



Issue Date: 26 January 2021

CASE NO.: 2018-RIS-00053

In the Matter of:

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

v.

PLAN ADMINISTRATOR,
ELIZABETH R. WELLBORN, P.A. 401(K) PLAN
(EBSA Case No. 17-1724D),
Respondent.

**DECISION AND ORDER DENYING MOTIONS FOR SUMMARY DECISION /
DECISION AND ORDER ASSESSING CIVIL MONEY PENALTY**

This matter arises under Section 502(c)(2) of the Employee Retirement Income Security Act of 1974, as amended, (ERISA), and the regulations at 29 C.F.R. Parts 2560 and 2570. On March 19, 2018, the Employee Benefits Security Administration of the Department of Labor (Complainant) issued a Notice of Determination (NOD) against TAG Resource, LLC (Respondent), the plan administrator of the Elizabeth R. Wellborn, P.A. 401(k) Plan assessing a \$41,100 penalty for failing to file a satisfactory 2015 Form 5500 annual report.¹ [Complainant's motion at p. 3 n. 3.] Complainant alleged that Respondent had not attached an Accountant's Opinion, audited financial statements, or accompanying footnotes to its Form 5500, and that as of the date of the NOD, it had not received a satisfactory annual report. Complainant determined that there was no reasonable cause to waive the assessed penalty.

After scheduled hearings were continued, the parties requested a decision on the record and a schedule for filing dispositive motions. I granted the parties' request, and on November 20, 2020, Respondent filed a motion to dismiss. On the same day, Complainant filed a cross-motion for summary decision. On December 11, 2020, both parties responded to their opponent's motions.² The parties

¹ The pleadings refer as well to the 2016 Form 5500 annual report, but Complainant has confirmed that this matter involves only the 2015 report.

² Both parties used creative styles for their pleadings. For purposes of this Decision and Order, Respondent's motion to dismiss, and Complainant's cross-motion for summary decision, both filed on November 20, 2020, are deemed to be motions for summary decision. Complainant's response memorandum in support of its cross-motion for summary decision filed on December 11, 2020 is deemed to be an opposition to Respondent's motion for summary decision.

indicated, pursuant to my order, that in the event that their motions for summary decision were denied, they desired a decision on the merits based on the evidence submitted with their motions, as well as other documents in the file.

Upon review of the parties' submissions, I find that there is a dispute of material fact, and summary decision will be denied. On the merits, I find that Respondent failed to file a compliant Form 5500 annual report on behalf of the Plan and that they were not excused from doing so under the circumstances of this case. Finally, I find that the penalty assessed by Complainant of \$41,100 is warranted and reasonable, and will affirm it.

Summary Decision

In cases involving the assessment of civil penalties under § 502(c)(2) of ERISA, an administrative law judge may issue a final decision “[w]here no issue of material fact is found to have been raised.”³ Under the procedural rules applicable to proceedings before the Office of Administrative Law Judges, summary decision is appropriate where “the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”⁴ The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact.⁵ Once the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts showing there is a genuine issue for trial.⁶ The party opposing the motion must set forth specific facts showing there is a genuine issue of fact for the hearing.”⁷

In this case, the parties generally agree on the facts, but disagree on the interpretation to be given to them. Accordingly, the motions for summary decision will be denied, and I will proceed to a decision on the merits based on the parties' submissions.

Findings of Fact

1. Elizabeth R. Wellborn, P.A. (Sponsor) is the sponsor of the Elizabeth R. Wellborn, P.A. 401(k) plan (Plan).
2. The Plan is an employee pension benefit plan established or maintained by an employer to provide retirement income to employees or resulting in the deferral of income to employees for periods extending to the termination of employment or beyond, and is covered by ERISA. ERISA §§ 3(2), 3(3), 4(a), 29 U.S.C. § 1002(2), 1002(3) and 1003(4)(a).
3. Respondent TAG was the plan administrator of the Plan within the meaning of ERISA § 3(16), 29 U.S.C. § 1002(16).
4. The agreement between Sponsor and Respondent (Agreement) provided that Respondent's authority to administer the Plan was conditional on

³ 29 C.F.R. § 2570.67(a)(1).

⁴ 29 C.F.R. § 18.40(d); *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322 (1986).

⁵ *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323 (1986).

⁶ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

⁷ 29 C.F.R. § 18.72(c)(1).

