U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 January 2007

In the Matter of

UNITED STATES DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY
ADMINISTRATION
Complainant

v.

DYNAPACE CORPORATION
Respondent

Case No.: 2005-RIS-00088

Vicki Shteir-Dunn, Esq.
Washington, D.C.
For the Complainant

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

This matter concerns an $86,500.00 civil penalty assessed under §502(c)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA" or "the Act") and its implementing regulations. *See* 29 U.S.C. §1132(c); 29 C.F.R. §§ 2560.502c-2 and 2570.60-71. Complainant, the United States Department of Labor, Employee Benefits Security Administration ("EBSA" or "complainant") assessed the penalty against respondent as plan administrator of the Dynapace Corporation ("Dynapace" or "respondent") 401(k) Profit Sharing Plan & Trust ("plan"), for its failure to include the report and opinion of an independent qualified public accountant ("IQPA report") and a financial schedule of assets held for investment as part of its 2002 Annual Report, as required by ERISA §103(a)(3)(A), 29 U.S.C. §1023(a)(3)(A). Respondent requested a hearing with this Office for waiver or reduction of the penalty. EBSA has filed the instant motion for summary decision with supporting documentation. Respondent did not respond to that motion.

Background

The material facts in this case are essentially undisputed. Although the parties may differ as to the number of plan participants, I find that the difference is easily resolvable based on respondent's own filings. As such, I conclude that no genuine issue of material fact remains for a hearing and that the case is ready for summary decision *See* 29 C.F.R. §2570.67.

Respondent serves as the sponsor and administrator of the plan, a profit sharing and 401(k) plan (EBSA Exhibit 1-Form 5500 at 1, line 2a; EBSA Exhibit 11-Form 5500 at 1, line 2a; Motion to Vacate Default Judgment dated Nov. 29, 2005).[1] At the beginning of the 2002 plan year, the plan held assets in trust and had in excess of 100 participants (EBSA Exhibit 1-Form 5500 at 2, line 6; EBSA Exhibit 11-Form 5500 at 2, line 6; EBSA Exhibit 9). On or about October 15, 2003, Dynapace filed Form 5500, the 2002 Annual Return/Report ("annual report") for the plan with EBSA without attaching an IQPA report or a schedule of assets held for investment (*see* EBSA Exhibit 1). Although the Form 5500 indicated that the opinion of an independent qualified public accountant was attached, no opinion was included with respondent's Form 5500 filing (*id*., Schedule H at 3, pt. III).

By letter dated January 29, 2004, EBSA notified respondent that it had received the Form 5500, but that two pieces of information were either missing or needed attention (EBSA Exhibit 2 at 1). Specifically, the January 29 letter stated: (1) that the IQPA report was not attached; and (2) that respondent had supplied inconsistent information concerning plan assets held for investment at the end of the year (*id*.). EBSA instructed respondent to submit the IQPA report, correct its answer concerning the plan assets held for investment, and submit the appropriate schedule for the assets (*id.*). The letter further instructed respondent to send the requested information to EBSA within 30 days and warned of potential Internal Revenue Service ("IRS") and Department of Labor ("DOL") penalties for noncompliance (*id.* at 1-2). The letter also provided respondent with a toll-free telephone number and mailing address it could utilize for questions about the letter (*id*.). Having received no reply to the January 29 letter, EBSA again notified respondent by letter dated March 17, 2004 that it still had not received the accountant's opinion and schedule of plan assets held for investment (EBSA Exhibit 3 at 1). EBSA again instructed respondent to send the requested information within 30 days, and the letter again warned of the potential for IRS and DOL penalties for noncompliance (*id*. at 1-2). The letter also provided the same toll-free telephone number and mailing address for questions (*id*.), but respondent did not reply to the March 17 letter. On August 16, 2004, EBSA issued a final request letter and instructed respondent either to notify EBSA within 15 days as to why the 2002 annual report was correct as filed or to correct the filing by including the IQPA report and schedule in an amended filing (EBSA Exhibit 4 at 1-2).

