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.

NEXT LEVEL SECURITY SERVICE, LLC D/B/A SMITH INFORMATION SECURITY, LLC, SMITH SECURITY SERVICES, LLC, SI SECURITY, LLC, AND WILLIAM SMITH, JR.,

RESPONDENTS.

ARB CASE NO. 2024-0028

ALJ CASE NO. 2021-FLS-00009
ALJ THEODORE W. ANNOS

DATE: July 31, 2024

Appearances:

For the Administrator, Wage and Hour Division:
Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Elena Goldstein, Esq., Reynaldo Fuentes, Esq., and Rachel Goldberg, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondents:
William Smith, Jr.; *Pro Se*; Silver Spring, Maryland

Before HARTHILL, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This matter arises under the civil money penalty (CMP) provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216, and its implementing regulations at

29 C.F.R. Parts 578 to 580. The Administrator, Wage and Hour Division, United States Department of Labor (Administrator) appeals the Decision and Order issued on January 31, 2024, by an Administrative Law Judge (ALJ).[1] In the D. & O., the ALJ reduced the total CMP assessed by the Administrator against Next Level Security Services, LLC d/b/a Smith Information Security, LLC, Smith Security Services, LLC, SI Security, LLC, and William Smith, Jr. (collectively, Respondents) for violations of FLSA's overtime provision.[2]

For the reasons that follow, we reverse the ALJ's reduction of the CMPs and order Respondents to pay a total penalty of $124,968.70.

BACKGROUND AND PROCEDURAL HISTORY

William Smith, Jr. is the sole owner of a security guard service named Next Level Security Services, LLC, and its predecessor or affiliated entities.[3] On January 24, 2019, following an investigation, Wage and Hour Division (WHD) notified Respondents that they owed 75 employees $138,775.78 in back wages for overtime pay violations under FLSA section 7, an equal amount in liquidated damages, and it assessed a CMP of $151,050.00.[4]

The Secretary of Labor subsequently filed a complaint for FLSA overtime and recordkeeping violations against Respondents in U.S. District Court for the District of Maryland, seeking, among other things, unpaid compensation for overtime pay violations under FLSA section 7.[5] On February 3, 2021, the district court entered default judgment against the Respondents concluding that, among other things, they willfully violated the FLSA's overtime pay requirement. The district court held Respondents "jointly and severally liable" and ordered the payment of $138,775.78 in unpaid overtime wages and an equal amount in

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[1] *Next Level Sec. Serv., LLC,* ALJ No. 2021-FLS-00009 (ALJ Jan. 31, 2024) (D. & O.).

[2] *Id.* at 21-22.

[3] *Id.* at 7, 7 n.10.

[4] *Id.* at 2, 8-9; Administrator's Exhibits (AX) 2, 3. *See also* 29 U.S.C. §§ 207, 216(e)(2).

[5] D. & O. at 2. *See Stewart v. Next Level Sec. Servs.*, No. 8:19-cv-02144-PWG, 2021 WL 365835, at *1 (D. Md. Feb. 3, 2021) (Memorandum Opinion). *See also* 29 U.S.C. §§ 216(b), 216(c), 217. The named defendants in the district court case are the same named Respondents in this case. D. & O. at 2 n.2.

liquidated damages.[6]

On March 10, 2021, the Administrator filed an Order of Reference with the Office of Administrative Law Judges seeking enforcement of the $151,050.00 CMP against Respondents for the section 7 overtime violations.[7] On November 2, 2022, the ALJ granted the Administrator's motion for summary decision finding, based on the district court's default judgment order, that the Respondents had willfully violated the FLSA and that CMPs were authorized, but denying summary decision as to whether a total CMP of $151,050.00 was appropriate.[8]

The ALJ held a hearing on November 15, 2022. Both parties were represented and afforded the full opportunity to present evidence and argument.[9] A WHD Investigator testified that WHD assessed a CMP for each employee whose FLSA rights were violated, starting with a per-employee penalty amount of $1,611.20, which was 80% of the maximum $2,014.00 per violation applicable at the time of the assessment.[10] WHD then increased the penalty by 25% due to the Respondents' refusal to pay the back wages, and declined to reduce the penalty for the size of the Respondents' business.[11]

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6 D. & O. at 2; *Stewart*, 2021 WL 365835, at *1, 5. As of April 12, 2024 (the date WHD filed an opening brief with the Board) Respondent had not paid the back wages and liquidated damages found due in this case. *See* D. & O. at 9-10; Administrator's Opening Brief (Adm'r Br.) at 7.

