upon Respondent for failure to file the required IQPA Report with the Annual Report for the Plan.

8. As the lawful designee of the Secretary, the Chief Accountant has the legal authority to impose the civil penalty assessed in this case, and the civil penalty is lawful.

9. The amount of the civil penalty assessed in this case is reasonable.

a. It is well below the maximum amount allowed by statute.

b. It was reviewed by multiple EBSA officials with technical expertise and relevant experience within OCA before being approved. Waiver of the penalty was expressly considered and rejected.

c. Respondent’s non-compliance is ongoing and without meaningful or credible explanation. The Controller’s description of an ongoing audit and multi-year search for documentation from a single plan year strains credibility. Factors supporting this conclusion include the duration of the

purported audit, the relatively small number of plan participants, and the conclusory nature of the explanations tendered by Respondent.

### **ORDER**

The civil penalty of \$50,000.00 assessed by the Chief Accountant against Respondent, being lawful and reasonable under the circumstances of this case, and supported by reliable and probative evidence, is hereby **AFFIRMED**.

**SO ORDERED:**

**WILLIAM T. BARTO**  
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 must be submitted to the following address:

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, Delegation of Authority and Assignment of Responsibilities to the Employee Benefits Security Administration, 77 Fed. Reg. 1088 (signed Dec. 21, 2011; published in the Federal Register on Jan. 9, 2012)(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.