- “prompt disclosure to Plan Administrator all information reasonably required by the Plan Administrator or TAG for the proper administration of the Plan,” including “the data necessary to complete the independent audit of the plan’s financial statement.”
5. The Agreement also provided that Respondent’s obligations as Plan administrator would terminate within 60 days of Sponsor’s notice to Respondent that Sponsor had terminated the Plan, after which Respondent would distribute assets from the Plan as directed by Sponsor.
 6. Respondent had the authority under the Agreement to terminate the Agreement with 60 days’ notice to Sponsor; that 60-day period could be shorter or longer if prudence under the then existing circumstances warranted it.
 7. By written notice received on October 20, 2015, Sponsor informed Respondent that it was closing and wished to terminate the Plan effective November 1, 2015.
 8. Between October 20, 2015 and February 17, 2016, Sponsor provided Respondent with year-end payroll information and census data, but did not provide information sufficient to complete an Independent Qualified Public Account (IQPA) report.
 9. Between February 17 and August 4, 2016, Respondent tried to reach Sponsor by telephone and by email, without success.
 10. By letter dated August 4, 2016, Respondent advised Sponsor that it lacked sufficient information to complete required Department of Labor and Internal Revenue Service filings, and advised Sponsor that if it did not provide the necessary information within 15 days, Respondent would proceed with terminating the plan adoption and fiduciary agreements, leaving Sponsor with the responsibility for filing “5500 corrections.”
 11. Respondent prepared, executed and filed the Plan’s 2015 Form 5500 on October 17, 2016.
 12. Before filing the Plan’s 2015 Form 5500 on October 17, 2016, Respondent filed a Form 5558 permitting an automatic extension of the filing deadline of July 31, 2016.
 13. Before filing the Plan’s 2015 Form 5500, Respondent liquidated the Plan’s assets and distributed them fully to the Plan participants.
 14. Respondent has not filed an acceptable IQPA report for the 2015 plan year.
 15. On February 8, 2017, Complainant issued a Notice of Rejection (“NOR”), which informed 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.
 16. Respondent did not file an amended 2015 Form 5500 within 45 days of the date of the NOR.
 17. On May 1, 2017, EBSA issued a Notice of Intent to Assess a Penalty (“NOI”) setting the proposed penalty amount of \$41,100, calculated on the basis of \$150 per day for 274 days.
 18. The NOI explained that the 2015 Form 5500 was deficient because an IQPA report was not attached and informed the Respondent that it had 35 days to respond to the notice and submit a statement of reasonable cause supporting reduction or elimination of the penalty.

19. On June 5, 2017, Respondent submitted a statement of reasonable cause.
20. In its reasonable cause statement, Respondent alleged that it took steps intended to terminate its position of plan administrator to the Plan.
21. Respondent's reasonable cause statement attached documents referencing the plan sponsor's intent to terminate the Plan effective December 31, 2015.
22. Also attached to the reasonable cause statement was a letter titled "Notice of Potential Termination of Adoption Agreement," dated August 4, 2016, signed by TAG's CEO, Phil Tisue, as plan administrator. The letter informed the plan sponsor that it would not be filing an IQPA report and that without the IQPA report the Department would reject the 2015 Form 5500. The letter also stated that attempts were made to reach the plan sponsor on February 17, July 6, July 13 and August 4, 2016. Finally, the letter informed the plan sponsor that it had 15 days to respond to TAG or TAG would proceed with terminating the "fiduciary agreement."
23. On March 19, 2018, EBSA issued a Notice of Determination ("NOD") assessing a \$41,100 penalty for Respondent's continued failure to file an amended 2015 Form 5500 with an IQPA report.
24. On or about April 17, 2018, Respondent filed an Answer and Request for Hearing, with attachments.
25. On April 29, 2020, Respondent filed an amended 2015 Form 5500 for the Plan that attached an IQPA report dated April 2, 2020 and prepared by Coulter & Justice, P.C. The audit firm included the following disclaimer:

We were not engaged as auditors of the Plan for the year ended December 31, 2015, until after the Plan terminated and the Plan sponsor dissolved. Due to our inability to obtain personnel files and other Plan information, including a sufficient understanding of internal controls, we were unable to perform certain compliance auditing procedures surrounding participant account data. . . . Because of the significance of the matters described in the Basis for Disclaimer of Opinion paragraph, we have not been able to obtain sufficient, appropriate audit evidence to provide a basis for an audit opinion. Accordingly, we do not express an opinion on these financial statements.

26. As of the date of this Decision and Order, Respondent has not filed an amended Form 5500 attaching an acceptable IQPA report for the 2015 plan year.

Discussion

A. Standard of Review

The standard of review for this proceeding is *de novo* for fact-finding, but deferential to Complainant as to the assessment of civil penalties. The burden is on Complainant to demonstrate that Respondent was required to file a Form 5500 for 2015 and that it did not file a compliant report. The burden then shifts to

Respondent to demonstrate that Complainant 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.