7 D. & O. at 2; *see* 29 U.S.C. § 216(e)(4); 29 C.F.R. §§ 580.6(a), 580.10(a).

8 D. & O. at 2-3.

9 *Id.* at 3.

10 *Id.*at 11. The statutory maximum is subject to annual adjustments for inflation; for the violations in this case, the maximum penalty was $2,014.00. *Id.* at 5 n.13 (citing Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2019, 84 Fed. Reg. 213, 214 (Jan. 23, 2019)). WHD determined that 80% was appropriate under its regulation and internal guidance because the violations were willful and the Respondent refused to commit to future compliance with the FLSA, but the violations were not repeated. *See* Adm'r Br. at 4-6; *see also* WHD Field Operations Handbook (FOH) 54f01(b) (Column III: willful violations assessed at 80% of the maximum penalty).

11 D. & O. at 11.

In assessing the seriousness of the violations, WHD considered a number of factors: Respondents refused to share documents during the investigation, which forced WHD to subpoena documents from third parties; did not allow the WHD Investigator to interview employees on site; attempted to conceal the continuing overtime violations during the investigation by issuing one set of checks for hours up to 40 per week and a separate set of handwritten corporate checks paying a non-overtime rate for hours worked over 40 in a workweek; did not agree to come into compliance; could not identify and had shifting explanations for which employees were exempt; and did not pay or agree to pay the back wages due.[12]

The WHD Investigator also noted that the Respondents' violations affected a large number of employees and resulted in a large amount of back wages due.[13] WHD assessed the same CMP amount for each employee, even though the amount of back wages owed to each employee varied.[14]

In applying the statutory and regulatory factors for CMP assessments,[15] the ALJ held that the penalty must have "a reasonable relationship to the amount of back wages owed," relying on Eighth Amendment principles derived from case law interpreting the Excessive Fines Clause, including *United States v. Bajakajian*.[16] The ALJ agreed with WHD that Respondents' violations were serious, "as demonstrated by the high number of violations, their changes to the payroll practices during the investigation, and their failure to cooperate with the investigation."[17]

The ALJ determined, however, that the CMP should not be increased by 25% for refusal to pay, as WHD had done, because Smith testified he was unable to pay the back wages owed, rather than just refusing to pay them.[18]

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12 *Id.* at 12-13.

13 Hearing Transcript (Tr.) at 58:16-59:2; 72:1-10.

14 D. & O. at 11.

15 29 U.S.C. § 216(e)(2)-(3); 29 C.F.R. § 578.4(a), (b).

16 D. & O. at 6, 22 (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)).

17 D. & O. at 14. The ALJ also noted Respondents' stipulation that they were aware of their FLSA obligations and responsibility for paying all workers. *Id.* at 7.

18 *Id.* at 16-17.

The ALJ then reduced the CMP by 15% based on his reconsideration of the size of the business which had, on average, only 65 workers employed at any one time during the period of investigation.[19]

Next, the ALJ found the financial burden of the penalty on the employer warranted a reduction in the recommended CMP. He noted the amount of the CMP assessment (even after the ALJ's adjustments) was "excessive" compared to Respondents' revenue, and that Smith testified his business was "struggling" since 2018.[20]

The ALJ concluded that the uniform penalty amounts assessed for each employee were "grossly disproportionate to some of the violations in this case" and reduced the total CMP amount from $151,050.00 to $36,440.00.[21] He noted the wide disparity in back wages owed to employees, spanning from $22.00 to over $14,000.00 (averaging $1,850.34 per employee), and that the total CMP amount was larger than the back wages found due.[22] To correct the alleged disproportionality, the ALJ created a table consisting of ranges of back wage amounts corresponding to fixed CMP amounts, identified the number of employees who were owed back wages within each range, multiplied the total number of employees in each range by the fixed CMP, and added the resulting amounts, to reach the aggregate $36,440.00 penalty.[23]

On March 1, 2024, the Administrator filed a Petition for Review of the ALJ's decision with the Administrative Review Board (ARB or Board). The Administrator contends that the ALJ erroneously concluded that: (1) when evaluating the seriousness or gravity of a violation of the FLSA's overtime pay provision to assess CMPs, the per-employee CMP assessment must be proportional to the individual back wages owed to each employee; (2) the

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19 *Id.* at 17-19.

20 *Id.* at 20-21. The ALJ also removed two employees he determined were erroneously included in the calculation. *Id.* at 19-20. WHD is not contesting this finding or the ALJ's finding regarding the size of the business. Adm'r Br. at 9 n.4.

21 D. & O. at 21-22.

22 *Id.* at 11.