By letter dated August 26, 2004, Dynapace responded to the final request letter (EBSA Exhibit 5). Citing a "substantial downturn in business during the past few years" that resulted in a reduction in its workforce, respondent stated that the company had only "35 active

[1] E.R.I.S.A., Inc., has asserted that it serves as the third party administrator for the plan (EBSA Exhibit 5). However, respondent has admitted in its filings before this Office that it is both the sponsor and administrator of the plan (*Motion to Vacate Default Judgment* dated Nov. 29, 2005).

participants" during the 2002 plan year and had determined that the report of an independent qualified public accountant was not required (*id.*). The letter requested that EBSA notify respondent as to whether it agreed with respondent's assessment, and also requested 60 days within which to complete an accountant's opinion if EBSA decided that an opinion was required (*id.*).

On September 29, 2004, EBSA issued a Notice of Rejection ("NOR"), rejecting the 2002 annual report as deficient on account of Dynapace's failure to attach the accountant's opinion and schedule of assets held for investment (EBSA Exhibit 6 at 1-2). The NOR informed respondent that, pursuant to §§104(a)(5) and 502(c)(2) of ERISA, an annual report rejected under §104(a)(4) of the Act (29 U.S.C. §1024(a)(4)) for failure to provide material information required to be part of the annual report is treated as a failure to file an annual report unless a revised, satisfactory report is filed within 45 days of the date of the NOR (*id.* at 2). The NOR also warned respondent that the Secretary of Labor ("Secretary") could assess civil penalties in an amount of up to $1,100.00 per day from the date on which the annual report was due to be filed (without regard for any extension) should respondent fail to submit a revised annual report with the IQPA report and schedule attached within the 45-day time limit (*id.*). The NOR further warned that no extensions of time were available for such response (*id.* at 1, 3). Respondent replied to the NOR by letter dated January 6, 2005 (EBSA Exhibit 7), which was a verbatim copy of respondent's August 24, 2004 letter.

By February 28, 2005, respondent still had not filed an amended annual report containing the IQPA report and schedule for assets held for investment, and EBSA issued a Notice of Intent to assess a civil penalty ("NOI") against respondent in the amount of $86,500.00 (EBSA Exhibit 8 at 1). The NOI informed respondent that its 2002 annual report was deficient due to its failure to ensure that an IQPA report and a schedule of assets held for investment were attached and that respondent had failed to submit an amended annual report with these items attached within 45 days after the date of the NOR (*id* at 1-2). Accordingly, the NOI gave respondent notice of EBSA's intent to asses a penalty in the amount of $86,500.00, pursuant to §502(c)(2) of ERISA, 29 U.S.C. §1132(c)(2) (*id.* at 2). The second page of the NOI lists two "deficiency items" for which EBSA calculated a penalty (EBSA Exhibit 8 at 2). The first deficiency item, the missing IQPA report, garnered a penalty of $150.00 per day, which accrued for 577 days, from August 1, 2003, the day following the due date of the plan's 2002 annual report, until February 28, 2005, the date of the NOI, for the missing IQPA report for a total penalty of $86,550.00 (*id.*). The NOI stated, however, that the maximum penalty to be assessed for a missing IQPA report was $50,000.00 (*id.*). The second deficiency item, the missing financial schedule, garnered a penalty of $100.00 per day for a total of 577 days, from August 1, 2003, the day following the due date of the plan's annual report, until February 28, 2005, the date of the NOI, for a total penalty of $57,700.00 (*id.*). The NOI stated that the maximum penalty to be assed for a missing financial schedule was $36,500.00 (*id.*). Added together, the maximum penalties amounted to $86,500.00. Finally, the NOI directed respondent to file a Statement of Reasonable Cause in which respondent was to state that it complied with ERISA §101(b)(1), 29 U.S.C. §1021(b)(1), or state any mitigating circumstances regarding either the degree or willfulness of its noncompliance and set forth facts as to why the penalty, as calculated, either should be reduced or not assessed (*id.*).

