U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

FIVE M's, LLC, d/b/a L&W AUTO SALVAGE (L&W AUTO PARTS) and JOHN MORGAVAN,

and

FIVE M's LLC, d/b/a VALPARAISO CAR CARE TRANSMISSION and JOHN MORGAVAN,

RESPONDENTS.

ARB CASE NO. 2019-0014

ALJ CASE NOS. 2015-FLS-00010
2015-FLS-00011

DATE: November 13, 2020

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Paul L. Frieden, Esq.; Sara A. Conrath, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondents:
Gordon A. Etzler, Esq.; *Gordon A. Etzler & Associates, LLP*; Valparaiso, Indiana

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. § 201, et seq. (2018), and its implementing regulations at 29 C.F.R. Part 578 (2020). The Administrator of the Wage and Hour Division of the United States Department of Labor (Administrator) appeals the November 19, 2018 Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ). In the D. & O., the ALJ reduced the civil money penalty (CMP) assessed by the Wage and Hour Division (WHD) on Respondents Five M's, LLC, d/b/a L&W Auto Salvage (L&W), Five M's LLC, d/b/a Valparaiso Car Care Transmission (Valparaiso), and John Morgavan (Morgavan) (collectively, Respondents) for violations of the FLSA's overtime and minimum wage requirements[1] from $38,500 to $8,750. For the reasons below, we order Respondents to pay a CMP of $19,250.

BACKGROUND

Five M's, LLC (Five M's) is the parent company of a number of auto-related businesses: L&W, a salvage yard, Valparaiso, a repair shop, and Premier Auto Sales, a car dealership.[2] Morgavan is an owner of Five M's and directs and controls its operations.[3]

Morgavan and his companies have a history of FLSA violations. In 2005, WHD investigated Valparaiso and determined that it had violated the FLSA's overtime and minimum wage laws by failing to pay an employee his last paycheck, and by paying hourly employees their regular pay rates, rather than the required overtime premium rates, for overtime hours.[4] As part of that investigation, WHD provided Valparaiso and Morgavan guidance on FLSA compliance and Wage and Hour compliance publications related to the FLSA.[5]

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[1] *See* 29 U.S.C. §§ 206 (minimum wage), 207 (overtime).

[2] Hearing Transcript (Tr.) at 101-02, 183. Premier Auto Sales is not a respondent in this action.

[3] Tr. at 171, 183; *Perez v. Five M's, LLC*, 2:15-cv-00176, 2017 WL 784204, at *1 (N.D. Ind. Mar. 1, 2017). The cited decision of the District Court of the Northern District of Indiana was admitted at the hearing as Administrator's Exhibit (AX) 10.

[4] Tr. at 79; *Perez*, 2017 WL 784204, at *1.

[5] *Perez*, 2017 WL 784204, at *10.

In 2012, Five M's was accused of another minimum wage violation for failing to pay an employee his last paycheck.[6] WHD and Five M's engaged in conciliation and WHD again provided Five M's with compliance publications related to the FLSA.[7]

WHD initiated another investigation of Respondents in 2014 and, once again, found that Respondents had committed a number of violations of the FLSA's overtime and minimum wage requirements.[8] Much like the findings from the 2005 investigation, WHD determined that Valparaiso underpaid twenty-one employees by paying hourly and salaried employees at their regular pay rates, rather than overtime premium rates, for overtime hours, by paying "book rate" technicians[9] less than the minimum wage and less than the required overtime rate, and by issuing a paycheck with insufficient funds to one of its employees.[10] Similarly, WHD determined that L&W underpaid fourteen employees by paying hourly and salaried employees at their regular pay rates, rather than overtime premium rates, for overtime hours, and by docking an employee's last paycheck.[11]

On April 24, 2015, WHD issued determination letters to the Respondents assessing a total of $14,477.06 in back wages for these violations.[12] WHD also assessed Respondents CMPs totaling $38,500. WHD reached this amount by assessing the statutory maximum penalty of $1,100 for each of the thirty-five

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[6] Tr. at 79.

