



In the Matter of:

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

DATE: June 14, 2013

Complainant-Appellee

OALJ CASE NO. 2009-RIS-00068

v.

**PLAN ADMINISTRATOR, THIBEAULT CORP. OF NE/T-QUIP SALES &
LEASING 401(k) PLAN**

Respondent-Appellant

**DECISION AND ORDER
AFFIRMING THE ADMINISTRATIVE LAW JUDGE DECISION AND ORDER
DATED JULY 19, 2011**

This proceeding is on appeal from the United States Department of Labor ("DOL"), 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 October 16, 2007, Thibeault Corp. of NE/T-Quip ("Thibeault"), the plan administrator of the Thibeault Corp. NE/TQuip Sales and Leasing 401(k) Plan ("401(k) Plan" or "Plan"), filed a Form 5500 Annual Return/Report of Employee Benefit Plan for the 401(k) Plan ("Annual Report") for the 2006 Plan Year with the U.S. Department of Labor Employee Benefits Security Administration ("DOL" or "EBSA"). Thibeault was required to have an annual audit performed on the Plan and the report of an independent qualified public accountant ("IQPA") was required to be filed with the Annual Report. No such IQPA report was attached to the Annual Report.

The established facts are as follows:

- The 401(k) Plan held assets in trust and had 199 participants at the beginning of the plan year and 184 participants at end of the plan year.

- Under ERISA and the implementing regulations, a plan with 100 or more participants that holds assets in trust is required to have an annual audit performed on the plan, attach the report of an IQPA to the plan's annual report, and file the annual report with DOL within 210 days after the end of the plan year.
- On October 16, 2007, Thibeault filed an Annual Report for the 401(k) Plan for the 2006 Plan Year and filed a Schedule H with this return. On the Schedule H, Thibeault indicated that the return included a disclaimed opinion from an IQPA. No such report was attached to this Annual Report.
- On November 7, 2007, Thibeault filed an amended Annual Report for the 401 (k) Plan for the 2006 Plan Year and an amended Schedule H with this return. On the amended Schedule H, Thibeault again indicated that the return included a disclaimed opinion from an IQPA. No such report was attached to this Annual Report.
- On December 24, 2007, DOL issued its first thirty-day clarification letter to Thibeault requesting that it provide the required IQPA report and submit a schedule of assets held for investment at the end of the year in the format prescribed in the Form 5500 instructions. A response was required within thirty days.
- Thibeault did not comply with the first thirty-day clarification letter request.
- On February 14, 2008, EBSA issued its second thirty-day clarification letter to Thibeault requesting that it provide an IQPA report and submit a schedule of assets held for investment at the end of the year in the format prescribed in the Form 5500 instructions. Again, a response was required within thirty days.
- Thibeault did not comply with the second thirty-day clarification letter request.
- On September 29, 2008, EBSA issued a Notice of Rejection ("NOR") which set forth, in further detail, the noted deficiencies. The NOR advised Thibeault that it had forty-five days within which to comply without incurring a penalty. A satisfactory response to the NOR with a completed IQPA and financial statements was due on or before November-13, 2008, forty-five days from the date of the NOR.
- Thibeault's October 7, 2008 and December 4, 2008 responses to the NOR did not contain an amended 2006 annual return with the required IQPA opinion.
- On December 15, 2008, EBSA issued a Notice of Intent to Assess a Penalty ("NOI") notifying Thibeault of the impending \$50,000 penalty assessment for its failure to file an amended 2006 Annual Report with the required accountant's opinion. The NOI advised Thibeault that it had thirty-five days within which to submit a statement of reasonable cause. The NOI also makes clear that the written statement of reasonable cause must: (i) state that the plan administrator complied with the requirements of Section 101(b)(1) of ERISA or state the mitigating circumstances regarding the degree or willfulness of the noncompliance; (ii) set forth all alleged facts as to why the penalty, as calculated, should be reduced or not be assessed based upon Section 2560.502c-2 of the implementing regulations; (iii) contain a declaration by the plan administrator that the statement is made under the penalties of perjury, as required under Section 2560.502c-2(e); (iv) be signed by the plan administrator or his or her authorized representative where the representative has been granted that specific authority pursuant to a duly executed, notarized power of attorney; and (v) be filed within thirty-five days at the designated address.
- On January 20, 2009, Thibeault as Plan Administrator submitted a written statement of reasonable cause ("Reasonable Cause Statement"), signed by Ernest Thibeault, III, as Plan Administrator. As reasonable cause for failure to submit a completed 2006 Annual Report,