In a letter dated March 31, 2005, respondent replied to the NOI, stating that at the time the 2002 annual report was filed, Dynapace only had "35 active participants" for the 2002 plan year (EBSA Exhibit 9 at 1). The letter stated further that the remaining participants shown listed on the Form 5500 were "terminated employees who had not yet received payment of their account balances" (*id*.). Respondent asserted that a required accountant's audit would have imposed a "severe financial hardship either on the company or [would] be passed to participant accounts" (*id*.). Respondent stated that it had retained an accounting firm and was in process of "working towards completing the 2002 audit" (*id.*). It requested relief on the grounds that: (1) it had acted in good faith in previously requesting relief from the reporting requirements from DOL; (2) it was operating under "severe financial strain;" (3) it filed the Form 5500, which lacked only the accountant's opinion; (4) it had retained a new accounting firm to finish the required audit; and (5) that, as a result of respondent's downsizing, it would not be required to file an IQPA report in the future (*id*.). At no time did respondent contest the necessity of filing a schedule of assets held for investment.

On July 5, 2005, EBSA issued a Notice of Determination on respondent's Statement of Reasonable Cause ("NOD"), which determined that no reasonable cause to waive the penalty existed (EBSA Exhibit 10 at 2). The NOD stated that an amended annual report containing the IQPA report and financial schedule had not been filed with EBSA and that respondent, who bears the burden of assuring that ERISA's reporting requirements are met, had not presented reasonable cause either for its original failure to file a complete 2002 annual report or for its failure to file an amended report in a timely manner (*id.*). The NOD also warned respondent that it had 35 days from the date of the NOD to request a hearing with this Office, or the penalty assessed would become the final order of the Secretary (*id.*). On May 31, 2006, Dynapace filed an amended 2002 annual report with an IQPA report attached (EBSA Exhibit 11).

On July 29, 2005, respondent requested a hearing with this Office (Answer of Respondent, Dynapace Corporation dated July 29, 2006). A *Notice of Docketing*, issued on August 9, 2005, required the parties to file a pre-hearing exchange within 30 days. Complainant filed its pre-hearing exchange on September 6, 2005; respondent failed to do so within the allotted time. On September 22, 2005, Associate Chief Judge Thomas M. Burke ordered respondent to show cause why a default judgment should not be entered.[2] On November 23, 2005, Judge Burke dismissed respondent's request for a hearing and ordered respondent to pay a civil penalty of $86,500.00 to complainant (*Decision and Order of Default Judgment* dated Nov. 23, 2005). On November 29, 2005, respondent moved to vacate the default judgment issued by the *Decision and Order* of Judge Burke. As grounds for the motion to vacate, respondent asserted that its representative had not received the *Order to Show Cause*, and, consequently, was unable to act on respondent's behalf (Motion to Vacate Default Judgment dated Nov. 29, 2006). On December 27, 2005, Judge Burke issued an order vacating the *Decision and Order of Default Judgment*, and the case was reassigned to me for hearing and decision.

[2] The regulations provide that where a party fails to comply with any order of an administrative law judge, the judge may impose sanctions, which may include the striking of any submissions of the non-complying party and the issuance of a decision against the non-complying party. 29 C.F.R. §18.6(d)(2)(v). Complainant, however, has not requested a default judgment.

On March 16, 2006, I issued a *Notice of Hearings and Pre-Hearing Order*, setting the hearing location and ordering the parties to exchange evidence. On May 22, 2006, the parties filed a Joint Motion for Postponement, advising this Office that they were engaged in efforts to settle the matter and requesting a continuance of at least 120 days. On May 24, 2006, I granted the motion continuing the hearing. On October 3, 2006, counsel for complainant advised this Office that the parties were unable to reach a settlement. Complainant filed its motion for summary decision on October 16, 2006, and respondent has not filed a response.

Discussion

Standard for Summary Decision

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges provide that an administrative law judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise … show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. §18.40(d); *see also* Fed. R. Civ. P. 56(c) (upon which 29 C.F.R. § 18.40 is modeled). In civil penalty proceedings under § 502(c)(2) of ERISA, where "no issue of a material of fact is found to have been raised, the administrative law judge may issue a decision which, in the absence of an appeal … shall become a final order [of the Department of Labor]." 29 C.F.R. §§ 2570.67(a)(1) and 2570.61(g). The party who files a motion for summary judgment has the initial burden of demonstrating an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion, the burden shifts to the non-moving party to show that there is a genuine issue of material fact left for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The opposing party may not "rest upon the mere allegations or denials" contained in the moving party's pleading, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). In evaluating a motion for summary decision, an administrative law judge is to review the factual evidence in the light most favorable to the non-moving party. *Stauffer v. Wal-Mart Stores, Inc.*, ALJ Case No. 99-STA-21, ARB Case No. 99-107, Decision and Order of Remand (Nov. 30, 1999). However, if the non-moving party fails to make a showing sufficient to establish the existence of an element of his case, then the moving party will be entitled to summary decision. *See Celotex*, 477 U.S. at 322-23.