[7] *Id.*; *Perez*, 2017 WL 784204 at *10.

[8] Tr. at 74, 77; AX 2, 8. The investigation period was October 7, 2012 to October 5, 2014. AX 2, 8.

[9] Valparaiso paid some technicians based on the amount of time it should take an average mechanic to perform a specific task, rather than the actual time the technician worked. *Perez*, 2017 WL 784204, at *4.

[10] *Id.* at *4, 9; AX 13.

[11] *Perez*, 2017 WL 784204, at *3, 9; AX 12.

[12] AX 2, 8.

employees who had been underpaid.[13] Respondents denied that they violated the FLSA or owed the back wages or penalties assessed by WHD.[14]

The Administrator pursued two enforcement actions against Respondents. First, on May 1, 2015, the Administrator filed a petition against Respondents in the United States District Court for the Northern District of Indiana.[15] In that action, the Administrator sought payment of back wages, an additional, equal sum as liquidated damages, and an injunction to restrain Respondents from violating the FLSA.[16] Second, on August 27, 2015, the Administrator filed Orders of Reference with the Office of Administrative Law Judges.[17] In the administrative action, the Administrator sought payment of the CMP.[18] The ALJ stayed the administrative action on December 1, 2015, pending the outcome of the District Court case.

On March 1, 2017, the District Court entered summary judgment in favor of the Administrator.[19] The District Court affirmed WHD's determination that Respondents had violated the FLSA and ordered Respondents to pay the $14,477.06 sought by the Administrator as back wages.[20] The District Court also ordered Respondents to pay an additional $14,477.06 as liquidated damages and enjoined Respondents from committing future FLSA violations.[21] In assessing liquidated damages and enjoining Respondents, the District Court considered Respondents' history and pattern of violations despite the previous notice and guidance they had

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[13] *Id.*

[14] AX 3, 9. WHD also charged Respondents with violations of the FLSA's child labor and recordkeeping laws in connection with the employment of Morgavan's 17 year old son. D. & O. at 1; AX 4. The ALJ ruled against the Administrator on these charges, and the Administrator did not appeal that part of the ALJ's decision. *See* D. & O. at 8-9.

[15] December 1, 2015 Order to Stay Proceedings at 1.

[16] *See Perez*, 2017 WL 784204, at *1.

[17] AX 1, 7.

[18] *Id.*

[19] *Perez*, 2017 WL 784204, at *10-11.

[20] *Id.* at *11.

[21] *Id.* at *9-10.

been given regarding the FLSA's requirements.[22] The District Court determined Respondents' conduct was willful, was not in good faith, and was not reasonable.[23]

After the District Court entered judgment in the Administrator's favor, the Administrator filed a motion for summary decision with the ALJ, which the ALJ granted in part and denied in part.[24] The ALJ concluded that the District Court's ruling decided several issues that were critical to the resolution of the assessment of the CMP in the administrative action: that Respondents violated the overtime and minimum wage requirements of the FLSA, that Respondents' violations were repeated and willful, that Respondents were informed by WHD that their conduct was unlawful, and that Respondents either knew or were in reckless disregard of the requirements of the FLSA.[25] Therefore, the ALJ determined that it was proper to assess a CMP.[26] However, the ALJ determined that there were factual disputes concerning whether the $38,500 assessment was appropriate.[27] Therefore, the ALJ conducted a hearing on April 17, 2018.

After the hearing, the ALJ determined that the maximum CMP of $1,100 for each violation was not appropriate, and reduced the penalty to $250 per violation.[28] The Administrator appealed, urging the Administrative Review Board (ARB or the Board) to reinstate the maximum CMP.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under the FLSA.[29] The FLSA, at 29 U.S.C. § 216(e)(4), affords any party against whom CMPs have been assessed the opportunity to challenge any

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[22] *Id.*

[23] *Id.*

[24] April 5, 2018 Order Granting Partial Summary Decision, Denying Motion to Dismiss and Establishing Location of Hearing.

[25] *Id.* at 5-6.

[26] *Id.*

[27] *Id.* at 6.