23 *Id.* at 22.

financial state of the Respondents' business is a relevant mitigating factor when assessing CMPs; and (3) Respondents' refusal to pay the back wages owed should be interpreted as an inability to pay warranting a reduction in the CMP assessment.[24]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to act for the Secretary in civil money penalty cases arising under section 16(e) of the FLSA, 29 U.S.C. § 216(e).[25] The ARB conducts de novo review of ALJ determinations regarding CMP assessments based on the record before the ALJ.[26] De novo review is also appropriate to determine whether a penalty is excessive under the Eighth Amendment.[27]

DISCUSSION

1. FLSA Legal Standards

The FLSA generally requires an employer to pay an employee who works

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[24] The Board has issued orders and served several filings in this matter, addressed to Respondents' email address and last known mail address, as well as to their former counsel, but Respondents have not filed any response.

[25] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020). The Board has no jurisdiction to pass on the validity of any portion of the Code of Federal regulations and must observe the pertinent provisions thereof in our decisions. *See id.*

[26] 5 U.S.C. § 557(b) "[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." *See also Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Five M's, LLC*, ARB No. 2019-0014, ALJ Nos. 2015-FLS-00010, -00011, slip op. at 6 (ARB Nov. 13, 2020); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Elderkin*, ARB Nos. 1999-0033, -0048, ALJ No. 1995-CLA-00031, slip op. at 6 (ARB June 30, 2000).

[27] *Bajakajian*, 524 U.S. at 336-37. The ALJ and Board may consider as applied constitutional principles, such as when determining if the amount of a punitive damage award is excessive in light of constitutional due process concerns. *Youngermann v. United Parcel Serv., Inc.*, ARB No. 2011-0056, ALJ No. 2010-STA-00047, slip op. at 9-10 (ARB Feb. 27, 2013). The ALJ and ARB may not, however, consider facial challenges to the "legality of a regulatory provision or the constitutionality of a statutory provision," 29 C.F.R. § 580.12(b); *see also Minthorne v. Virginia.*, ARB No. 2009-0098, ALJ Nos. 2009-CAA-00004, -00006, slip op. at 8-9 (ARB July 19, 2011).

more than 40 hours in a work week an overtime premium of one and one-half times employees' regular rate of pay for the hours worked over 40.[28] The FLSA also provides that persons who repeatedly or willfully violate the overtime provisions "shall be subject to a civil penalty not to exceed $1,100 for each such violation."[29] A violation is repeated where an employer has previously violated the FLSA, "provided the employer has previously received notice, through a responsible official of the Wage and Hour Division . . . that the employer allegedly was in violation of the provisions of the Act."[30] A violation is willful if "the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act."[31]

In exercising discretion to determine the appropriate penalty, the Administrator "shall" consider both the gravity of the violation and the employer's size.[32] Where appropriate the Administrator may also consider discretionary factors, "including but not limited to": (1) the employer's good faith efforts to comply; (2) its explanation for the violations; (3) its previous history of violations; (4) any commitment to future compliance; (5) the interval between the violations; (6) the number of affected employees; and (7) any pattern to the violations.[33] The Administrator implements these mandatory and discretionary considerations, in part, through detailed instructions in the FOH.[34]

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[28] 29 U.S.C. § 207(a)(1).

[29] *Id.* § 216(e)(2).

[30] 29 C.F.R. § 578.3(b)(1).

[31] *Id.* § 578.3(c)(1).

[32] 29 U.S.C. § 216(e)(3); *see also* 29 C.F.R. § 578.4(a).

[33] 29 C.F.R. § 578.4(b).

[34] *See supra* Background and Procedural History section; FOH §§ 52f14, 52f17, 54f01. The WHD Regional Administrator retains discretion to increase or lower the CMP assessed. § 52f17(a). The Board has used and approved the same FOH procedures. *See, e.g.*, *Five M's*, ARB No. 2019-0014, slip op. at 7-8, 11, 13 (concluding that an employer's repeated or willful conduct along with its unwillingness to comply with the FLSA may be considered as aggravating factors, but the small size of the business may be a mitigating factor); *Chao v. A-One Medical Services, Inc.*, ARB No. 2002-0067, ALJ No. 2001-FLS-00027, slip op. at 3 n.2 (ARB Sept. 23, 2004) (highlighting WHD assessment, which included a 25 percent increase for failure to pay back wages found due).

