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, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

TAFS CORPORATION d/b/a WHISTLE STOP and MOHAMMED TAHIR, an individual,

and

SHALIMAR DISTRIBUTORS, LLC d/b/a PROMISED LAND TRUCK STOP and MOHAMMED TAHIR, an individual,

RESPONDENTS.

ARB CASE NO. 2023-0007

ALJ CASE NOS. 2021-FLS-00005
2021-FLS-00006

CHIEF ALJ STEPHEN R. HENLEY

DATE: July 18, 2024

Appearances:

For the Prosecuting Party:
Elena Goldstein, Esq.; Jennifer S. Brand, Esq.; Sarah Kay Marcus, Esq.; Rachel Goldberg, Esq.; Reynaldo Fuentes, Esq.; *U.S. Department of Labor, Office of Solicitor*; Washington, District of Columbia

For the Respondent:
Kathryn L. Simpson, Esq.; *Mette, Evans & Woodside*; Harrisburg, Pennsylvania

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 (Administrator) of the Wage and Hour Division (WHD) appeals the Decision and Order (D. & O.) issued on October 13, 2022, by the Chief Administrative Law Judge (ALJ). In the D. & O., the ALJ reduced the total CMPs assessed by the Administrator against Mohammed Tahir, TAFS Corporation, doing business as Whistle Stop (Whistle Stop), and Shalimar Distributors, LCC, doing business as Promised Land Truck Stop (Promised Land') (collectively, Respondents) for wage and overtime violations of the FLSA.[1]

For the reasons that follow, we reverse the ALJ's reduction of the CMPs and order Respondents to pay a total penalty of $45,722.75.

BACKGROUND AND PROCEDURAL HISTORY

Mohammed Tahir operated and co-owned two gas stations and convenience stores in Pennsylvania—Whistle Stop and Promised Land.[2] WHD investigated Promised Land in 2015 and identified minimum wage, over time, and recordkeeping violations effecting one worker who was owed $375 in back wages.[3] At the close of that investigation, the WHD investigator advised Tahir regarding his FLSA minimum wage, overtime, and recordkeeping obligations.[4] WHD did not assess a CMP for this violation and Tahir did not pay the back wages owed to this worker.[5]

The Administrator subsequently conducted investigations of Whistle Stop and Tahir for the time period of July 16, 2015 to April 10, 2018, and of Promised Land and Tahir for the time period of April 11, 2015 to April 10, 2018. WHD issued determination letters on June 18, 2018, informing Respondents that (1) they failed to pay overtime as required by section 7 of the FLSA and (2) the violations at the two locations affected 52 employees who were collectively owed $39,944.90 in back

---

1 D. & O. at 9-11.

2 D. & O. at 4 (formally cited as *TAFS Corp., et al*, ALJ Nos. 2021-FLS-00005, 2021-FLS-00006, slip op. at 4 (ALJ Oct. 13, 2022)). Promised Land is still in operation; Whistle Stop is not. D. & O. at 7.

3 *Id.* at 4.

4 Administrator's Opening Brief (Adm'r Br.) at 6 (citing April 19, 2022 Hearing Transcript (Tr.) at 31:7-33:1).

5 *Id.* (citing Tr. at 31:24-32:6).

wages.[6] WHD also assessed CMPs of $17,010 and $28,712.25 against Whistle Stop and Promised Land gas stations, respectively, and Tahir individually, for violations of the FLSA's minimum wage and overtime provisions, for a total CMP of $45,722.25.[7] Respondents notified the Administrator of their objections to the back wages and CMP on June 26, 2018.

The Administrator subsequently filed a complaint against Respondents in United States District Court for the Middle District of Pennsylvania, which included the same FLSA violations at issue here. On July 28, 2020, the district court granted summary judgment and ordered Respondents to pay $119,281.14, consisting of $59,690.57 in back wages and $59,690.57 in liquidated damages.[8]

ALJ PROCEEDINGS AND DECISION

On February 2, 2021, the Administrator referred Whistle Stop and Promised Land to the Office of Administrative Law Judges (OALJ) for a final determination on the violations for which the CMPs were imposed and of the appropriateness and reasonableness of the penalties assessed.[9] On February 2, 2022, the ALJ partially granted the Administrator's motion for summary decision, finding, based on the district court's summary judgment order, (1) that Respondents had willfully violated the FLSA and that CMPs were authorized, but (2) that the amount of $45,722.25 in CMPs was not appropriate on summary judgment.[10]

On April 19, 2022, the ALJ then held a hearing on the appropriateness and reasonableness of the amount of the Administrator's CMP assessment.[11] At the hearing, the WHD investigator explained how WHD calculated the penalties, using

---

[6] D. & O. at 2. Respondents' FLSA violations at both gas stations included: failure to pay all workers the minimum wage due to deductions from their pay; paying some workers straight time pay for hours worked over 40 hours in a work week; failure to pay some workers any pay for hours worked over 40 hours in a work week; and incorrectly classifying some employees as salaried exempt managers resulting in overtime violations. D. & O. at 4-5; Tr. at 31:24-32:6, 36:8-37:15. WHD concluded that Whistle Stop's overtime violations resulted in underpayments totaling $14,877.56 due to 18 employees, and Promised Land's overtime underpayments totaled $25,067.34 due to 34 employees. D. & O. at 4.

[7] D. & O. at 2, 4-5. We note that the reference to $26,712.15 appears to be a typographical error. D. & O. at 5. *See* AX12 at 1 (WHD assessed a total CMP for $28,712.25 against Promised Land).