[28] D. & O. at 7-8.

[29] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

such assessment through administrative procedures, including the opportunity for a hearing, as established by the Secretary of Labor in accordance with the Administrative Procedure Act. The APA provides, at 5 U.S.C. § 557(b), that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . ." Thus, the Board reviews the ALJ's decision de novo,[30] although on the record that was before the ALJ.[31]

DISCUSSION

1. The Civil Money Penalty

The FLSA provides that "[a]ny person who repeatedly or willfully violates [the FLSA's overtime or minimum wage provisions] shall be subject to a civil penalty not to exceed $1,100 for each such violation."[32] A violation is repeated if, inter alia, the employer has committed a previous violation, "provided the employer has previously received notice, through a responsible official of [WHD] or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the [FLSA]."[33] A violation is willful "where the employer knew that its conduct was prohibited by the [FLSA] or showed reckless disregard for the requirements of the [FLSA]."[34]

As set forth above, based on the rulings from the District Court, the ALJ held that Respondents' conduct was repeated and willful. That holding was not challenged on appeal. Therefore, a CMP is appropriate. The question before the ALJ below, and on appeal to the Board, is what amount should be assessed against Respondents as a penalty.

The FLSA requires that in determining the amount of a CMP, WHD must consider "the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation . . . ."[35] In addition to these two mandatory statutory considerations, the FLSA's implementing regulations also

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[30] 5 U.S.C. §§ 554, 557; *see also Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. ZL Rest. Corp.*, ARB No. 2016-0070, ALJ No. 2013-FLS-00004, slip op. at 4 (ARB Jan. 31, 2018).

[31] *See* 29 C.F.R. § 580.15; *see also ZL Rest. Corp.*, ARB No. 2016-0070, slip op. at 4.

[32] 29 U.S.C. § 216(e)(2).

[33] 29 C.F.R. § 578.3(b)(1).

[34] 29 C.F.R. § 578.3(c)(1).

[35] 29 U.S.C. § 216(e)(3); *see also* 29 C.F.R. § 578.4(a).

provide other discretionary factors that may be considered in determining the amount of the penalty to be assessed. These include (1) the employer's good faith efforts to comply with the FLSA, (2) the employer's explanation for the violations, (3) the employer's previous history of violations, (4) the employer's commitment to future compliance, (5) the interval between violations, (6) the number of employees affected, and (7) whether there is any pattern to the violations.[36]

As set forth above, the Administrator elected to impose the maximum statutory penalty—$1,100—for each of the thirty-five employees Respondents underpaid in violation of the FLSA. At the hearing, the WHD officials responsible for investigating Respondents testified regarding their reasons for assessing the maximum penalty in this case. They explained that they applied the maximum penalty initially because Respondents' conduct was both repeated and willful.[37] They also testified that they left the CMP at the maximum because Respondents refused to commit to future compliance with the FLSA and refused to pay the back wages WHD calculated as owed.[38]

Although WHD did not take into account any mitigating factors, the ALJ did. The ALJ considered the small size of Respondents' business, the number of years that elapsed between the investigations, and the relatively small amount ($414) of the average back wages owed to each employee.[39] The ALJ also concluded that Respondents' refusal to pay was the product of an "honest, though erroneous belief that the 35 employees were exempt under the FLSA as auto service providers."[40] Based on these mitigating factors, the ALJ reduced the penalty to just $250 per employee.

We conclude that neither the maximum $1,100 penalty assessed by the Administrator nor the reduced $250 penalty imposed by the ALJ are appropriate based on the facts and circumstances presented in the record. For the reasons that follow, we hold that the Administrator erred by neglecting to consider and account for important mitigating factors analyzed by the ALJ which do warrant reducing the CMP from the statutory maximum. However, we disagree with the weight the ALJ afforded to the mitigating factors. The several aggravating factors present in

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36 29 C.F.R. § 578.4(b).

37 Tr. at 112-14, 132.

38 *Id.* at 119-23, 130, 132-34.