Thibeault stated that he was under the mistaken belief that the third party administrator was responsible for the administrative needs of the Plan (including the audit); that the Plan found an auditor who could perform the audit for \$32,000, which he believed was unreasonably expensive; that the fees to administer the Plan plus the cost of an audit exceeded the value of employer contributions to the Plan; that the company is small/medium sized and that the participants and the company had lost proceeds due to the market conditions; that the company was having difficulty keeping employees employed; and that the plan administrator believed that the Plan would have been exempt from the audit requirement if he had "forced" a lump sum cash payout on any employee vested with less than \$1,000 in their account.

- On March 24, 2009, DOL's Reasonable Cause Committee met to discuss Thibeault's Reasonable Cause Statement. The Committee expressly considered the assertions in Thibeault's Reasonable Cause Statement, Thibeault's correspondence in response to DOL's NOR, the number of participants in the Plan, the dates of the NOI and Reasonable Cause Statement, and that Thibeault was not in compliance as of the date of the meeting. The Committee recommended that DOL assess the proposed \$50,000 penalty.
- On April 6, 2009, DOL issued a Notice of Determination on Statement of Reasonable Cause (NOD) to Thibeault finding that: (i) no IQPA report or amended Form 5500 was submitted in response to the NOI; and (ii) Thibeault failed to present reasonable cause for his failure to file an acceptable Annual Report in his original filing and his failure to timely correct his filing. The NOD thereby assessed a \$50,000 penalty against Thibeault.
- Thibeault timely filed a request for a hearing before an Administrative Law Judge ("ALJ")
- As of June 18, 2010, the date of the hearing before the ALJ, Thibeault had not filed a Form 5500 Annual Report containing IQPA opinions for the plan years 2006, 2007, or 2008.
- On August 9, 2010, the ALJ issued an order closing the record and requiring briefs by September 13, 2010.
- On August 27, 2010, Thibeault came into compliance for the 2006 plan year by filing the Annual Report with the required audit report, and the report was accepted by DOL.
- The post trial briefs were timely filed. Along with its brief, Thibeault filed a Motion to Reopen the Record. DOL objected to the Motion to Reopen the Record.
- The ALJ conducted a hearing on the Motion to Reopen. Thibeault sought to reopen the record to introduce evidence that it submitted a report from an IQPA, thereby making the Annual Report for the 2006 Plan Year complete.
- The ALJ granted the Motion to Reopen and requested supplemental briefs from the parties on the applicability of *United States Dep't of Labor, EBSA v. Dutch American*, ALJ No. 2009-RIS-00014 (ALJ Jan. 6, 2010) (ALJ finding that reducing a Section 502(c)(2) penalty by 50% was appropriate where compliance occurred four months prior to the date of the formal hearing before the ALJ).¹
- On October 1, 2010, the ALJ received two exhibits from Thibeault. The first exhibit contained the Annual Return/Report of Employee Benefits Plan for 2006, 2007, and 2008, the IQPAs for each year, and a screen print from the DOL website indicating submission of the completed Annual Reports for each plan year with corresponding IQPAs. The second

¹ In the case of *U.S. Department of Labor (EBSA) v. Plan-Administrator, Dutch American Import Co., Employee Stock Ownership Plan*, 2009-RIS-14 ("Dutch American"), the reduction of the fine subsequently was appealed by EBSA. The Secretary set aside the ALJ's decision in whole and imposed the full penalty in a decision issued January 26, 2012.

exhibit consisted of a letter from Steven R. Boivin, CPA, explaining the delays encountered in completing the audits.