[8] *Scalia v. Shalimar Distribs. LLC*, No. 4:18-CV-01642, 2020 WL 4335020, at *7 (M.D. Pa. July 28, 2020).

[9] 29 C.F.R. § 580.10. The OALJ consolidated the two cases. D. & O. at 2-3.

[10] *Id.* at 3.

[11] D. & O. at 3-4; 29 C.F.R. § 580.12(c).

computation worksheets which track the regulatory requirements.[12]

WHD calculated a CMP for each individual employee who suffered FLSA monetary violations.[13] To reach that number, WHD first identified the correct maximum CMP amount that corresponded to the relevant period of time that an employee experienced a violation.[14] WHD started with the maximum CMP assessment given Respondents' repeated and willful FLSA minimum wage and overtime violations.[15] WHD further determined that the back wages owed were significant and that the violations represented an ongoing pattern of non-compliance with no good faith basis.[16] The investigator also testified that Tahir generated payroll documents in ways to create an "illusion of compliance" where none existed, and that Tahir refused to comply with the FLSA by paying the back wages found due.[17]

WHD then considered the size of the business, reducing the CMP assessed by 30 percent.[18] WHD then increased the CMP assessed by 25 percent due to Tahir's failure to pay the back wages found due.[19] The final CMP amount was then multiplied by the number of employees who experienced a back wage violation of more than $20.[20] WHD therefore assessed a CMP for each employee whose FLSA rights were violated, assessing the same amount for each employee without regard

---

12 Tr. at 49:12-25, 50:10-24. WHD's assessment and computation worksheets track the instructions in the WHD Field Operations Handbook (FOH). *Compare* FOH §§ 54f01, 52f14–52f17 *with* Tr. at 45:3-51:6. The FOH instructions implement the statutory and regulatory mandatory and discretionary factors that WHD considers when assessing CMPs. 29 U.S.C. § 216(e)(3) and 29 C.F.R. § 578.4.

13 Tr. at 49:23-25; FOH § 54f01(b).

14 Tr. at 49:23-50:9; AX-16; AX-17. The statutory maximum is subject to annual adjustments for inflation; for nine of the violations in this case, the maximum penalty was $550.00, and was $1,080.00 for the remainder. D. & O. at 4 n.7 (citing Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018, 83 Fed. Reg. 7 (Jan. 2, 2018)).

15 Tr. at 45:3-14, 76:4-7; FOH § 54f01(b) (directing investigators to initiate the CMP assessment process with the maximum penalty if the employer's conduct is repeated and willful and they have failed to comply with the FLSA).

16 Tr. at 46:16-24; 47:4-48:17; 45:3-14; 48:25-49:11; 50:18-24.

17 Tr. at 46:16-24; 47:4-48:17; 45:3-14; 48:5-17; 48:25-49:11; 50:18-24.

18 Tr. at 45:15-46:15 (noting that the small number of workers employed at both gas stations merited a reduction); 50:14-17; FOH § 54f01(c)(2).

19 Tr. at 50:18-24, 52:7-12; FOH § 54f01(c)(4).

20 Tr. at 46:5-10; 72:9-23; FOH § 54f01(c)(5).

to the amount of individual back wages owed to each employee.[21]

In his order, the ALJ acknowledged the FLSA violations were repeated and willful, but noted the CMPs were greater than the total amount of back wages owed,[22] and, in dicta, suggested a 25 percent increase for a failure to comply *could* violate an employer's due process rights because it would punish an employer "for exercising its rights to challenge the back wage assessment."[23] He then considered whether the CMP violated the Eighth Amendment's prohibition against excessive fines, relying on the Supreme Court's decision in *United States v. Bajakajian*.[24] He held that, under *Bajakajian,* when assessing the mandatory factor of the "gravity" of a violation, the CMP must not be "grossly disproportionate to the offense committed," but instead "'must bear some relationship to the gravity of the offense.'"[25] The ALJ then theorized that whenever "a CMP is predicated on a failure to pay required wages, the assessed penalty must bear some reasonable relationship to the actual amount of back wages owed to each individual."[26]

The ALJ noted that several workers were owed less than $100 and some as little as $22.50 in back wages, thus many of the individual CMP assessments were ten times larger than the back wages owed (and in one case 42 times larger).[27] The ALJ concluded that WHD's practice of assessing the same CMP amount for every violation, regardless of the back wages owed to each employee, was "grossly disproportionate to the amount of back wages owed" to some individual employees.[28]

To correct this alleged disproportionality, the ALJ created two tables that consisted of ranges of back wage amounts that corresponded to fixed CMP amounts.[29] The ALJ then identified the number of employees who were owed back wages within each range, multiplied the total number of employees in each range by

---

21 D. & O. at 4-7; Tr. at 73:3-7.

22 D. & O. at 4-5, 7. The amount of back wages owed was higher by the end of the district court proceedings due to Respondents' continued violations after the conclusion of WHD's investigation. *Shalimar*, 2020 WL 4335020, at *5-6.

23 D. & O. at 8 n.10. The ALJ further noted that such a policy would lead to penalties that exceed the statutory maximum. *Id.*

24 D. & O. at 8 (citing *United States v. Bajakajian*, 524 U.S. 321 (1998)).

25 *Id.* (quoting *Bajakajian*, 524 U.S. 321 at 334).

26 *Id.* at 8.

27 *Id.* at 7, 9.

28 *Id.* at 8-9.

