



In the Matter of:

**U.S. DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY
ADMINISTRATION**

Date: January 26, 2012

Complainant-Appellant

OALJ Case No. 2009-RIS-00014

v.

**DUTCH AMERICAN IMPORT
COMPANY, INC. PLAN
ADMINISTRATOR**

Respondent-Appellee

DECISION AND ORDER

This proceeding is on appeal from the United States Department of Labor, Office of Administrative Law Judges, and arises under the provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.* ("ERISA") and the implementing regulations at 29 C.F.R. Parts 2520 (rules and regulations for reporting and disclosure), 2560 (rules and regulations for administration and enforcement), and 2570 (procedural regulations under ERISA).

BACKGROUND

On or about September 25, 2007, the Plan Administrator of the Dutch American Import Company, Inc. Employee Stock Ownership Plan ("Dutch American" or "Plan") filed the Form 5500 Annual Report for the plan year ending December 31, 2006 ("Annual Report") with the U.S. Department of Labor Employee Benefits Security Administration ("DOL"). DOL determined that the Annual Report failed to provide certain material information required to be part of the Annual Report. Specifically, Dutch American had non-qualifying assets that required either a 100 percent of assets ERISA bond or a report of an Independent Qualified Public Accountant ("IQPA"). The non-qualifying assets consisted of loans from the plan to Dutch American which were prohibited transactions, and the bond amount was insufficient to cover such non-qualifying assets. DOL's Office of Chief Accountant ("OCA") sent a Notice of Rejection dated April 28, 2008, to Dutch American explaining that Dutch American would have to file a revised satisfactory Annual Report within 45 days of the date of the Notice of Rejection. The Notice of Rejection also warned that failure to file within the 45-day period could result in an assessment of a civil penalty of up to \$1,100 per day from the date on which the Annual Report was due.

Dutch American failed to file an amended Annual Report within the 45-day timeframe so DOL issued to Dutch American a Notice of Intent to Assess a Penalty dated June 23, 2008. The penalty calculated by OCA was \$49,200. Dutch American timely filed a Statement of Reasonable Cause (“SRC”) but, in a Notice of Determination on the Statement of Reasonable Cause (“NOD”) dated September 15, 2008, DOL stated that it had reviewed the representations made in the SRC and determined that there was no reasonable cause to waive the penalty, in part, because an IQPA report and amended Form 5500 were not submitted in response to the Notice of Intent to Assess a Penalty. Dutch American then timely filed a request for a hearing before an Administrative Law Judge (“ALJ”). By letter dated April 8, 2009, while the matter was pending before the ALJ, Dutch American filed a corrected Annual Report, including an IQPA report, which was accepted by DOL.

Dutch American rectified its filing deficiencies more than six months after it received the third written notice (the NOD) from DOL’s OCA, that is, almost one year after the issuance of the first notice (the Notice of Rejection). (The record in the case shows that, in addition to the written notifications from DOL’s OCA, Dutch American received phone calls in 2008 from an investigator in DOL’s Seattle District Office (SDO) seeking information about the plan. In a letter dated July 21, 2008, the Regional Director of the SDO advised Dutch American of the SDO’s findings based on the investigation, including Dutch American’s failure to file a complete Annual Report.)

A hearing took place on August 11, 2009. Among the facts agreed to and filed by DOL and Dutch American at the beginning of the hearing was the following stipulation:

(9) Respondent requested a reduction of the penalty after full correction was made and suggested a modified penalty of \$7,380.00. Complainant rejected the offer and stated that no reduction of any kind would be acceptable. Dutch American argued before the ALJ that the penalty should be reduced because it did come into compliance, though late.

On January 6, 2010, the ALJ issued a Decision and Order Reducing Civil Penalty. The only issue in the case was reduction of the \$49,200 civil penalty assessed by DOL. The ALJ determined that the penalty should be reduced to \$24,600.

The ALJ noted that “[c]hallenges to DOL civil penalties under ERISA are not uncommon.” Civil penalty appeals that result in a decision by an ALJ have generally involved situations in which a corrected annual report was never filed, filed with the SRC, or filed after the filing of the SRC but before the NOD was issued by DOL. The ALJ stated that, in many cases, the plan administrator files an acceptable report while the case is pending before the ALJ, and the cases are resolved between the parties before the ALJ decides the case. Looking to precedent, the ALJ examined cases where the respondents sought waiver of the assessed penalty and DOL’s reduced penalties were affirmed by the ALJ. Those cases involved situations where an acceptable report was filed with the SRC or prior to issuance of the NOD. The ALJ noted that in one case where the plan failed to file an acceptable amended annual report with an IQPA report by the time of the hearing the full penalty was affirmed in a summary decision.