39 D. & O. at 7.

40 *Id.* at 7-8.

this case, including the willful and repeated nature of Respondents' conduct and Respondents' lack of good faith efforts to comply with the law, necessitate a larger penalty than that which was imposed by the ALJ.

As emphasized by the Administrator, the record firmly establishes that Respondents' violations of the FLSA are both repeated and willful. Respondents are not first time offenders. In a span of nine years, Morgavan's businesses were implicated in three separate FLSA actions—two investigations and one conciliation. The parallels between the 2005 and 2014 investigations are notable. With both investigations, Respondents were charged with underpaying employees on their last paychecks and paying employees their regular pay rates in lieu of the required overtime rates for overtime hours. The District Court found that the violations from the 2014 investigation "mirror[ed]" the violations from the 2005 investigation.[41] In fact, the District Court stated that "[t]he only thing that seems to have changed since 2005 is the fact that Mr. Morgavan created a parent company (Five M's) to make filing his taxes easier."[42]

It is also significant that after both the 2005 investigation and the 2012 conciliation, WHD gave Respondents information to assist them with complying with the FLSA's requirements. The District Court noted that after the 2005 investigation, Valparaiso and Morgavan were given specific guidance on FLSA compliance as well as numerous Wage and Hour compliance publications related to the FLSA.[43] Following the 2005 investigation and 2012 conciliation, Respondents also agreed to comply with the FLSA moving forward.[44] The fact that Respondents nevertheless reverted to their pattern of unlawful pay practices weighs in favor of a larger penalty than that which was imposed by the ALJ.[45]

Furthermore, the evidence of record shows that Respondents' unlawful pay practices were not isolated or scattered, but instead spread to a large portion of Respondents' workforce. During the two year period of the most recent investigation, from October 7, 2012 to October 5, 2014, WHD identified violations affecting thirty-five employees. Morgavan testified he employed somewhere between

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41 *Perez*, 2017 WL 784204, at *2.

42 *Id.*

43 *Id.* at *10.

44 Tr. at 79.

45 *See* 29 C.F.R. § 578.4(a), (b)(3), (7).

twenty-five and forty individuals in 2013 and 2014.[46] Thus, although Respondents' workforce was relatively small, Respondents underpaid a significant portion of their employees.[47]

As noted by the Administrator, Respondents also refused to commit to comply with the requirements of the FLSA in the future. After both the 2005 investigation and the 2012 conciliation, Respondents agreed to comply with the FLSA. Yet, those commitments were illusory, as the violations uncovered in the 2014 investigation make clear. WHD's witnesses also testified that during the most recent investigation, Respondents refused even to offer a token commitment to comply with the FLSA.[48] This also weighs in favor of a larger penalty.[49]

Respondents have also failed to offer any reasonable explanation or excuse for their FLSA violations or demonstrate that they took good faith efforts to comply with the law.[50] As noted above, the District Court found that Respondents "produced no evidence that [their] conduct resulting in FLSA violations was in good faith and reasonable."[51] The ALJ likewise found that the explanations offered by Respondents for their conduct were "unreasonabl[e]."[52] We agree.

As already explained, Respondents were previously cited for overtime and minimum wage violations, were put on notice of the FLSA's requirements, were given information to help them comply with the law, and yet still failed to fulfill their obligations. At the hearing, Respondents did not offer any meaningful testimony or evidence explaining why their conduct was reasonable, was justified, or should be excused under these circumstances. To the contrary, Morgavan, despite this history, admitted at the hearing that he was still largely unaware of his

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46 *See* Tr. at 184.

47 *See* 29 C.F.R. § 578.4(b)(6).

48 Tr. at 130, 133.

49 *See* 29 C.F.R. § 578.4(b)(4).

50 *See* 29 C.F.R. § 578.4(b)(1)–(2).

51 *Perez*, 2017 WL 784204, at *9.

52 D. & O. at 6.

obligations as an employer under the FLSA.[53] Morgavan also expressed that he was unfamiliar with the District Court's ruling, even though the District Court enjoined him and his companies from violating the FLSA and found that his violations of the law were willful and unreasonable.[54] Morgavan testified that it was his intention to comply with the FLSA and that he had done what he could, as a small business owner, to try to comply.[55] Yet, Morgavan's avowals ring hollow in light of his pattern of conduct and history of noncompliance.