2. The Board's De Novo Review of the CMP

A. The Mandatory Factors: The Gravity of the Violations and Size of the Business

Although the statute and regulations are silent regarding what determines the gravity or seriousness of the violations, the statute requires that, to warrant a CMP under section 16(e), the conduct must be either repeated or willful.[35] In determining the seriousness of the Respondents' violations, WHD and the ALJ properly relied upon the willful nature of their violations, including, among other things, Respondents' stipulation that they were aware of their FLSA obligations and responsibility for paying all workers, their attempts to obscure the wage violations (including using two checks to pay employees to avoid overtime liability), their shifting and unsupported arguments that some employees were exempt, and their obstruction of WHD's investigations.[36] This accords with the district court's conclusion in the corresponding case against the Respondents.[37]

We agree with the Administrator and ALJ that the willful nature of Respondents' violations warrants a finding that the violations were serious. We further find that WHD's assessment of 80% of the maximum penalty, based on its standard practice for violations that are willful but not repeated, was reasonable.[38] The record evidence further supports the ALJ's reduction of 15% of

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[35] 29 U.S.C. § 216(e)(2).

[36] D. & O. at 14-16 (agreeing with the Administrator that the Respondents' conduct here was serious).

[37] *Stewart,* 2021 WL 365835, at *4 (noting, for instance, that, "[t]he Court finds particularly persuasive the fact that defendants paid employees with two checks starting in November of 2016, with one check compensating employees for 80 hours of wages, and a second check compensating them for any hours over 80 during the pay period, but without the overtime premium" and that these "undisputed facts support a finding that defendants acted willfully in disregarding the FLSA's overtime pay requirements").

[38] *See, e.g.*, *Hong Kong Entm't (Overseas) Invs., Ltd.*, ARB No. 2013-0028, ALJ No. 2010-FLS-00008, slip op. at 7-8 (ARB Nov. 25, 2014) (affirming ALJ's consideration of employer's willful violations during analysis of the gravity of the violation); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Best Miracle Corp.*, ARB No. 2014-0097, ALJ No. 2008-FLS-00014, slip op. at 9 (ARB Aug. 8, 2016) (affirming maximum statutory penalty for violations characterized as "willful"). *See also* FOH 54f01(b).

the total CMP because Respondents are a small business.[39]

B. The Discretionary Regulatory Factors

The regulations state that, where appropriate, the Administrator "may" also consider discretionary factors, "including but not limited to": (1) the employer's good faith efforts to comply; (2) its explanation for the violations; (3) its previous history of violations; (4) any commitment to future compliance; (5) the interval between the violations; (6) the number of affected employees; and (7) any pattern to the violations.[40] We have considered these factors and reviewed the record de novo, and agree with the Administrator that no reduction of the assessment is warranted.[41]

The WHD Investigator testified that the Respondents did not demonstrate a good faith effort to comply,[42] and, in fact, demonstrated a reckless disregard for compliance during and after WHD's investigation, requiring WHD to subpoena records from third-parties.[43] The Investigator further testified that the Respondents did not provide any justification for WHD's substantiated findings, only shifting excuses, for instance, that its employees were exempt from the FLSA.[44] Indeed, the Investigator testified that the evidence tended to show that the Respondents structured their business affairs to obscure overtime

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[39] D. & O. at 17-19 ("Respondents had between 20 and 99 employees for a majority of the period [of investigation] at issue.").

[40] 29 C.F.R. § 578.4(b).

[41] The record evidence does not support the ALJ's conclusion that WHD did not consider the factors. D. & O. at 11. *Cf. Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Keystone Floor Refinishing Co., Inc.*, ARB Nos. 2003-0056, -0067, ALJ No. 2002-CLA-00017, slip op. at 12 (ARB Sept. 23, 2004) ("We find that the record evidence does not support the ALJ's conclusion that the WHD failed to advance the basis for its assessment of the penalty.").

[42] Tr. at 26:25-27:6.

[43] *Id.* at 22:23-23:21; 32:11-20; 61:8-13.

[44] *Id.* at 41:25-43:2; 44:19-23.

violations.[45] The Investigator also noted in his testimony these were very serious violations affecting, by the end of the investigation, at least 73 workers.[46]

Respondents demonstrated an ongoing pattern of violating the FLSA's overtime provisions, which they took steps to hide from WHD.[47] At the conclusion of the investigation, WHD provided the Respondents with detailed information about how to comply with the FLSA.[48] Yet, the Respondents refused to commit to future compliance and, as WHD ultimately determined, had even continued violating the FLSA during the course of the investigation.[49]

We find that these factors support the Administrator's CMP assessment in this case. Upon consideration of all of the foregoing aggravating and mitigating actors, we assess a CMP of $124,968.70 for 73 violations, calculated as follows: assessing 80% of the maximum CMP of $2,014.00, reducing by 15% given the size of the business, increasing by 25% because of Respondents refusal to comply and refusal to pay. Mitigation is unwarranted under the discretionary factors, and the total CMP is $124,968.70.