According to the ALJ, affirming the full penalty in this case despite Dutch American’s correction of the deficiencies would remove an incentive for plans governed by ERISA to

file corrected/amended reports after a penalty is assessed against them. The ALJ reasoned that the goal of ERISA is to protect the integrity of employee benefit plans maintained by employers through reporting requirements enforced upon plan administrators. DOL's ability to achieve this goal would be diminished if plan administrators decided there was no point in filing an acceptable report once the civil penalties had been assessed because the penalties would not be reduced by their late compliance with the reporting requirements. The ALJ further noted that if civil penalty assessments are not reduced in circumstances such as this, there is no incentive for the plan to file corrected reports once civil penalties have been assessed and their SRC has been rejected. According to the ALJ, the fact that Dutch American ultimately filed an acceptable report differentiates this case from those cases where the full penalty was affirmed and an acceptable report was never filed. Further, the ALJ determined that the subsequent filing of an acceptable report while the case was pending before the ALJ is a mitigating circumstance that could not be considered at the time the NOD was made. The ALJ found that the subsequent filing of the amended Annual Report warrants a reduction of the penalties that were assessed. The ALJ examined cases where she stated the penalty was reduced by 95%, 75%, and 73.2%. Each of those cases involved situations where the respondent submitted a compliant annual report before DOL issued the NOD. The ALJ determined that a 50% reduction in DOL's original assessment would be a fair and equitable penalty because of the additional delay in Dutch American's filing, that is, filing while the matter was pending before the ALJ.

By letter dated January 26, 2010, DOL appealed the ALJ's decision and seeks review of:

- (1) Whether the Administrative Law Judge erred in reducing the assessed penalty set forth in the Notice of Determination based on the record in this case;
- (2) Whether the Administrative Law Judge erred in reducing the penalty without a finding that DOL abused its discretion in assessing an unabated \$49,200 penalty for the 2006 plan year reporting violations.

I shall deal with the issues raised on appeal in turn.

The Department of Labor's contention that the ALJ erred in reducing the assessed penalty set forth in the NOD based on the record in this case.

DOL's argument is that the ALJ erred in reducing the amount of the penalty because it did not give appropriate deference to OCA's penalty assessment and gave inappropriate weight to Dutch American's belated correction of the non-compliant Form 5500 that gave rise to the penalty.

The ALJ found all factual issues related to OCA's penalty assessment in DOL's favor. With respect to deference toward OCA's penalty assessment, the ALJ says that, in view of the fact that Dutch American did not file an amended Annual Report at the time it filed its SRC, the calculation of the civil penalty was valid.

The ALJ considered, and ruled based on, a fact that post-dated DOL's NOD – namely, that Dutch American filed a compliant report after the case was pending before the ALJ.

This fact was stipulated by the parties. The ALJ says this is a basis to reduce the penalty because:

- (1) A *de novo* review of the penalty proceedings includes taking into consideration mitigating circumstances and events that transpired after the SRC was issued.
- (2) In many cases, a plan administrator files an acceptable report while the case is pending before the ALJ and DOL then reduces or waives the penalty in a settlement.
- (3) If civil penalty assessments are not reduced in circumstances such as this, there is no incentive for the plan to file corrected reports once civil penalties have been assessed and their SRC has been rejected.

None of these reasons provides a valid and appropriate basis for the ALJ's reduction of the penalty (as explained below). The regulation establishing the procedure for the NOD and implementing this notice does not provide for a mitigation of penalty in these circumstances. I find that there is not a substantial basis in the decision of the ALJ for the ALJ to substitute her judgment as to the amount of the penalty for that of the DOL.

Mitigation

The factual issues in this matter were not in dispute. The ALJ says that, in view of the fact that Dutch American did not file an amended Annual Report at the time it filed its SRC, the calculation of the civil penalty was valid.

As stated by the Senior Policy Advisor in *U.S. Department of Labor, PWBA v. Spalding & Evenflo Companies, Inc.*, the regulations adopted by DOL at 29 C.F.R. 2560.502c-2 to implement the provisions of sections 104(a)(4), 104(a)(5), and 502(c)(2) of ERISA are entitled to deference, unless the implementation exceeds the agency's authority or is unreasonable.¹

The regulation at Sec. 2560.502c-2(d) states that DOL may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 101(b)(1) of ERISA or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance. The ALJ gives no indication that the DOL's implementing regulations are unreasonable.