Although the ALJ found that Respondents' violations were "unreasonable," he nevertheless found as a mitigating factor in Respondents' favor that Respondents "honest[ly], though erroneous[ly]" believed an exception or exemption applied which relieved them of their obligations under the FLSA.[56] Although this conclusion was obviously an important part of the ALJ's decision to significantly reduce the CMP, the ALJ did not elaborate on or explain a basis for it. We hold that the record does not support the ALJ's conclusion that Respondents' conduct was the product of an honest mistake. At times at the hearing and in briefing, Respondents alluded to or made legal arguments regarding exceptions or exemptions available under the FLSA. For example, reference was made to an exception from the overtime requirement for certain commissioned employees in retail or service establishments.[57] Reference was also made to an exemption from overtime for sales people, service advisors, partsmen, and mechanics at car dealerships.[58] However, Respondents did not offer testimony or other evidence at the hearing that would allow the Board to conclude that Respondents' conduct was actually motivated by

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[53] Morgavan testified:

> The information [the WHD investigator] requested was, like I said, it was just a three-page pamphlet of, I believe the Department of Labor rules and regulations, and to be honest with you, **I don't know half of them anyhow**. I'm not sure what they're talking about today when they're talking about different types of orders and stuff like that. I mean, **I'm really not familiar**. **As a small businessman, if it's my obligation, I didn't know anything about it**. . . ."

Tr. at 179-80 (emphasis added); *accord* Tr. at 185-87.

[54] *Id*. at 185-86.

[55] *Id*. at 180, 186-87.

[56] D. & O. at 7-8.

[57] *See* 29 U.S.C. § 207(i).

[58] *See* 29 U.S.C. § 213(b)(10)(A); *see also Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117 (2016).

an honest belief that these exemptions applied to their workforce.[59] In fact, Morgavan testified that he did not understand or know what WHD's witnesses were referring to when they discussed the exemptions and FLSA rules at the hearing.[60] Respondents' failure to take good faith efforts to comply or establish reasonable explanations for their conduct also warrant a larger penalty than that which was imposed by the ALJ.

Although there are multiple aggravating factors, the ALJ reasonably concluded that there are also critical mitigating factors not considered by the Administrator that warrant reducing the CMP from the statutory maximum. As the ALJ found, Respondents are undoubtedly a small business. Although the record is not clear as to the exact number of individuals Respondents employed during the investigation period,[61] Morgavan estimated that between 2013 and 2014, he employed twenty-five to forty individuals.[62] The small size of Respondents' business weighs in favor of reducing the CMP from the maximum imposed by WHD.[63]

The Administrator argues that WHD considered the size of Respondents' business, but did not, and was not required to, reduce the CMP because of it.[64]

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[59] The only citation to the record the ALJ made for the proposition that Respondents believed an exception applied to their workforce was to Respondents' Exhibit L, a set of three articles regarding FLSA exemptions, including one related to the service advisor exemption at 29 U.S.C. § 213(b)(10)(A). D. & O. at 6. Although the ALJ admitted this exhibit, among many others, into the record at the outset of the hearing, Respondents never elicited testimony explaining the exhibit or establishing that Respondents relied on the article (or the substance of the article) when setting their pay practices. We hold that the cited exhibit does not establish that Respondents were motivated by a belief that this exemption applied to their workforce, or that such a belief would have been honestly held under the facts of this case.

[60] *See* Tr. at 179-80, 186-87.

[61] The Board has held that "[i]t was incumbent upon WHD to ask for the data needed to evaluate the size of the business, particularly when dealing with an obviously small business." *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Chrislin, Inc.*, ARB No. 2000-0022, ALJ No. 1999-CLA-00005, slip op. at 10 (ARB Nov. 27, 2002).

[62] *See* Tr. at 184.