- By mid-October, 2010, the Complainant's Supplemental Brief and the Respondent's Further Post-Trial Brief were received. The ALJ closed the record.
- The ALJ issued a Decision and Order on July 19, 2011 ("Decision and Order") affirming the penalty assessed against Thibeault in the amount of \$50,000.

Thibeault timely appealed the ALJ's Decision and Order to the Secretary of the Department of Labor on August 9, 2011. The Notice of Appeal stated that the sole issue on appeal is whether EBSA acted arbitrarily, capriciously or unreasonably in assessing a \$50,000 penalty against the Respondent for having failed to file a complete 2006 annual report as the report did not include an audit by an IQPA notwithstanding having provided EBSA with a valid statement of reasonable cause. This Office² issued a briefing schedule letter on September 19, 2012. Thibeault and DOL timely filed their briefs on October 25 and November 21, 2012, respectively.

ERISA Section 502(c)(2) provides for a civil penalty to be assessed by the Secretary for a plan administrator's failure or refusal to file the required annual report. The regulations provide that the amount assessed under Section 502(c)(2) of the Act shall be determined by the Department of Labor, taking into consideration the degree and/or willfulness of the failure or refusal to file the annual report. 29 C.F.R. § 2560.502c-2(b). After the Department has provided an administrator a written notice of intent to assess a penalty, the administrator may file a statement of reasonable cause regarding why the penalty, as calculated, should be reduced, or not be assessed. The statement must set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. 29 C.F.R. § 2560.502c-2(e). The Department 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 ERISA Section 101(b)(1) or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance. 29 C.F.R. § 2560.502c-2(d). Following a review of all the facts alleged in support of no assessment or a complete or partial waiver of the penalty, the Department notifies the administrator of its determination to waive the penalty, in whole or in part, and/or assess a penalty. 29 C.F.R. § 2560.502c-2(g).

The rules require the ALJ's decision to include findings of fact and conclusions of law with reasons therefor upon each material issue of fact or law presented on the record, and it must be based upon the whole record. The penalty (if any) which may be included in the decision of the ALJ shall be limited to the penalty expressly provided for in Section 502(c)(2) of ERISA, and it shall be supported by reliable and probative evidence. 29 C.F.R. § 18.57.

It is undisputed that Thibeault did not come into compliance with ERISA until after the hearing before the ALJ. The record also establishes that EBSA followed the law and implementing regulations in this matter. The record does not present mitigating circumstances regarding the degree or willfulness of the noncompliance other than those expressed by Thibeault in its

² EBSA Order No. 1-08 delegates authority and assigns responsibility to the Director of the Office of Policy and Research 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).

Reasonable Cause Statement, the circumstances that were rejected by EBSA and the ALJ. The ALJ's decision met the requirements set forth in 29 C.F.R. § 18.57.

The Secretary may review a decision of an ALJ, and the regulations provide that the notice of appeal shall state with specificity the issue or issues in the decision of the ALJ on which the party is seeking review. 29 C.F.R. § 2570.69. Thibeault's sole issue on appeal to the Secretary is whether EBSA acted arbitrarily, capriciously or unreasonably in assessing a \$50,000 penalty for Thibeault's failure to file a complete 2006 Annual Report. In seeking review, Thibeault does not state with specificity what issue in the decision of the ALJ should be reviewed. Rather, based on the Notice of Appeal and Thibeault's brief dated October 25, 2012, Thibeault in effect is asking the Secretary to review the case *de novo* to decide whether EBSA acted arbitrarily, capriciously or unreasonably in assessing the penalty. The regulations provide that the review by the Secretary shall not be *de novo* proceeding but rather a review of the record established before the ALJ. 29 C.F.R. § 2570.70. Thus, Thibeault is asking the Secretary to apply a standard of review that is not available to the Secretary when reviewing a case on appeal.

Therefore, the ALJ decision is affirmed in whole, and I hereby order that the penalty amount, \$50,000, be paid by the Respondent-Appellant 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