Respondent's Failure to File the IQPA Report and Schedule of Assets Held for Investment

ERISA protects the security of employees and dependents affected by employee benefit plans by requiring administrators of plans covered by the Act[3] to comply with extensive

[3] ERISA regulates both employee welfare and pension plans. An employee welfare benefit plan is defined as one providing employees or their beneficiaries with "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability [or] death…." ERISA § 3, 29 U.S.C. §1002(1). An employee pension benefit plan is defined as one providing employees with retirement income, "regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits

reporting and disclosure provisions. *See* 29 U.S.C. §1001 (detailing Congressional findings) & ERISA §§ 101-05, 29 U.S.C. §§1021-25 (detailing reporting requirements). ERISA §101(b)(1) requires the administrator of a plan to file an annual report of the plan with the Secretary. 29 U.S.C. §1021(b)(1). The Act defines an administrator as either the person specifically designated by the terms of the plan's operating instrument or, in the absence of such designation, the plan's sponsor. ERISA § 3, 29 U.S.C. §1002(16)(A)(i) and (ii). Section 101(b)(1) provides that the annual report is to include the information required by ERISA §103, 29 U.S.C. §1023. ERISA §103 provides that a plan administrator of an employee benefit plan "shall engage" an independent qualified public accountant to conduct an examination of the plan's books and records to enable the accountant to form an opinion 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." 29 U.S.C. §1023(a)(3)(A). The IQPA report "shall be made part" of the plan's annual report, which is to be filed with the Secretary not more than 210 days after the close of a plan year. *Id.* §§ 1023(a)(3)(A) and 1024(a)(1). Where an employee benefit plan has fewer than 100 participants at the beginning of the plan year, the Act and its implementing regulations provide for "simplified" annual reporting. *See id*. §1024(a)(2)(A); 29 C.F.R. §2520.103-1(c). An administrator of such a plan is still required to file the Form 5500 and any applicable statements or schedules, but may not be required to file an IQPA report. 29 C.F.R. §§ 2520.103-1(c); 2520.104-41; 2520.104-46.

Additionally, when a plan holds assets for investment, ERISA §103(b)(3)(C) requires the administrator to attach to the annual report a schedule of those assets, "aggregated and identified by issue, borrower, or lessor, or similar party to the transaction." 29 U.S.C. §1023(b)(3)(C); *see also* 29 C.F.R. §2520.103-10(a) & (b). Assets held for investment purposes include any investment assets "held by the plan on the last day of the plan year [ ] and [a]ny investment asset which was purchased at any time during the plan year and was sold at any time before the last day of the plan year." 29 C.F.R. §2520.103-11(b)(1) & (2). If the investment is a debt obligation of the United States or any of its agencies, an interest issued by a company registered under the Investment Company Act of 1940, a bank certificate of deposit with a maturity of not more than one year, commercial paper with a maturity of not more than nine months, a participation in a bank common or collective trust, a participation in an insurance company pooled separate account, or a security purchased from a person registered as a broker-dealer and listed on a national securities exchange, it does not qualify as an asset held for investment. *Id.* §2520.103-11(b)(2). Additionally, the regulations provide that assets held for investment shall not include investments which were not held by the plan on the last day of the plan year for which the annual report was filed if that investment is reported on the annual report in any one of four schedules to be attached to the report. *See id.* §2520.103-11(b)(3).

If the Secretary determines that the annual report submitted by the plan administrator is either incomplete or contains a material qualification in the accountant's opinion, she is empowered to reject the annual report. ERISA §104(a)(4), 29 U.S.C. §1024(a)(4). If the

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from the plan." *Id.* §1002(2)(A). Employee benefit plans include both welfare and pension plans. *Id.* § 1002(3). ERISA is applicable to any employee benefit plan "established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce." ERISA § 4, 29 U.S.C. §1003(a)(1).