There does not appear in the record an expression of mitigating circumstances other than those put forth by Dutch American in its SRC, the circumstances that were rejected by

¹ *U.S. Department of Labor, PWBA v. Spalding & Evenflo Companies, Inc.*, 1992-RIS-19, slip op. at 7 (PWBA Nov. 18, 1994). At the time of the *Spalding* decision, the U.S. Department of Labor Employee Benefits Security Administration operated as the U.S. Department of Labor Pension and Welfare Benefits Administration ("PWBA"). EBSA Order No. 1-94 delegated authority and assigned responsibility to the Senior Policy Advisor for the review of decisions of ALJs under regulations implementing the Department's authority to assess civil penalties under ERISA Sec. 502(c)(2) and (i). EBSA Order No. 1-08 rescinded EBSA Order No. 1-94 and redelegates such authority and responsibility to the Director of the Office of Policy and Research.

DOL. The basis for the ALJ's finding that a post-NOD filing is a "mitigating circumstance" as contemplated by the regulations is not explained. The ALJ decision says only that the post-NOD filing is a "mitigating circumstance" that "transpired after" Dutch American issued the SRC and "obviously could not be considered" when DOL issued the NOD. However, the ALJ agreed that "penalties were appropriate" when DOL issued the NOD (rather than merely appearing at the time to be appropriate). The ALJ does not appear to explain how Dutch American's post-NOD filing offered a mitigating circumstance regarding the degree or willfulness of the noncompliance that DOL could not take into account when it decided the penalty amount.

The ALJ does not present findings of fact and conclusions of law with reasons for deciding that post-NOD filings constitute a mitigating circumstance as contemplated by the law and regulation.

Settlement

As stated before, the regulation permits DOL to determine that all or part of a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 101(b)(1) of ERISA or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance. In this case, the parties had stipulated that DOL had rejected Dutch American's request for a reduction of the penalty and had stated that no reduction would be acceptable.

The ALJ points out that in other cases, DOL has elected to engage in a settlement and reduced penalties where filings were provided after the NOD was issued, but DOL declined to do so in this case. In this case, the only evidence offered related to settlement was that stipulated by the parties. By affirming the correctness of DOL's NOD but then reducing the penalty in light of other post-NOD DOL settlements, the ALJ appears to decide the matter on facts that are not in the record (that is, evidence related to settlement negotiations beyond what was stipulated), revisiting (and reversing) DOL's decision whether to settle for smaller penalty post-NOD. In substituting her own judgment for DOL's, the ALJ does not follow precedent or the regulatory scheme available for reduction of penalties. The ALJ's decision argues that the ALJ, pursuant to *de novo* authority, could do whatever it wanted in assessing a penalty, based on the evidence before it. This is correct insofar as the ALJ has the power to try facts *de novo*. However, in deciding issues of law, the ALJ is bound by the governing statute and regulations, except to the extent the ALJ finds them to be invalid.² Whether applying the arbitrary and capricious standard or the *de novo* standard of review, the ALJ could only reach the conclusion that DOL properly applied the law.

Incentive to file

The ALJ argues that penalty reduction must be available to the ALJ for plan filings after Notices of Determination in order to preserve incentive to file. First, this policy reasoning is problematic. Plans already have incentive to file post-NOD because penalty reductions can be negotiated with DOL. The ALJ points out DOL's history of reducing or waiving the penalty in settlement even in situations where a plan administrator files an acceptable report while the case is pending before the ALJ. So, in fact, the policy effect

² *Id.* at 8.

of the type of ALJ intervention promoted in this proceeding is to reduce the incentive for delinquent filers to file and settle with DOL post-NOD, and increase the incentive to take such matters through the hearing process. Second and more important, such a policy basis is not appropriate grounds for the ALJ to reduce a penalty. Policy judgment is not an appropriate judgment based on facts or related matters of law. Nor does policy judgment serve as reliable and probative evidence that would be a basis for a decision to reduce a penalty. Nor does it speak to whether the agency acted properly in setting the penalty. It is simply not relevant and cannot provide any basis for reducing the penalty. The ALJ's policy argument would usurp DOL's policymaking role in this regard.

The Department of Labor's contention that the ALJ erred in reducing the civil penalty without a finding that DOL abused its discretion in assessing an unabated \$49,200 penalty for the 2006 plan year reporting violations.

Because the ALJ erred in reducing the penalty based on the record, the second contention by DOL will not be addressed in this opinion.

Therefore, the ALJ decision is set aside in whole, and I hereby order that the penalty amount as assessed by DOL, \$49,200, be paid to the U.S. Department of Labor within thirty (30) days from the date of service of this decision. Amounts not paid by that time shall be subject to penalties and interest provided for by ERISA and its implementing regulations.



JOSEPH S. PIACENTINI
Director, Office of Policy and Research