29 *Id.* at 10.

the fixed CMP, and then added the resulting amounts.[30]

Finally, in evaluating the CMP assessment generally, the ALJ also considered the financial state of Respondent's businesses.[31] In reducing the total CMPs, the ALJ noted that neither business was profitable, Whistle Stop ceased operations, and Promised Land's financial state was "precarious."[32] In sum, the ALJ dramatically reduced the total CMP amount from $45,722.75 to $13,800.[33]

On December 14, 2022, the Administrator filed a Petition for Review of the D. & O. with the Administrative Review Board (ARB or Board). The Administrator argues that the ALJ erred because CMPs are not required to be proportional to the back wages owed to each individual employee and that his approach contradicts the statute, regulations, and Board precedent. The Administrator also argues that the WHD's CMP assessment procedures do not violate the Eighth Amendment and that she appropriately determined the amount of CMPs under the applicable regulatory factors.[34]

Respondents counter that the ALJ's assessment of the factors was appropriate, the ALJ properly concluded the assessed penalty did not bear a reasonable relationship to the amount of back wages owed under *Bajakajian*, and that the ALJ properly accounted for Respondents' financial difficulties the Administrator failed to consider, which were mostly due to COVID restrictions.[35]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to act in civil money penalty cases arising under section 16(e) of the FLSA, 29 U.S.C. 216(e).[36] The ARB conducts de novo review of ALJ determinations regarding CMP assessments based on the record before the ALJ.[37] De novo review is also

---

30 *Id.*

31 *Id.* at 9 (citing *United States v. United Mine Workers*, 330 U.S. 258 (1947)).

32 *Id.*

33 *Id.* at 9-11.

34 Adm'r Br. at 15-50.

35 Resp. Br. at 4-6.

36 Secretary's Order 01-2020-Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13,186 (Mar. 6, 2020).

37 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 Five M's, LLC*, ARB No. 2019-0014, ALJ Nos. 2015-FLS-00010, -00011, slip op. at 6 (ARB Nov. 13, 2020);

appropriate to determine whether a penalty is excessive under the Eighth Amendment.[38]

DISCUSSION

1. FLSA Legal Standards

The FLSA requires every employer to pay covered employees at least $7.25 for every hour worked.[39] In addition, the FLSA generally requires an employer to pay an employee who works more than 40 hours in a work week an overtime premium of one and one-half times the employees' regular rate of pay for the hours worked over 40.[40]

The FLSA also provides that "[a]ny person who repeatedly or willfully violates [the minimum wage or overtime provisions of the FLSA], . . . shall be subject to a civil penalty not to exceed $1,100 for each such violation."[41] A violation is repeated "[w]here the employer has previously violated section 6 or section 7 of 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."[42] 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."[43]

In exercising discretion to determine the appropriate penalty, the Administrator "shall" consider both the gravity of the violation and the employer's

---

Elderkin, ARB Nos. 1999-0033, -0048, ALJ No. 1995-CLA-00031, slip op. at 5 (ARB June 30, 2000).

[38] *Bajakajian*, 524 U.S. at 336-37. The ALJ and Board may consider as applied constitutional challenges, 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 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).

[39] 29 U.S.C. § 206(a)(1)(C).

[40] 29 U.S.C. § 207(a)(1).

[41] 29 U.S.C. § 216(e)(2).

[42] 29 C.F.R. § 578.3(b)(1).

[43] *Id.* at § 578.3(c)(1).

size.[44] 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.[45] The Administrator implements these mandatory and discretionary considerations, in part, through detailed instructions in the FOH.[46]

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

A. Applying the Mandatory Factors: The Size of the Business Warrants a Reduction and the Gravity of the Violations Does Not Warrant a Reduction in the Penalty

The Administrator is correct that a reduction in the CMP is not required simply because an employer is a small business.[47] But the FLSA's CMP provision and its implementing regulations do require *consideration* of the size of the employer's business (and the gravity or seriousness of the violations) in determining the amount of CMPs to assess.[48] Here, WHD considered the size of the businesses, as required by the statute and regulations, and reduced the applicable CMPs by 30 percent.[49] This is consistent with WHD's internal policies, as well as Board precedent, and we agree that a reduction of 30 percent is warranted.[50]

---

44 29 U.S.C. § 216(e)(3); *see also* 29 C.F.R. § 578.4(a).

45 29 C.F.R. § 578.4(b).

46 *See supra, Background and Procedural History*; FOH §§ 54f01, 52f14–52f17. 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); *A-One Med. Servs., Inc. (A-One Medical)*, ARB No. 2002-0067, ALJ No. 2001-FLS-00027, slip op. at 3 n.2 (ARB Sept. 23, 2004) (affirming WHD assessment, which included a 25 percent increase for failure to pay back wages found due).

47 Adm'r Br. at 17 n.11.

48 29 U.S.C. § 216(e)(3); 29 C.F.R. § 578.4(a); *see also Elderkin*, ARB Nos. 1999-0033, -0048, slip op. at 14-15.

49 Tr. at 45:20-46:15; 50:10-17.

50 Tr. at 49:12-17 (identifying and explaining the CMP computation sheets used in the investigation); FOH § 54f01(c)(2)-(3); *Five M's*, ARB No. 2019-0014, slip op. at 12 (citing *Elderkin*, ARB Nos. 1999-0033, -0048, slip op. at 14-15) ("[T]he 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.") (citations omitted).

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 216(e), the conduct must be either repeated or willful.[51] Violations that are *both* are the most serious.[52] Here, we agree with the Administrator that the repeated and willful nature of Respondents' violations do not warrant any reduction of the maximum CMP.[53] The Board has previously affirmed CMP assessments that increase the total penalty for failure to pay back wages found due,[54] and we agree with the Administrator that a 25% increase is warranted here.[55]

---

[51] 29 U.S.C. § 216(e)(2).