C. *The CMP Need Not Be Proportional to Individual Back Wages Owed When Assessing the Gravity of Respondents' Violations*

Although ALJs have significant discretion when reviewing WHD's CMP assessments,[50] the ALJ erred in requiring consideration of individualized back

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45 *Id.* at 25:9-17 (describing how the Respondents used two checks to separately pay for straight time and overtime hours). Respondents also stipulated that they were aware of their FLSA obligations and responsibility for paying all workers. D. & O. at 7.

46 Tr. at 58:16-59:2.

47 *Id.* at 60:1-61:7 (describing how the Investigator identified willful violations by seeing changes to the way Respondents paid workers once WHD began its investigation).

48 *Id.* at 28:24-29:19; 42:3-44:1 (describing counseling and information provided at the conclusion of the investigation).

49 D. & O. at 12. Indeed, the Respondents' actions required the district court to issue an injunction to ensure future compliance. *Stewart*, 2021 WL 365835, at *5.

50 29 C.F.R. § 580.12(b), (c); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Thirsty's, Inc.*, ARB No. 1996-0143, ALJ. No. 1994-CLA-00065, slip op. at 5-6 (ARB May 14, 1997). This authority includes the power to "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." 29 C.F.R. § 580.12(c).

wages and requiring individual CMP assessments to be proportional to back wages. The ALJ relied on proportionality principles outlined in *Bajakajian* and its interpretation of the Eighth Amendment's bar against excessive fines, for his conclusion that CMP assessments must "bear some relationship to the gravity of the offense," which in this case the ALJ concluded meant the amount of back wages owed to each individual employee.[51] As we explained in *Administrator v. TAFS Corp.*, such an approach is contrary to the statute, regulations, and Board precedent.[52]

The ALJ also failed to explain or apply the multi-factor test the Supreme Court and circuit courts have articulated to assess gross disproportionality. Those factors include an assessment of: (1) the nature or essence of the substantive offense; (2) the class of persons to whom the statute is directed; (3) the maximum penalty that could have been imposed; and (4) the harm caused by the defendant's conduct.[53] Applying the *Bajakajian* factors to this case, WHD's original assessment and our de novo assessment is proportional to Respondents' violations of the FLSA.

The circumstances of this case are readily distinguishable from those evaluated by the Supreme Court in *Bajakajian* under the relevant factors. Here, the "essence" of the violations was failure to pay overtime to workers. Unlike the reporting offense in *Bajakajian*, which was not associated with any related illegal activity, Respondents' FLSA violations were repeated, effecting 73 employees.[54] Moreover, unlike the relatively simple reporting violation in *Bajakajian*, Respondents intentionally structured the business and recordkeeping practices over years to systematically deny their employees overtime premiums to which they were entitled, including issuing two checks to avoid paying overtime premiums and treating some employees as exempt

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51 D. & O. at 6, 6 n.19 (citing *Bajakajian*, 524 U.S. at 334).

52 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. TAFS Corp.*, ARB No. 2023-0007, ALJ Nos. 2021-FLS-00005, -00006, slip op. at 13-22 (July 18, 2024).

53 *Bajakajian*, 524 U.S. at 337-39; *see also U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 408-10 (4th Cir. 2013) (articulating the *Bajakajian* factors similarly); *TAFS Corp.*, ARB No. 2023-0007, slip op. at 15-17 (same).

54 D. & O. at 9-10, 19-20; *Stewart*, 2021 WL 365835, at *1, 3.

supervisors without a consistent justification for doing so.[55] The Respondents also disregarded WHD's compliance advice, refused to come into compliance, and obstructed WHD's investigation.[56]

Moreover, the purpose of CMPs is to deter *future violations* of the FLSA because of a pattern of repeated or willful conduct.[57] Respondents, employers that willfully violated the FLSA, are precisely the type of entities against which Congress sought to impose CMPs for FLSA violations.[58] And unlike in *Bajakajian*, where the defendant was not a money launderer or drug trafficker implicated by the statute he was charged under, the CMPs here are the result of the type of violation that FLSA CMPs are meant to deter (i.e., nonpayment of overtime wages).[59]

In assessing the appropriateness of a penalty, due deference must be given to Congress' authority to set the maximum CMP for each violation.[60] Congress has set the CMP limit and amended it annually for inflation to ensure that its deterrent effect is not eroded over time. We find it reasonable based on

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[55] D. & O. at 15; *see also Bajakajian* 524 U.S. at 339; *United States v. Malewicka*, 664 F.3d 1099, 1104-06 (7th Cir. 2011) (noting that concealing financial transactions on 23 occasions "required significant planning" to execute and was conducted over a "prolonged period of time," which added to the defendant's culpability).