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).

The Department is authorized to assess daily civil penalties beginning on 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).

B. Failure to File Compliant Form 5500 Annual Report

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 17, 2016, it did not include the required IQPA audit report. There is no dispute that the IQPA report was not included when the Form 5500 was filed, and that no IQPA report for 2015 has yet been filed.

Respondent argues, however, that its obligation to file a Form 5500 report ended under the terms of its agreement with Sponsor, either as of December 19, 2015 (60 days after Sponsor notified Respondent that it wished to terminate the Plan) or by February 17, 2016, when Sponsor failed to provide information that was required to complete the report.

1. December 19, 2015 Termination Date

Section III of Part III of the Agreement provides that Sponsor was permitted to “discontinue or revoke its participation in the Plan at any time upon 60 days written notice.” The Agreement specifies that in the event that no successor Plan was established, Sponsor’s assets would be spun off from the Plan and the employer – here, Elizabeth R. Wellborn, PA – would become the plan sponsor, and its signatory – here, Elizabeth R. Wellborn – would become the Plan trustee.

Complainant agrees that the Agreement served to designate Respondent as administrator of the Plan. The issue, however, is whether the October 20, 2015 notice from Sponsor to Respondent served to terminate that designation 60 days later, thereby relieving Respondent from its fiduciary responsibilities to administer

the plan. In support of its argument that it did, Respondent relies in part on the ERISA definition of a plan administrator:

- (A) The term “administrator” means—
- (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
 - (ii) if an administrator is not so designated, the plan sponsor; or
 - (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1002(16). Again, there is no dispute that Respondent was properly designated the administrator of the Plan, and therefore meets the definition of “administrator” under ERISA. ERISA and its implementing regulations do not explicitly provide for termination of administrator status, and Respondent has not explained how a contractual provision for termination of the Agreement alters that status, but has merely asserted it. That assertion is inconsistent with the fiduciary duty imposed by ERISA overall on plan administrators, and is inconsistent with relevant case law. As the Third Circuit observed in *Glaziers and Glassworkers Union Local No. 252 Annuity Fund*, 93 F.3d 1171 (3d Cir. 1996), “once a fiduciary relationship exists, the fiduciary duties arising from it do not necessarily terminate when a decision is made to dissolve that relationship,” *Id.* at 1183, and “an ERISA fiduciary’s obligations to a plan are extinguished only when adequate provision has been made for the continued prudent management of plan assets.” *Ibid.*; accord, *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979). This Respondent did not do.

In addition, although Respondent now claims that its duties ended 60 days after October 20, 2015, its past actions are inconsistent with that claim: it continued for many months to attempt to obtain the documentation necessary to file a complaint Form 5500 for 2015, filed that form, continued to try to obtain an IQPA report, and filed an amended 2015 Form 5500 for the Plan. Respondent did not, at the relevant times, regard itself as being relieved from the responsibility to file a complete Form 5500, and I reject the argument that it was relieved of its duties 60 days after October 20, 2015.

2. February 17, 2016 Termination Date

Respondent next argues that its obligation to file a compliant Form 5500 ended on or about February 17, 2016 when it became clear that Respondent was unable to obtain the “books and records” necessary to do so, and that Sponsor was required to provide those documents. Thus, argues Respondent, a condition of its appointment as Plan administrator failed, and it was no longer obligated to file the 2015 Form 5500. Respondent has not pointed to any provision of the Agreement in support of that argument. And if it had, it would fail for the reason set forth above: that violation of the agreement under the contract was ineffective to end Respondent’s fiduciary duties. Beyond that, Respondent’s argument fails as a factual matter. Sponsor notified Respondent of its intent to terminate the plan on October 20, 2015, with an effective date of November 1, 2015. Respondent made no

effort between October 20, 2015 and February 17, 2016 to obtain the necessary records. Further, although its attempts to reach Sponsor by telephone and email were unsuccessful, there is no evidence that Respondent tried to find Respondent by any other means. And there appears to have been some other means, as Respondent has argued that it notified Sponsor by certified letter on August 4, 2016 that it was terminating the relationship, with no representation that the letter was returned. Accordingly, I reject the argument that Respondent was relieved of its duties to file a compliant Form 2500 for 2015 as of February 17, 2016.