[52] *See, e.g.*, *Hong Kong Ent. (Overseas) Invs., Ltd.*, ARB No. 2013-0028, ALJ No. 2010-FLS-00008, slip op. at 10-11 (ARB Nov. 25, 2014) (affirming ALJ's consideration of employer's repeated and willful violations during analysis of the gravity of the violation); *Best Miracle Corp.*, ARB No. 2014-0097, ALJ No. 2008-FLS-00014, slip op. at 9 (ARB Aug. 8, 2016) (affirming maximum penalty for violations characterized as "repeated" and "willful").

[53] Tr. at 31:10-33:6 (explaining how the WHD investigator advised Tahir of his FLSA minimum wage, overtime, and recordkeeping obligations at the conclusion of the first investigation in 2015, but he did not come into compliance); 47:22- 48:17 (explaining that the previous investigation had shown a pattern of violations and "willful disregard for the requirements of the [FLSA]"); *see also Shalimar*, 2020 WL 4335020, at *1, 4-5 (noting that, at the conclusion of WHD's 2015 investigation, WHD investigators "advised Tahir of his minimum wage, overtime, and recordkeeping obligations under the FLSA and that his practices at the time were not compliant. Despite being made aware of these obligations, Tahir continued to discard timesheets, otherwise keep inaccurate records, and failed to pay required minimum wage and overtime.").

[54] *A-One Medical*, ARB No. 2002-0067, slip op. at 3 n.2. The ALJ noted that WHD's policy of increasing the penalty for failure to pay back wages when due could lead to penalties above the statutory maximum but that would be impermissible under the applicable regulations, WHD guidance, and Board precedent. 29 C.F.R. § 578.3(a)(2); FOH § 54f01(c)(4) (directing WHD staff to increase a CMP by 25 percent for failure to pay back wages but to then select the *lesser* of that amount or the maximum penalty allowed); *Best Miracle Corp.*, ARB No. 2014-0097, slip op. at 9.

[55] The ALJ observed that enhancing the CMP by 25 percent could violate an employer's due process rights because it would punish an employer "for exercising its rights to challenge the back wage assessment." D.& O. at 8 n.10. We do not share that concern because, as the Administrator explains, this increase is discretionary, can be reversed when the employer pays the back wages, and is not applied when the employer pays some wages but disputes others. Resp. Br. at 16 n.10 (citing FOH § 54f01(c)(4)). And, employers can merit a reduction in the CMP assessment in those cases where back wages are owed for repeated or willful violations and the employer agrees to comply with the FLSA. FOH § 54f01(b). Thus, the penalty enhancement appears to be designed to encourage compliance, not penalize employers who challenge WHD's investigations. We also note that employers are provided notice by WHD and the opportunity to be heard through

The ALJ increased some penalties and reduced others in proportion to the individualized back wages owed, holding that, when assessing the seriousness or gravity of the violation, "the CMP assessed must bear some reasonable relationship to the amount of back wages owed." We do not agree with an approach, for reasons discussed in detail in Section C, *infra*, and decline to reduce the CMP assessment based on the amount of individual back wages owed to the employees in this case.

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.[56] The ALJ noted that WHD considered only the size of the business and the refusal to pay back wages and "[n]o other factors were considered."[57] The investigator testified, however, that WHD did consider and weigh each of these factors; reviewing the record de novo, we likewise find that consideration of the discretionary factors supports the CMP assessment.[58]

i. Respondents' Good Faith Effort to Comply and Explanations for the Violations Do Not Warrant a Reduction

The WHD investigator testified that Tahir did not demonstrate a good faith effort to comply, rather he demonstrated a reckless disregard for compliance after the first WHD investigation.[59] The district court's decision confirms the investigator's testimony.[60] Tahir also continued committing violations after the close of the second investigation, which demonstrates that he did not make good faith

---

administrative proceedings, as evidenced in this case and as due process requires. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (citation omitted); *Dia v. Ashcroft*, 353 F.3d 228, 239-244 (3d Cir. 2003) (same).

56 29 C.F.R. § 578.4(b).

57 D. & O. at 4-5.

58 *See Keystone Floor Refinishing Co., Inc.*, ARB Nos. 2003-0056, -0067, ALJ No. 2003-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.")

59 Tr. at 45:12-14, 31:7-33:6.

60 *Shalimar*, 2020 WL 4335020, at *7 ("Defendants have not presented any evidence that they acted in good faith or had reasonable grounds for their violations.").

efforts to comply. No reduction in penalties is warranted under this factor.

The investigator further testified that Tahir did not provide any justification for WHD's substantiated findings.[61] On the contrary, the investigator testified "that Mr. Tahir attempted to construct the records in such a way that the overtime violations were not detectable," but were instead intended to "give an illusion of compliance."[62] The investigator also noted in her testimony these were "very serious violations" affecting, at the end of the second investigation, 52 workers.[63] These record facts do not warrant a reduction based on this factor.

ii. Respondents' History of Violations, Commitment to Future Compliance, and Interval Between Violations Do Not Warrant a Reduction

Tahir refused to commit to compliance going forward and he demonstrated an on-going pattern of violating the FLSA's minimum wage and overtime provisions going back to 2015.[64] At the conclusion of the first investigation, WHD provided Tahir with detailed information about how to come into compliance.[65] Nevertheless, he continued violating the FLSA, as WHD determined in its second investigation.[66] And he continued violating the FLSA even *after* the conclusion of the second investigation when he was again given information about how to comply.[67] Indeed, his actions required the district court to issue an injunction to ensure future compliance.[68]

The investigator further identified similar minimum wage, overtime, and recordkeeping violations across the two investigations of Mr. Tahir's businesses.[69]

---

61 Tr. at 41:5-42:11; 45:12-14; 71:14-19 (noting that Mr. Tahir simply stated to the investigator that his employees were not being honest with the WHD).