[56] D. & O. at 12-16. *See id.* at 14 ("I agree with the Administrator that Respondents' violations are serious.").

[57] H.R. Rep. No. 101-260 at 25 (1989).

[58] *U.S. Dep't of Lab. v. Micro-Chart*, ARB No. 1998-0080, ALJ No. 1998-FLS-00012, slip op. at 4 (ARB Nov. 4, 1988) (noting that "the goal of the CMP provision . . . is to sanction repeat and willful offenders of the minimum wage and overtime provisions of the FLSA").

[59] *See TAFS Corp.*, ARB No. 2023-0007, slip op. at 20 (citing *Bajakajian*, 524 U.S. at 337-38; *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1315 (11th Cir. 2021). *See also Bunk*, 741 F.3d at 409 (noting consideration of award's deterrent effect on defendant, and others perhaps contemplating a related course of conduct, when analyzing gross disproportionality under the Excessive Fines Clause).

[60] *See TAFS Corp.*, ARB No. 2023-0007, slip op. at 16 n.92 (citations omitted)*; see also United States v. Blackman*, 746 F.3d 137, 144 (4th Cir. 2014) (because questions of proportionality are reserved primarily to the legislature, the *Bajakajian* test is highly deferential) (citing *Bunk,* 741 F3d. at 397; *Bajakajian*, 524 U.S. at 336)).

the severity of the misconduct here for WHD to have assessed CMPs at 80% of the maximum statutory penalty. WHD's standardized treatment of CMPs across cases ensures that the resulting CMP in this case is comparable to those imposed for similar violations in other cases.[61] Indeed, the ALJ's ad hoc penalty and back wage table, developed for this case, undermines that consistency across cases.

Courts look to both monetary and non-monetary harms in addressing the harm factor.[62] Unlike *Bajakajian*'s mere reporting violation, the harm in this case was not minimal — at the time that WHD assessed the CMPs, WHD found that the Respondents' actions deprived 73 employees of their lawfully owed wages, totaling more than $138,000.00 (and assessed $151,050.00 in CMPs, which was on par with the back wage total).[63] As we noted in *TAFS Corp.,* willful violations that affect many employees are particularly harmful.[64]

Non-monetary harms include "how the violation erodes the government's purposes for proscribing the conduct."[65] As the Fourth Circuit noted when upholding a $24 million civil penalty under the False Claims Act for a military contractor's fraudulent procurement scheme, courts "must consider the award's deterrent effect on the defendant and on others perhaps contemplating a related

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[61] *See TAFS Corp.*, ARB No. 2023-0007, slip op. at 20-21, 20 n.118 (citations omitted). We note that this case is not an outlier; in addition to *TAFS Corp.*, the Board has upheld similar per-employee civil penalty assessments. *See, e.g.*, *id.* at 21, 21 n.121 (citing *Best Miracle Corp.*, ARB No. 2014-0097, slip op. 3-6, 9 (lowering an CMP assessment to the statutory maximum and applying the same CMP amount on a per-employee basis for 42 employees); *A-One Medical*, ARB No. 2002-0067, slip op. at 3 (affirming the application of the maximum CMP per employee for eight employees after reducing the amount for the size of the employer and increasing it due to the employer's failure to pay back wages found due)).

[62] *See, e.g.*, *Bunk*, 741 F.3d at 409 ("[T]he concept of harm need not be confined strictly to the economic realm."); *Pimentel v. City of Los Angeles*, 974 F.3d 917, 923 (9th Cir. 2020), (discussing non-monetary harms in an Eighth Amendment challenge).

[63] *See United States v. George*, 779 F.3d 113, 124 (2d Cir. 2015) (finding that unlawfully employing an immigrant laborer for five years to avoid paying minimum wages was a significant harm that justified the forfeiture of the defendant's home and was not disproportionate).

[64] *TAFS Corp.*, ARB No. 2023-0007, slip op. at 17.

[65] *Id.* (citations omitted).

course of fraudulent conduct."[66] Here, the harm that the FLSA CMPs are aimed at stemming is underpayment of wages, the precise conduct that Respondents engaged in, which undermines Congress' proscribed overtime pay requirements.