Secretary rejects an annual report as incomplete or containing a material qualification in the accountant's opinion, and a revised filing is not made within 45 days after the Secretary makes this determination, she is further empowered to retain an independent qualified public accountant to perform the required audit and to bring an action for appropriate legal or equitable relief. ERISA §104(a)(5), 29 U.S.C. §1024(a)(5). Pursuant to §502(c)(2), 29 U.S.C. §1132(c)(2), the Secretary retains the enforcement authority to assess civil penalties of up to $1,100.00 per day[4] from the date of a plan administrator's failure or refusal file an annual report required to be filed with the Secretary for those annual reports due after December 31, 1987. When the Secretary rejects an annual report under ERISA §104(a)(4), that rejected annual report is to be treated as if it had not been filed. ERISA §502(c)(2), 29 U.S.C. §1132(c)(2).

Assessment of the penalty under §502(c)(2) is guided by the regulations set forth at 29 C.F.R. §2560.502c-2. The plan administrator is responsible for filing an annual plan report meeting the requirements of ERISA §101(b)(1) and bears the liability for civil penalties assessed by EBSA[5] for failure or refusal to file a compliant annual report. 29 C.F.R. §2560.502c-2(a). EBSA is to consider "the degree and/or willfulness" of the administrator's failure or refusal to file the annual report in making its penalty determination. *Id.* §2560.502c-2(b)(1); *see also* H.R. Conf. Rep. 100-495, at 889 (1987) (providing that penalties reflect the "materiality" of the failure). EBSA must provide the plan administrator with written notice indicating its intention to assess a penalty and inform the administrator of the penalty amount, the period of time to which the penalty applies, and the reason or reasons for the penalty. 29 C.F.R. §2560.502c-2(c).

Upon the issuance of the notice of intention, part or all of a penalty may be waived upon a showing by the plan administrator, within 30 days of the service of the notice, that there was reasonable cause for the failure to file a compliant annual report. 29 C.F.R. §2560.502c-2(e). Although the regulations provide that the statement of reasonable cause must be made in writing, under penalty of perjury, and must "set forth all the facts alleged as reasonable cause for the reduction or non-assessment of the penalty," they are flexible and do not define particular circumstances under which reasonable cause may exist. *See id.* Such flexibility ensures that "appropriate consideration is given to the *good faith* and *diligent* efforts by the [plan] administrator to comply with the annual reporting requirements." *Dep't of Labor, EBSA v. Callaghan & Callaghan, Inc.*, 2005-RIS-00099, at 3 (ALJ Apr. 24, 2006) (emphasis added).

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[4] While the text of the Act provides a limit of $1,000.00 per day, this amount is subject to inflation-based adjustments. Section 31001(s) of the Debt Collection Improvement Act of 1996 amended the Federal Civil Penalties Inflation Adjustment Act of 1990 to require that the head of each Federal agency adjust civil monetary penalties subject to its jurisdiction for inflation. 29 C.F.R. §2575.100. The regulations now provide that the maximum civil penalties assessed under ERISA §502(c)(2) are increased from $1,000.00 per day to $1,100.00 per day for violations occurring after July 29, 1997. *Id.* §2575.502c-2. The NOR issued by EBSA in this case warned Dynapace that the Secretary could assess a civil penalty of up to $1,100.00 per day from the date on which the annual report was due (EBSA Exhibit 6).

[5] Secretary of Labor Order 1-2003 delegated the Department's ERISA enforcement responsibilities to EBSA. *See also* Secretary of Labor Order 1-87 (April 13, 1987).

After a review of all of the facts alleged in support of penalty waiver, EBSA is to notify the plan administrator in writing of its determination. 29 C.F.R. §2560.502c-2(g). The determination notice becomes the final order of the Secretary within 45 days of the notice service date unless, within 30 days of the service date,[6] the plan administrator requests a hearing with this Office in accordance with the procedures outlined at 29 C.F.R. §§2570.61-.71 and 29 C.F.R. §18.4. *Id*. §2560.502c-2(h).