[63] *See* 29 U.S.C. § 216(e)(3); 29 C.F.R. § 578.4(a). The Administrator argues that the ALJ erred by reducing the CMP based on the size of Respondents' business at the time of the hearing, rather than at the time of the violations. Administrator's Opening Brief on Appeal (Adm'r Br.) at 21. Although the ALJ did cite the size of Respondents' business at the time of the hearing, he also cited and relied on the size of Respondents' business at the time of the violations. D. & O. at 7 ("At the time of the violations, the size of the Employer's business was less than 100 . . . .").

[64] Adm'r Br. at 15.

However, the WHD investigator testified that WHD did not actually take the size of Respondents' business into consideration. Instead, she testified that other aggravating factors were determinative for purposes of assessing the maximum penalty, regardless of the size of Respondents' business.[65]

The Administrator is correct that WHD is not required to reduce the size of the CMP just because a business is small.[66] But, the FLSA is clear that WHD must at least consider the size of the business in determining the CMP and weigh it along with the other relevant factors.[67] The testimony at the hearing demonstrates WHD refused to even consider Respondents' size. When the small size of Respondents' business is weighed with and against the other statutory and regulatory factors, we agree with the ALJ's reasonable conclusion that Respondents' size does warrant reducing the CMP from the statutory maximum.

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[65] The WHD investigator testified:

> [ALJ]: So my question then would be what factors other than repeated and willful did you consider in coming up with the final recommended CMP?
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> [Investigator]: Well factor repeated.
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> [ALJ]: Other than those two, and if there were no others then that's fine, but what other factors did you consider other than they were violations that were repeated and willful?
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> [Investigator]: None.
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> [ALJ]: All right. And is that the same with L&W Auto Salvage?
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> [Investigator]: Yes.
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> [ALJ]: I guess the question I'm asking you is it would appear there were no factors taken into consideration that might tend to mitigate the penalty, is that fair to say? Do you agree?
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> [Investigator]: I agree.

Tr. at 114-15; *accord* Tr. at 113, 119-23.

[66] *See Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Elderkin*, ARB Nos. 1999-0033, -0048, ALJ No. 1995-CLA-00031, slip op. at 14-15 (ARB June 30, 2000).

[67] 29 U.S.C. § 216(e)(3); 29 C.F.R. § 578.4(a); *see also Chrislin*, ARB No. 2000-0022, slip op. at 9 ("There is little if any evidence that either WHD or the ALJ weighed the small size of Chrislin's business against the gravity of the violations . . . . Because the statute mandates that size of the business be considered in determining the penalty, this factor cannot be treated so lightly.").

We also agree with the ALJ that the gravity or seriousness of the Respondents' conduct is mitigated by the relatively small size of the amounts owed by Respondents to each employee.[68] As noted by the ALJ, Respondents underpaid each employee by just $414, on average, over a two year period.[69] The evidence also shows that twenty-two of the thirty-five employees were underpaid by less than $200, and eleven were underpaid by less than $100.[70] In addition, approximately 50% of all of the back wages owed were due to just two employees.[71] Although Respondents engaged in a repeated, willful, and pervasive pattern of violations, the relatively small average underpayments are not so grave as to warrant the maximum CMP.

Upon consideration of all of the foregoing aggravating and mitigating factors, we assess a CMP of $550 for each of the thirty-five employees who were underpaid in violation of the FLSA, for a total of $19,250. This CMP appropriately balances the repeated and willful nature of Respondents' conduct, the pattern and history of Respondents' behavior, and Respondents' lack of good faith effort or reasonable excuse for their conduct, against the relatively small size of the Respondents' business and of the size of the violations.

2. Respondents' Application for Sanctions

On August 30, 2019, after the briefing period for this appeal closed, Respondents submitted a brief styled as an "Application for Sanctions" (Application), in which Respondents asked the Board to enforce a "global" settlement agreement that they allegedly reached with the Administrator. According to Respondents, Respondents and the Administrator had been engaged in settlement negotiations. Although the Administrator rejected all of Respondents' settlement offers, Respondents nevertheless delivered to the Administrator a check in the amount of $14,477.06, which Respondents classify as a type of first settlement installment payment and a "conditional term of settlement

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68 *See* 29 U.S.C. § 216(e)(3); 29 C.F.R. § 578.4(a).