62 Tr. at 48:5-17.

63 Tr. at 45:22-46:1; 51:7-14.

64 Tr. at 29:24-30:4.

65 Tr. at 32:7-33:6 (describing counseling and information provided after the first investigation).

66 Tr. at 45:3-14 (noting that Tahir's conduct "reflected a pattern of violations from the previous investigation").

67 Tr. at 38:1-7 (describing counseling and information provided after the second investigation); 43:19-21; 54:9-55:24 (confirming that, despite the second investigation concluding, Tahir continued to violate the FLSA).

68 *Shalimar*, 2020 WL 4335020, at *7.

69 *Compare* Tr. at 30:2-23 (detailing minimum wage, overtime, and recordkeeping violations at Promised Land truck stop during the first investigation) *with* Tr. at 35:8-37:22

The interval of time between the violations was minimal.[70]

In addition, although payment of back wages and liquidated damages may be warranted for an employer attempting to rapidly and in good faith resolve FLSA violations, payment of back wages is generally not a condition warranting lower CMP assessments.[71] And mitigation is not warranted where, as in this case, an employer did not voluntary comply and indeed continued to violate the FLSA until the district court reached judgment.[72]

iii. The Number of Affected Employees and Pattern of Violations Does Not Warrant a Reduction

As detailed above, 52 employees were affected, and Respondents had a pattern of overtime, minimum wage, and recordkeeping violations from 2015 to 2018. Thus, mitigation is not warranted under these factors.

Upon consideration of all of the foregoing aggravating and mitigating factors, for the Whistle Stop violations, we assess a CMP of $945 for each of the 18 violations, calculated as follows: assessing the maximum CMP of $1080.00, reducing by 30% given the size of the business, increasing by 25% because of Tahir's refusal to comply and refusal to pay.[73] Mitigation is unwarranted under the discretionary factors, and the total is $17,010.00.

Upon consideration of all of the foregoing aggravating and mitigating actors, for the Promised Land violations, we assess a CMP of $945 for 25 violations, and $481.25 for nine violations, calculated as follows: assessing the maximum CMP of $1080.00 or $550, as applicable,[74] reducing by 30% given the size of the business, increasing by 25% because of Tahir's refusal to comply and refusal to pay.[75]

(detailing the same violations, but also violations regarding the misclassification of workers as exempt managers resulting in additional overtime violations).

70 Tr. at 34:5-6 (noting that the second investigation included the year that the first investigation was conducted).

71 *Cf. Micro-Chart, Inc.,* ARB No. 1998-0080, ALJ No. 1998-FLS-00012, slip op. at 4 (ARB Nov. 4, 1998) (rejecting the employer's claim that CMPs should not be assessed where the wages have been paid in full by the completion of the investigation as that would simply allow the employer to repeatedly "violate the FLSA and avoid a CMP").

72 D. & O. at 7 (garnishments were required to satisfy the judgement).

73 Tahir continued to violate the FLSA until the district court entered judgment and garnishments were required to satisfy the judgment. D. & O. at 7; Tr. at 20:11-14, 95:24-25, 96:12. Therefore, we will apply WHD's policy of increasing the CMPs by 25%.

74 D. & O. at 4 n.7.

75 *Supra* note 73.

Mitigation is unwarranted under the discretionary factors, and the total is $28,712.25.

The total for all 52 violations is $45,722.75. This CMP, as assessed by the Administrator, 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 Respondents' business.

C. *The CMP Assessed Need Not Be Proportional to the Back Wages Owed to Each Individual Employee*

Although ALJs have significant discretion when reviewing WHD's CMP assessments,[76] the ALJ erred in requiring consideration of individualized back wages and requiring individual CMP assessments to be proportional to back wages. We agree with the Administrator that such an approach is contrary to the statute, regulations, and Board precedent, and is not required by Eighth Amendment case law.

i. The Text and Purpose of the FLSA Statute and Regulations

As the Administrator concedes, the "gravity" of a given violation could theoretically be measured by the amount of back wages assessed for that violation.[77] Neither the FLSA's text nor its implementing regulations, however, support a requirement that CMPs must be set in proportion to the back wages unlawfully withheld from *each individual worker*. The FLSA requires only that the "gravity of the *violation*" (and the size of the employer's business) be considered.[78] In addition, the statute sets out the maximum penalty by reference to the individual violations, not the amount of back wages owed as a result of those violations.[79] The regulatory factors likewise do not require the type of proportionality imposed by the ALJ, nor do they suggest that individualized back wages must be considered.[80]

We also agree with the Administrator that requiring proportionality could

---

76 *See* 29 C.F.R. § 580.12(b), (c); *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).

77 Adm'r Br. at 25.

78 29 U.S.C. § 216(e)(3) (emphasis added).

79 *Id.* at § 216(e)(2) (pegging the maximum penalty to "*each* [repeated or willful minimum wage or overtime] *violation*") (emphasis added).