As the chronology of undisputed material facts makes clear, EBSA followed the applicable procedures in assessing the penalty and even afforded respondent two additional 30-day periods and one additional 15-day period within which to file an amended annual report prior to the issuance of the NOR. Respondent admits that the plan is an employee benefit plan subject to the requirements of ERISA (*Answer of Respondent, Dynapace Corporation* dated July 29, 2005). Respondent admits further that it is both the administrator and sponsor of the plan (*id.*). Although respondent "does not contest the necessity of performing [a] certified audit" (*id.*) on the plan, it argues that as fewer than "40 active employees" were employed with the company as the result of layoffs, a "legitimate question" exists as to whether an IQPA report was required to be attached to the 2002 annual report. I disagree with respondent's argument and conclude that it was responsible for both engaging an independent qualified public accountant to provide an opinion of the plan and for attaching the IQPA report to the 2002 annual report. By its own filing, respondent listed 138 as the total number of plan participants at the beginning the plan year on the Form 5500 used to file the 2002 annual report (EBSA Exhibit 1 at 2, line 6). Additionally, in its Statement of Reasonable Cause, respondent admitted that the plan's participant count "exceeded 100" when the accounts of active participants and those participants terminated from the company were added together (EBSA Exhibit 9). As such, respondent did not administer a plan that was eligible for "simplified" reporting under the Act and regulations and was required to file an IQPA report with its annual report for 2002.[7]

With respect to the schedule of assets held for investment, oddly, complainant does not put forth facts in its motion for summary decision, accompanying statement of undisputed facts or memorandum of legal authorities showing that respondent failed to attach a schedule of assets held for investment to its annual report. Complainant instead focuses on respondent's failure to timely file the IQPA report, and characterizes that failure as the deficiency constituting the "missing material information" for which complainant argues EBSA's penalty ought to be upheld (*Memorandum in Support of Motion for Summary Decision* at 13). However, among the exhibits that accompany complainant's motion for summary decision is respondent's initial annual report, which contains Schedule H, the statement of financial information (EBSA Exhibit 1, Schedule H). In Part IV of Schedule H, respondent indicates that it did not hold any assets for investment during the plan year (*id.* at 4, line i). Yet, in the schedule's previous "Asset and

[6] Pursuant to 29 C.F.R. §2560.502c-2(i)(2), the NOD provided 35 days for response.

[7] In its answer and request for a hearing, respondent has admitted as much and subsequently filed an amended annual report with the IQPA report attached (EBSA Exhibit 11). Complainant acknowledged in its *Statement of Undisputed Facts* accompanying its motion for summary decision that respondent had in fact filed the amended report and acknowledged in its *Memorandum in Support of Summary Decision* that respondent's amended filing corrected the deficiencies at issue.

Liability Statement" in Part I, respondent indicated that the plan held the following general investments during the 2002 plan year: interest-bearing cash, participant loans, and interest in pooled separate accounts (*id*. at 1-2, lines 1(c)(1)-(15)). Additionally, in Part II of Schedule H, respondent indicates in the "Income and Expense Statement" that it earned interest on its investments held in both interest-bearing cash and in participant loans (*id.* at 2). Furthermore, Schedule D, which was included in the original filing of the annual report, lists the dollar amount of the interests held in the plan's pooled separate accounts (EBSA Exhibit 1, Schedule D). Finally, in its Statement of Reasonable Cause, respondent does not dispute (nor has it ever disputed) that it was required to file a schedule of assets held for investment and, apparently, attached such schedule to its amended annual report (EBSA Exhibit 11).[8] Accordingly, I conclude (and respondent does not contest) that respondent held assets for investment during the 2002 plan year and was required to file a schedule of such assets with its original annual report. By its own filing, respondent's Schedule H shows the various dollar amounts of investments held through the end of the 2002 plan year, and respondent has put forth no facts indicating that any of these investments do not qualify as "assets held for investment" pursuant to 29 C.F.R. §§2520.103-11(b)(2)(i)-(vii) or 2520.103-11(b)(3)(i)-(iv).