Courts also look at the relationship between the penalty and the harm caused to the victim.[67] In *United States v. George*, for example, the Second Circuit found unlawfully employing a immigrant laborer for five years in order to avoid paying minimum wages was a significant harm that justified the forfeiture of the defendant's home.[68] The CMP of $124,968.70 is commensurate with the harm to 73 employees by depriving them of $138,755.78 in overtime wages.

In sum, Respondents caused significant harm by willfully violating the FLSA, are the precise type of entity that Congress envisioned deterring when it authorized CMPs for overtime pay violations, and the CMP is consistent with penalties in like cases. We are satisfied that the CMP assessed here does not constitute an excessive fine under the Eighth Amendment's proportionality principles. The CMP reflects the necessary and proper deterrent going forward.

D. *Respondents' Financial Resources Need Not Be Considered as a Mitigating Factor to Reduce the CMP Amount*

Relying on caselaw construing the Eighth Amendment and ARB decisions applying the child labor FLSA CMP regulations, the ALJ here reasoned that "the current financial resources of the [Respondent's] business and the penalty's consequent burden on" the Respondents were relevant mitigating factors.[69] The ALJ determined that the CMP assessed by WHD was an excessive financial burden on the Respondents in this case because, among other things, it was "9.6% of the average annual revenue during the investigation and . . .15.9% of the 2018

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[66] *Bunk*, 741 F.3d at 409.

[67] *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001), (looking at "the relationship between the penalty and the harm to the victim caused by the defendant's actions").

[68] *George*, 779 F.3d at 124.

[69] D. & O. at 20.

annual gross receipts."[70] The ALJ additionally noted that because Smith said that his business was "struggling" since 2018, Respondents could not cover the back wages and liquidated damages due from its 2018 profits.[71] Concluding that both WHD's CMP assessment and the ALJ's adjusted assessment would be excessive, the ALJ "modif[ied] the assessment accordingly" and created a chart linking specific CMP amounts to specific ranges of back wages.[72]

As we explained in *TAFS Corp.,* it is inappropriate to give weight to the defendant's finances. First, the FLSA overtime and minimum wage regulations do not provide for financial hardship as a mitigating factor. Second, the *Bajakajian* court did not explicitly require consideration of whether the fine would deprive the defendant of their livelihood under the Eight Amendment analysis,[73] and neither the Fourth Circuit, the applicable appellate circuit in this case, nor prior Board cases consider a defendant's finances as a factor in the analysis.[74] Third, as discussed above, the deterrent effect of FLSA CMPs would be dulled by a consideration of financial hardship.

Even when courts consider the financial health of the business, "the bar for a [penalty] to be unconstitutionally excessive on livelihood-deprivation grounds is a high one" and, to warrant reducing the fine, it must constitute a

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[70] *Id.* at 21. The ALJ further noted that even the CMP that would be assessed if adjusted as he determined was warranted (i.e., no 25% increase for refusal to pay back wages, a 15% decrease because of the Respondent's size, and removal of duplicate employees) was still an excessive financial burden because it would be "6% of the average annual revenue and 10% of the 2018 annual gross receipts." *Id.*

[71] *Id.* at 21, 21 n.91.

[72] *Id.* at 21-22.

[73] *Bajakajian*, 524 U.S. at 337-39.

[74] *See Blackman*, 746 F.3d at 143-45 (noting impact on livelihood not a factor and lack of adequate assets to satisfy judgment irrelevant in evaluating excessiveness of fine). The ALJ's reliance on *United States v. United Mine Workers of America*, 330 U.S. 258 (1947) and *Elderkin*, ARB Nos. 1999-0033, -0048, is misplaced for the reasons discussed at length in *TAFS Corp.*, ARB No. 2023-0007, slip op. at 17-19. *See* D. & O. at 20 n.87. *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Chrislin, Inc.* ARB No. 2000-0022, ALJ No. 1999-CLA-00005 (ARB Nov. 27, 2002) is also inapposite because, like *Elderkin*, it involved the child labor CMP regulation, 29 C.F.R. § 579.5(b), which specifically requires consideration of financial information when considering the size of the business, which is not required under the overtime CMP regulation.