80 29 C.F.R. § 578.4.

undermine the purpose of CMPs to deter violations of the FLSA's minimum wage and overtime pay requirements.[81] Because repeated or willful low-dollar violations would result in lower CMPs under this approach, the deterrent impact would be lessened or nullified. Proportionality would also presumably result in lower CMP assessments for violations against low-wage workers.[82]

ii. Board Precedent

The Board's precedent does not require consideration of individualized back wage evaluations in assessing CMPs. To the contrary, we have affirmed assessments that used the same WHD procedures used in this case, where WHD assessed the same CMP for each employee despite individualized back wage amounts for the same violations, without requiring that the CMP be assessed proportionately to the individual back wages owed.[83]

In *Best Miracle*, for example, the Board reduced the ALJ's assessment to the statutory maximum for each employee and excluded employees who experienced violations after the investigation concluded.[84] We did not identify a comparison or proportionality requirement between the individual back wages owed and the individual CMPs assessed, the only requirement was that the assessment be based on the violations experienced. Similarly, in *A-One Medical*, we affirmed the per-employee CMP assessment regardless of back wages owed.[85]

---

[81] The 1989 FLSA amendments adding minimum wage and overtime CMPs were intended to give "the Secretary the authority to assess fines for flagrant violations . . . as a deterrent to potential violators." H.R. Rep. No. 101-260, at 25 (1989). Government Accountability Office research suggested that "civil monetary penalties of sufficient size" were necessary "to deter violations of the minimum wage, overtime, and recordkeeping requirements." Legislative History of the Fair Labor Standards Amendments of 1989 P.L. 101-157 (1989) at 48 (statements of Congressman Miller).

[82] Although WHD's policy is to not assess CMPs for employees owed $20 or less in back wages, the agency's guidance is clear that individualized back wages should not be used to modify per-employee CMP assessments. *See* FOH §§ 54f01(c)(5), 52f14(a)(3) (staff must "not confuse the amount of CMPs with the amount of back wages. Back wages are the amounts of wages the employer has illegally withheld from employees. CMPs are intended to discourage employers from future non-compliance. *There is no inherent relationship between the two.*") (emphasis added).

[83] *See, e.g.*, *Five M's*, ARB No. 2019-0014, slip op. at 13; *Best Miracle Corp.*, ARB No. 2014-0097, slip op. at 3-6, 9; *Hong Kong Ent. (Overseas) Invs., Ltd.*, ARB No. 2013-0028, slip op. at 7-11; *A-One Medical*, ARB No. 2002-0067, slip op. at 3; *Baystate Alt. Staffing, Inc.*, Case No. 1994-FLS-00022, slip op. at 7 (ARB Dec. 19, 1996).

[84] *Best Miracle Corp.*, ARB No. 2014-0097, slip op. at 9.

[85] *A-One Medical*, ARB No. 2002-0067, slip op. at 3.

Although we have sometimes affirmed assessments in which the amount of back wages owed was considered a mitigating factor, we have not adopted a rule that the ALJ appears to have adopted here, that would *require* CMP assessments to be based on individualized determinations of back wages owed to each employee. In *Five M's*, for example, although the amounts owed were mitigating facts, in determining the final CMP amount, the Board assessed the *same CMP amount* for each of the 35 employees.[86] Finally, in other cases in which the Board took back wages or other factors into consideration, it did not apply an individualized proportionality rule.[87]

Thus, although the Board has held that back wages paid to each employee *may* be considered as a basis for lowering a CMP assessment, our precedent does not *require* the CMP assessment *must be* linked to back wages owed to each employee.

iii. The Eighth Amendment Does Not Compel CMPs to be Linked to Individualized Back Wages

a. Applicable Legal Standards

The ALJ relied on *Bajakajian's* 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 he concluded meant the amount of back wages owed to each individual employee.[88] As the ALJ correctly noted, the "touchtone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[89] The Court, however, expressly cautioned against "requiring strict proportionality" because "any judicial determination regarding the gravity of a particular criminal offense will be

---

86 *Five M's*, ARB No. 2019-0014, slip op. at 13. As the Administrator notes, there are several distinguishing features of the back wages here compared to the back wages in *Five M's*. Adm'r Br. at 29-30. For example, nearly half the workers here were owed more than $300 in back wages compared to most of the back wages in *Five M's* being owed to only 2 workers, and average back wages in this case were almost twice as high as in *Five M's*.

87 *Hong Kong Ent. (Overseas) Invs., Ltd.*, ARB No. 2013-0028, slip op. at 10-11 (considering the full $309,816.21 amount of wages owed in CMP assessment, among other things); *Baystate Alt. Staffing, Inc.*, Case No. 1994-FLS-00022, slip op. at 7-8) (same); *ZL Rest. Corp.*, ARB No. 2016-0070, ALJ No. 2016-FLS-00004, slip op. at 3, 5-6 (ARB Jan. 31, 2018) (same but reducing CMPs because WHD did not take small size into consideration).

88 D. & O. at 8 (citing *Bajakajian*, 524 U.S. at 334).

89 *Id.* (citing *Bajakajian* 524 U.S. at 334).

inherently imprecise."[90] Meeting this proportionality standard, is "by no means onerous;" it will be an "infrequent instance" where a penalty is grossly disproportionate.[91]

In finding the forfeiture to be grossly excessive, the *Bajakajian* Court first examined the "essence" of the substantive crime, noting that it was solely a willful failure to report and was not related to any other illegal activity. Second, the Court noted that Bajakajian "did not fit into the class of persons for whom the statute was principally designed," such as money launderers or tax evaders. Third, the Court noted that the Sentencing Guidelines indicated a "minimal level of culpability." The Court also compared the amount of the fine to the maximum statutory penalty. In assessing the appropriateness of a penalty related to the constitutional limits imposed by the Eighth Amendment, due deference must be given to Congress' authority to set the maximum CMP for each violation.[92] In *Yates*, the Eleventh Circuit noted that it was relevant that the penalty imposed in that case was lower than maximum civil penalty under the statute at issue.[93]

Finally, the Court considered the harm caused by Bajakajian minimal. Bajakajian failed to report the amount of money being taken out of the country to the U.S. government. There was no fraud on the government or financial "loss to the public fisc." His conduct nonetheless led to a $357,144 criminal asset forfeiture.[94]

Courts also look at the relationship between the penalty and the harm caused

---

[90] *Id.*; *cf. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434-35 (2001) ("We have recognized that the relevant constitutional line [in reviewing punitive damage awards] is inherently imprecise, rather than one marked by a simple mathematical formula.") (internal quotations marks omitted).