69 *See* AX 12, 13.

70 *See id.*

71 *See id.*

negotiations."[72] The Administrator retained the check, which Respondents argue was "the concluding act of the formation of the terms of settlement contract [sic]."[73]

The Administrator denies the existence of a settlement agreement. The Administrator asserts she rejected each of Respondents' settlement offers, which would have had Respondents pay less than the amount of the judgement already entered against them in the District Court action.[74] The Administrator also asserts that the check was received independent of any settlement offer and that she retained the check as partial satisfaction of the District Court judgment, which, to that point, was unpaid.[75]

We deny Respondents' Application and request to enforce the alleged settlement agreement. Respondents' Application, in essence, presents a contract dispute and claim for breach of contract. The Board was created by delegation from the Secretary of Labor and, therefore, has a limited and defined jurisdiction and scope of authority. Respondents have not shown what legal power, authority, or ability the Board has to enforce a disputed settlement agreement or find that the Administrator breached the purported agreement in this case, particularly when the alleged settlement concerns a claim that was, in large part, resolved in a separate forum (the District Court) and involves a statute that has specified settlement rules.[76]

Even assuming we had the power or authority to resolve the issues raised by Respondents' Application, we would find that there are no grounds to grant Respondents the relief that they seek. Respondents concede that the Administrator rejected all of Respondents' settlement offers.[77] Although Respondents assert that

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[72] Respondents' Application for Sanctions (App.) at 1; Respondents' Reply to Administrator's Opposition to Respondents' Application for Sanctions (Reply to App.) at 2.

[73] App. at 2.

[74] Administrator's Opposition to Respondents' Application for Sanctions (Opp. to App.) at 3

[75] *Id*. at 3, 6-7.

[76] *See* 29 U.S.C. § 216(c).

[77] Respondent's Brief on Appeal (Resp. Br.) at 3 (stating that the Administrator "has this week rejected offers of settlement"); Reply to App. at 2 ("DOL has never proposed a counteroffer, even now" and "'[t]hrough its attorney, DOL's position of settlement was not to accept any amount, if not the full amount payable in full."). The evidence submitted by the Administrator also confirms the agency rejected Respondents' proposals. Exhibit 1 to Opp. to App. ("Thank you for this offer. The Department of Labor declines your offer of settlement. We will proceed with our appeal before the ARB.").

the $14,477.06 check was subsequently delivered as part of a renewed, conditional settlement offer, Respondents did not present any evidence to support this position. Respondents did not submit any evidence that the check was delivered with conditions or caveats or with any correspondence or indication it was proffered as part of a settlement offer.[78] The only contemporaneous evidence Respondents submitted regarding the purpose of the check was a June 6, 2019 letter Respondents' counsel delivered to the Administrator shortly after sending the check, which states that the check was sent only to "show Mr. Morgavan's good faith" and apparently prove he had the means to pay.[79] Respondents have supplied no factual or legal support for the proposition that a check deposited under these circumstances created a settlement agreement.

For these reasons, we deny Respondents' request that the Board, as a "sanction," enforce the alleged settlement agreement or dismiss the case.

CONCLUSION

Accordingly, **IT IS ORDERED** that the civil money penalty assessed by the Administrator against Respondents is modified for the reasons set forth above. The Respondents are **ORDERED** to pay a penalty of $19,250 to the United States Department of Labor for violations of the overtime and minimum wage provisions of the Fair Labor Standards Act as amended, 29 U.S.C. §§ 206, 207, 216(e).

SO ORDERED.

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[78] The amount of the check—$14,477.06—is also the exact amount of back wages the District Court ordered Respondents to pay and does not appear, from any of the evidence submitted, to track any settlement amount ever offered by Respondents. Thus, the amount of the check itself provided no indication it was delivered as part of a settlement offer.

[79] Exhibit 2 to Opp. to App.