"ruinous monetary punishment that might conceivably be so onerous as to deprive a defendant of his or her future ability to earn a living."[75] Here, the evidence of Respondents' finances does not seem sufficient to make this determination; for example, Respondents failed to provide a figure for the net profit in 2016, the self-reported gross and net income only includes summary information, and Respondents were earning a profit in 2018, the final year of the period of investigation.[76] These limited facts do not demonstrate the CMP was "ruinous" and would deprive Respondents of their future ability to earn a living.[77]

Moreover, even if we were to consider the financial impact of the CMP, the record in this case would not support a reduction when weighed with the gravity of the violations.[78] A significant number of workers were harmed by the Respondents' willful violations of the FLSA, the Respondents refused to correct and even attempted to conceal the violation, and they were repeatedly uncooperative with WHD during its investigation.

E. *Respondents' Statement That He Lacked the Ability to Pay Does Not Overcome His Refusal to Pay*

The Administrator argues that the record does not support the ALJ's conclusion that the Respondents' failure to pay the back wages and liquidated damages was driven not by an unwillingness to pay, but an inability to pay, and thus the Respondents did not merit a 25% increase in the assessed CMP.[79] We

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[75] *United States v. Chin*, 965 F.3d 41, 58 (1st Cir. 2020) (internal quotation marks and alterations omitted).

[76] D. & O. at 21. *Cf. TAFS Corp.,* ARB No. 2023-0007, slip op. at 17-19 (declining to consider the businesses' finances as a mitigating factor even when employer was not running a profitable business).

[77] *Chin*, 965 F.3d at 58 (internal quotation marks and alterations omitted).

[78] *Elderkin,* ARB Nos. 1999-0033, -0048, slip op. at 1, 15 (affirming CMP despite employer's financial difficulties when the injury to a minor was very severe); *Chrislin*, ARB No. 2000-0022, slip op. at 11 (contrasting the facts in *Elderkin* and noting that the employer cooperated with the investigation, came into compliance, and the injuries were far less severe).

[79] The ALJ summarily concluded that "[t]he nature of Respondents' conduct and their lack of good faith efforts to comply with the law support a larger penalty. Nonetheless, I find

agree the ALJ's finding, which rested solely on Smith's testimony that he was unable to pay, is problematic.

First, the ALJ did not specifically weigh the credibility of Smith's statement.[80] Smith's hearing testimony that he could not pay back wages is contradicted by his other testimony that he might have paid if WHD would have offered some compromise amount,[81] as well as evidence that he attempted to evade payment and forestall WHD's investigation, actions the ALJ acknowledged as problematic.[82] The ALJ also found Smith lacked credibility on other issues, and that his testimony was inconsistent.[83]

Second, there was no evidence that the Respondents ever attempted to pay the back wages due. Finally, even if Respondents' operating profit was insufficient to cover the owed back wages and liquidated damages,[84] there was no evidence of Respondents' other financial resources. We agree with the Administrator that, reviewing the evidence as a whole, Respondents' acts evince a refusal to pay, not an inability to do so.

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that the CMP should not be increased by 25% for refusal to pay back wages." D. & O. at 16-17.

[80] While we defer to ALJ credibility findings that are "explicitly based" on observations of a witness's demeanor or conduct at the hearing, "[w]hen the ALJ fails to explain his assessment of witness credibility or his findings are not objectively supported by the record, the ARB will review the evidence and make its own credibility conclusions." *Pickett v. Tennessee Valley Auth.*, ARB Nos. 2002-0056, -0059, ALJ No. 2001-CAA-00018, slip op. at 7 (ARB Nov. 28, 2003) (internal citations omitted).

[81] D. & O. at 16.

[82] *See, e.g.*, D. & O. at 14-16. The ALJ also found Respondents' argument that it had a bona fide disagreement with WHD regarding which employees were exempt unpersuasive, as evidenced by the Respondents' shifting responses to WHD and to the ALJ during the hearing. *Id.* at 15.

[83] *See e.g.*, D. & O. at 15-16 (noting that the ALJ was "unconvinced by Mr. Smith's hearing testimony" that he had provided all of the documents WHD requested, that the ALJ "doubt[ed] the credibility of Mr. Smith's hearing testimony" regarding whether the employees he listed were truly exempt supervisors, and that the ALJ "was not persuaded by Mr. Smith's explanation for the two-check protocol").

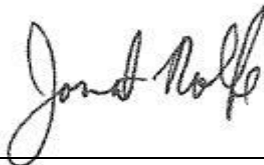
[84] D. & O. at 21, 21 n.91.

Conclusion

For the foregoing reasons, we **REVERSE** the ALJ's Decision and Order regarding Respondents' civil money penalties assessment. Respondents are **ORDERED** to pay a penalty of $124,968.70 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.

SUSAN HARTHILL
Chief Administrative Appeals Judge



JONATHAN ROLFE
Administrative Appeals Judge