[91] *U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 408 (4th Cir. 2013).

[92] *See Bajakajian*, 524 U.S. at 336 ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature."); *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1314 (11th Cir. 2021) ("[Penalties] falling below the maximum statutory fines for a given offense ... receive a strong presumption of constitutionality.") (internal quotation marks omitted); *cf. Youngermann*, ARB No. 2011-0056, slip op. at 9 ("[P]unitive damages awarded within limits set by statute do not implicate the constitutional due process concerns[.]").

[93] *Yates*, 21 F.4th at 1315 (considering "how the imposed penalties compare to other penalties authorized by the legislature"); *Pimentel v. City of Los Angeles*, 974 F.3d 917, 921 (9th Cir. 2020) (considering "whether the underlying offense related to other illegal activities" and "whether other penalties may be imposed for the offense").

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

to the victim.[95] 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.[96] The Board has likewise noted that repeated and willful violations that affect many employees are particularly harmful.[97] In assessing non-monetary harms, courts also look at factors such as "how the violation erodes the government's purposes for proscribing the conduct."[98]

Neither the *Bajakajian* court nor the Third Circuit, the applicable appellate court in this case, explicitly require consideration of whether the fine would deprive the defendant of their livelihood under the Eight Amendment analysis.[99] Although circuits vary in whether they consider financial factors,[100] if considered, "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 "ruinous monetary

---

95 *See Cooper Indus., Inc.*, 532 U.S. at 435 (looking at "the relationship between the penalty and the harm to the victim caused by the defendant's actions").

96 *United States v. George*, 779 F.3d 113, 124 (2d Cir. 2015).

97 *Hong Kong Ent. (Overseas) Invs., Ltd.,* ARB No. 2013-0028, slip op. at 8 (affirming ALJ's finding that the violations were "most serious as they were both repeat[ed] and willful" and because of the large number of employees effected); *Five M's*, ARB No. 2019-0014, slip op. at 8 (noting that a history and pattern of violations considered under 29 C.F.R. § 578.4 were relevant to assessing the seriousness of the violation and "weigh[ed] in favor of a larger penalty").

98 *Pimentel*, 974 F.3d at 923-24 (approving of penalty imposed for overstaying parking meters and noting that the city was "harmed because overstaying parking meters leads to increased congestion and impedes traffic flow"); *Yates*, 21 F.4th at 1316 (detailing how harms resulting from fraud against the government are "untethered to the value of any ultimate payment" since they affect the public's confidence in the government); *see also Bunk*, 741 F.3d at 409 (courts "must consider the award's deterrent effect on the defendant and on others perhaps contemplating a related course of fraudulent conduct.").

99 *Bajakajian*, 524 U.S. at 337-39; *see also United States v. Cheeseman*, 600 F.3d 270, 283-84 (3d Cir. 2010) (articulating the *Bajakajian* factors without consideration of financial factors).

100 *Compare United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007) ("it is appropriate to consider whether the forfeiture in question would deprive [defendant] of his livelihood"), *and United States v. Chin*, 965 F.3d 41, 58 (1st Cir. 2020), *with United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1311 n.12 (11th Cir. 1999) ("whether a forfeiture is 'excessive' is determined by comparing the amount of the forfeiture to the gravity of the offense . . . and not by comparing the amount of the forfeiture to the amount of the owner's assets"), *and United States v. Bikundi,* 926 F.3d 761, 796 (D.C. Cir. 2019) (noting that the Supreme Court has not weighed in on the issue and the "Excessive Fines Clause does not make obvious whether a forfeiture is excessive because a defendant is unable to pay . . . . ").

punishment that might conceivably be so onerous as to deprive a defendant of his or her future ability to earn a living[.]"[101] The Board has likewise not considered the fact that an employer closes its business prior to the imposition of CMPs a factor when assessing penalties for repeated or willful violations of the FLSA.[102]

United Mine Workers and *Elderkin*, cited by the ALJ, do not lead to a contrary conclusion.[103] In *United Mine Workers*, the Court held that a $3.5 million contempt citation was excessive,[104] commenting that a court must "consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."[105] The Court did not, however, reject the $3.5 million contempt fine outright, but held a $700,000 contempt citation, with the remaining $2.8 million held in reserve should the union continue to be in contempt, would be appropriate.[106]

We agree with the Administrator's contextual reading of *United Mine Workers*—the Court's rejection of the larger fine was in part to induce compliance with a restraining order; if the union complied with the restraining order, it would not forfeit the remaining amount.[107] *United Mine Workers* thus does not stand for the proposition that the state of the employer's business is a mandatory or discretionary factor in the analysis of a penalty for violating the FLSA's minimum wage or overtime pay provisions.