Therefore, since respondent's original annual report failed to contain an IQPA report and a schedule of assets held for investment, and respondent made no amended filings containing these items in response to the January 29, March 17, and August 16, 2004 letters, the annual report was incomplete and properly rejected by the Secretary. Since the Act provides that an annual report rejected by the Secretary as incomplete is to be treated as if it had not been filed, civil penalties in the amount of up to $1,100.00 per day[9] may be assessed against the plan administrator. The Secretary, acting through EBSA, followed the applicable regulatory procedures, providing respondent with the appropriate written notices, an opportunity for penalty waiver or reduction, and even afforded respondent two 30-day periods and one 15-day period in which to file an amended annual report prior to the issuance of the NOR. Based on the facts respondent provided in the original filing of its annual report, there remains no genuine issue of material fact for resolution at a hearing on the issues of whether respondent was required to file the IQPA report and asset schedule. Complainant has put forth facts, which remain uncontested, showing that respondent failed to include both the IQPA report and the Schedule of Assets for Investment with its original annual report. The Act and regulations required that such items be included with the annual report filed with the Secretary. Respondent's initial failure to attach such items to the annual report rendered it incomplete and properly rejected; respondent's subsequent failure to amend the annual report within the penalty-free timeframe rendered it properly the subject of penalties to be assessed by EBSA

[8] As part of its amended annual report, respondent attached seven pages of financial statements to the amended Form 5500 (EBSA Exhibit 11). However, EBSA has chosen to include *only* the IQPA report, the statement of net assets available for benefits, and the table of contents in its filing with this Office. The table of contents states that respondent's seventh page was its "Schedule of Assets Held at the End of the Year," but, again, oddly, EBSA has not provided the actual schedule.

[9] *See* note 4 *supra*.

EBSA's Penalty Assessment

Unless EBSA has acted in an arbitrary, capricious, or unreasonable manner, an administrative law judge generally will not disallow a penalty assessed for failure to file a complete annual report in a timely manner. *See e.g.*, *Dep't of Labor, PWBA v. Sociedad Para Asistencia Legal Money Purchase Plan*, 1994-RIS-00062, at 3 (ALJ Mar. 29, 1995); 5 U.S.C. §706(2); *see also Northwestern Inst. of Psychiatry v. Martin*, No. CIV. A. 92-0321, 1993 WL 52553, at * 3 (E.D. Pa. Feb. 24, 1993) (citing *Revak v. Nat'l Mines Corp.*, 808 F.2d 996, 1002 (3d Cir. 1986) for the proposition that courts must defer to an agency's "consistent interpretation" of its own rules unless such interpretation is either "plainly erroneous" or "inconsistent with the regulation.")). I conclude that EBSA did not act in an arbitrary, capricious, or unreasonable manner in assessing the $86,500.00 penalty against respondent.

Several factors support this conclusion. First, ERISA places the responsibility for accurate and timely filing of the annual report on the plan administrator. As such, respondent bore the original responsibility for filing a compliant annual report and the subsequent responsibility for correcting the deficient filing. EBSA's three letters issued before the NOR should have alerted Dynapace of the need to file an amended report with the IQPA opinion and schedule of assets held for investment within the timeframes provided by the letters. Respondent's first response, which occurred ten days after EBSA's final request letter of August 16, stated simply that it had "determined that an independent accountant's opinion was not required" and asked EBSA whether it agreed with respondent's conclusion (EBSA Exhibit 1). However, despite the fact that EBSA had afforded respondent an additional 75 days within which to file a compliant annual report, respondent failed to do so within that timeframe. Additionally, after the issuance of the NOR, which provided respondent with 45 penalty-free days in which to file a compliant annual report and warned that extensions of time were not available, respondent replied with a copy of its letter of August 26. Additionally, after the annual report was rejected by the Secretary, responded informed EBSA that it had retained an accounting firm to perform the independent audit, but respondent did not file its amended annual report until May 31, 2006, well after the penalty-free deadlines had lapsed. Although respondent stated in its Statement of Reasonable Cause that it made a past effort to contact EBSA, it has not put forth any facts, let alone facts evidencing diligent efforts to comply with ERISA's annual reporting requirements, that it took steps to file a compliant annual report in accordance with the deadlines.