3. *October 3, 2016 Termination Date*

Respondent finally argues that any residual responsibilities it had for administering the Plan ended 60 days after it gave formal written notice of termination of the appointment to Sponsor. That notice was dated August 4, 2016; 60 days after that date was October 3, 2016. This is, essentially, the flip side of Respondent's argument that Sponsor's October 20, 2015 letter triggered termination in 60 days, and it suffers from the same deficiency: that a contractual provision cannot terminate Respondent's obligation to complete its fiduciary duties. Furthermore, as Respondent acknowledges, the letter of August 4, 2016 did not trigger the 60-day time until termination of the agreement even if it could be terminated. The letter was denominated a notice of *proposed* termination, and by its terms gave Sponsor a grace period of 15 days to renew the contractual relationship. Thus, it was not until expiration of that 15-day grace period until the 60-day notice became effective, extending the effective date from October 3 to October 18, 2016. But Respondent filed the 2015 Form 5500 on October 17, 2016, before expiration of the 60-day period. Once again, Respondent's actions speak louder than its words: it clearly believed itself required to file the Form 5500, attempted to obtain the necessary information, and indeed filed it.

4. *Conclusion*

For the reasons set forth above, I find that Respondent failed to file a compliant 2015 Form 5500 for the Plan year 2015 in that it failed to include the required IQPA report. And I find and conclude that its failure to do so was not excused by (1) Sponsor's notification of plan termination, (2) Sponsor's failure to provide necessary information, or (3) Respondent's notice of potential termination to Sponsor.

C. Civil Penalties

Under § 502(c)(2) of ERISA, a plan administrator who fails or refuses to file the required annual report is subject to civil penalties of up to \$2,097 per day.⁸ A report that has been rejected by the Department of Labor is deemed not to have been filed for purposes of imposing civil penalties. 29 U.S.C. § 1132(c)(2).

⁸ Although ERISA statutorily provides for civil penalties up to \$1,000 per day, the Department of Labor has, under the Federal Civil Penalties Inflation Adjustment Act of 1990, increased the maximum daily penalty to \$2,097. See 29 C.F.R. § 2560.502c-2.

An administrator receiving a Notice of Intent to assess a civil penalty may, within 35 days, file a statement of reasonable cause explaining why the penalties should be reduced or not imposed. In this case, Respondent did so timely, and its response was considered by Complainant.

Under 29 C.F.R. § 2560.502c-2(d), Complainant may determine that the proposed civil penalties should be reduced or not paid “on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.” The showing must be in writing and must “set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty.” Respondent timely filed such a written statement on June 5, 2017, setting forth arguments similar to those set forth above – that Respondent was unable to obtain the necessary information from Sponsor to complete the Form 5500, that Respondent had resigned as Plan administrator, and that it was otherwise excused from its obligations as Plan administrator.

Complainant rejected Respondent’s statement, and assessed civil penalties of \$150 per day beginning on August 1, 2016 (the day after the due date for filing the 2015 Form 5500) and ending 274 days later, when Complainant issued the Notice of Intent, a total of \$41,100.00. *See* 29 C.F.R. § 2560.502c-2(a)(2).

Applying a deferential standard of review to the Complainant’s assessment of penalties, and its rejection of Respondent’s statement of reasonable cause, I find that Complainant’s proposed civil penalties of \$41,100.00 were properly assessed and should not be reduced or waived. I have previously rejected the reasons suggested by Respondent to excuse its failure to file a compliant Form 5500. Those are the same reasons it suggested to Complainant in its attempt to have the assessed penalties reduced or waived. Respondent has offered no new reasons in support of a reduction or waiver. I explained above why I rejected those arguments with respect to excusing the failure to file a compliant annual report, and I adopt that explanation for finding that the proposed civil penalties are appropriate.

Conclusion

Based on the foregoing, I find and conclude that Respondent did not file a compliant Form 5500 for the year 2015, and I further find and conclude that the civil penalties assessed by Complainant should not be adjusted.

ORDER

Accordingly, IT IS ORDERED:

1. The motions of Complainant and Respondent for summary decision are DENIED; and

2. Respondent TAG Resources, LLC, as administrator for the Elizabeth R. Wellborn, PA 401(k) Plan shall, not later than 90 days after the date of this Decision and Order, pay a civil money penalty in the amount of \$41,100.00 to the U.S. Department of Labor for its failure to file a compliant Form 5500 annual report for the year ending December 1, 2015.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/ksw
Newport News, Virginia

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. The notice of appeal shall state with specificity the issue(s) in the decision of the administrative law judge on which the party is seeking review. Such notice of appeal must be served on all parties of record. The 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, 77 Fed. Reg. 1088 (Signed Dec. 21, 2011; published in Federal Register Jan. 9, 2012) (delegation of review authority to the Assistant Secretary for Benefits Security).