Second, respondent's mistaken assertion that an IQPA report would not be required for the plan during the 2002 plan year on account of Dynapace's downturn in business does not excuse respondent from its failure to timely file a compliant annual report. In both of its response letters, its Statement of Reasonable Cause, and its answer in requesting a hearing with this Office, respondent asserts that, as a result of a downturn in business and subsequent layoffs, it only retained 35 "active" employees. However, in the same stroke, it agrees in those same documents that the plan participant count exceeded 100 and admits the necessity of performing a certified audit. As discussed, the Act and implementing regulations provide for simplified annual reporting for plans with fewer than 100 participants at the *beginning of the plan year*. Dynapace's entries on the Form 5500 show that the plan had 100 or more participants at the beginning of plan year 2002. Respondent's assertion that only 35 participants were "active" is

irrelevant; over 100 participants had accounts with the plan at the beginning of 2002. As the governing law and regulations make the number of plan participants at the beginning of the plan year (and not their status) the operative issue for determining whether an IQPA report is required, respondent's assertion that fewer than 100 participants were "active" would not relieve it of its duty to file an IQPA report for 2002.

However, assuming, *arguendo*, that the plan did have fewer than 100 participants at the beginning of 2002, there is no evidence that respondent attempted to amend the original Form 5500 to reflect the correct number of plan participants. The number of plan participants at the beginning of the plan year would bear on the issue of whether an IQPA report was required to be filed, and, as plan administrator, respondent had a duty to provide an accurate count on the Form 5500 or to correct any inaccurate count. With its three request letters, EBSA afforded respondent 75 days to do so. Additionally, the NOR and NOI afforded respondent the opportunity to amend the original report or to explain any circumstances that would bear on why respondent failed to take corrective action to amend its participant count. Respondent declined to take these opportunities.

Third, EBSA states that the penalty it imposes for a missing or deficient accountant's report is $150.00 per day for the total number of days the report is missing from the annual report; in this case, the penalty amounted to $86,550.00 and was capped at $50,000.00. For missing financial statements, EBSA imposes a penalty of $100.00 per day for the total number of days the schedule is missing from the annual report; in this case, the penalty amounted to $57,700.00 and was capped at $36,500.00. These *per diem* penalties are well below the maximum of $1,100.00 per day that the Secretary is authorized to assess under §502(c)(2) of ERISA. Although respondent eventually filed a compliant annual report with the IQPA and schedule of assets held for investment attached, it has not put forth any facts to suggest that EBSA was unreasonable in selecting the penalties that it ultimately assessed. Respondent has never contested the necessity of filing the schedule of assets held for investment, and I conclude that EBSA has not only acted within its authority to assess the $100.00 per day but has acted reasonably in so doing. Although respondent has contested the necessity of filing the IQPA report, its rationale for its failure to file the report is irrelevant and could not constitute cause for penalty reduction or waiver. I conclude that EBSA has acted within its authority to assess the $150.00 *per diem* penalty and acted reasonably in so doing. "ERISA places the responsibility for accurate, complete, and timely reporting on the plan administrator. [Respondent's] failure to take steps to ensure that the IQPA report was properly filed does not demonstrate good faith or diligence in the performance of a plan administrator." *Callaghan & Callaghan*, 2005-RIS-00099 at 4.

Based on the foregoing, I conclude that complainant EBSA has proven that Dynapace has failed to file a complete 2002 annual plan report and has further shown that the civil penalties it imposed are reasonable. EBSA is therefore entitled to summary decision in its favor.

ORDER

IT IS ORDERED that complainant's motion for summary decision is **GRANTED**.

IT IS FURTHER ORDERED that respondent Dynapace Corporation, as plan administrator, shall pay the U.S. Department of Labor a civil penalty in the amount of $86,500.00 for violations of the Employee Retirement Income Security Act of 1974. Respondent is directed to pay the penalty within 30 days from the date of service of this decision. Respondent's payment shall be sent to the U.S. Department of Labor, ERISA Civil Penalty Collections, P.O. Box 100240, Atlanta, Georgia. Amounts not paid by that time shall be subject to penalties and interest provided for in the Act and regulations.

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JEFFREY TURECK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 29 CFR § 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 the decision will become the final agency action within the meaning of 5 U.S.C. §704.