Elderkin is likewise inapposite. That case involved the appropriateness of a CMP for violations of the FLSA's child labor provisions, where the applicable regulations specifically require weighing a business' financial health.[108] In contrast,

---

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

102 *Best Miracle*, ARB No. 2014-0097, slip op, at 3, 9 (upholding the Administrator's assessment of CMPs even though the employer has closed its business); *Hong Kong Ent. (Overseas) Invs., Ltd.*, ARB No. 2013-0028, slip op. at 9-10 (affirming CMP assessment where an employer "could have decreased the size of its workforce to a size that it could afford, or otherwise changed or closed its business" rather than having employees perform work without "having the financial condition or ability to pay" them) (internal quotations omitted); *Micro-Chart, Inc.*, ARB No. 1998-0080, slip op. at 2 ("[F]inancial hardship is no defense to failure to pay wages due on time").

103 D. & O. at 9 (citing *United States v. United Mine Workers*, 330 U.S. 258 (1947), and *Elderkin*, ARB Nos. 1999-0033, 1999-0048, slip op. at 14-17.

104 *United Mine Workers*, 330 U.S. at 302-21.

105 *Id.* at 304.

106 *Id.* at 304-05.

107 *Id.* at 305.

108 *Elderkin*, ARB Nos. 1999-0033, -0048, slip op. at 10-11 (citing to 29 C.F.R. § 579.5(b), which requires the Administrator to take into account the "dollar volume of sales or

the CMP regulations for minimum wage and overtime violations do not require WHD to consider the financial health of a business.[109]

We conclude that it is inappropriate to give weight to the defendant's finances in this case. First, the FLSA overtime and minimum wage regulations do not provide for financial hardship as a mitigating factor. Second, the Third Circuit, the applicable appellate circuit in this case, and prior Board cases do not consider a defendant's finances as a factor in the analysis.[110] Third, as discussed above, the deterrent effect of FLSA CMPs would be dulled by a consideration of financial hardship.

b. The CMP Assessment in This Case is Not Grossly Disproportional

Applying de novo the analysis in *Bajakajian*, we conclude that WHD's assessment was proportional to Respondents' violations of the FLSA. Here, the "essence" of the violations was failure to pay minimum wages and overtime to workers. Unlike the reporting offense in *Bajakajian*, which was not associated with any related illegal activity, Tahir's FLSA violations were repeated, effecting 52 employees (65 at the conclusion of the district court proceedings).[111] The violations included recordkeeping practices to "create the illusion of compliance,"[112] and were in disregard of WHD's verbal and written compliance advice after WHD found violations in the 2015 investigation.[113] Indeed, Tahir continued violating the FLSA after the conclusion of the second investigation.[114]

Moreover, the purpose of CMPs is to deter *future violations* of the FLSA

---

business done, amount of capital investment and financial resources, and such other information as may be available relative to the size of the business of such person" when assessing CMPs for violations of the FLSA's child labor provisions).

109 29 C.F.R. § 578.4. We are bound to observe this regulation. *See* 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).

110 *See United States v. Lessner*, 498 F.3d 185, 206 (3d Cir. 2007) (commenting that "even if a defendant's hardship is a proper consideration," the fine imposed does not exceed the defendant's ability to pay).

111 D. & O. at 3 n.4, 4-5; *Shalimar*, 2020 WL 4335020, at *4-6.

112 Tr. at 48:5-17; *see Bajakajian* 524 U.S. at 339; *United States v. Malewicka*, 664 F.3d 1099, 1104-05 (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); *Cheeseman*, 600 F.3d 270, 283-84 (noting other unlawful behavior related to seizure of weapons).

113 *See, e.g.*, Tr. at 31:7-23 (noting the advice Tahir was given).

114 Tr. at 54:9-55:24.

because of a pattern of repeated or willful conduct.[115] As an employer who repeatedly *and* willfully violated the FLSA, Tahir is precisely the type of person against whom Congress sought to impose CMPs for FLSA violations.[116] Unlike in *Bajakajian*, where the defendant was not a money launderer or drug trafficker that would implicate the reporting statute he was charged under, the CMPs here are the result of the type of wage violation that FLSA CMPs are meant to deter.[117]

In addition, the conduct and the resulting fine here is proportional to the maximum statutory penalty established by Congress, as adjusted annually for inflation.[118] We find it reasonable based on the severity of misconduct here for WHD to have assessed CMPs lower than the maximum for each violation.[119] Further, WHD's policy standardizes treatment of CMPs across cases, which ensured that the penalty in this case is comparable to those imposed for similar violations in other

---

[115] *See supra,* H.R. Rep. No. 101-260 at 25.

[116] *Micro-Chart, Inc.*, ARB No. 1998-0080, slip op. at 4 (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").

[117] *See Bajakajian*, 524 U.S. at 337-38; *Cheeseman*, 600 F.3d at 284 (noting that federal law was intended to ensure that those engaged in illicit drug abuse should not possess firearms, confirming that the state's forfeiture of defendant's gun collection was not excessive); *Yates*, 21 F.4th at 1315 (relying on a similar analysis when confirming that a defendant who defrauded the government was the precise type of person the False Claims Act was attempting to deter).

[118] In *Bajakajian*, the Court noted the wide disparity between the amount of cash the defendant was forced to forfeit as a result of his reporting violation ($357,144) to the Sentencing Guideline's fine for similar reporting violations ($5,000). *Bajakajian*, 524 U.S. at 338; *see also Collins v. SEC*, 736 F.3d 521, 527 (D.C. Cir. 2013) ("A penalty that is not far out of line with similar penalties imposed on others and that generally meets the statutory objectives seems highly unlikely to qualify as excessive in constitutional terms."); *see also United States v. Sepulveda-Hernandez*, 752 F.3d 22, 37 (1st Cir. 2014) ("When the forfeiture judgment is less than the maximum authorized fine, a defendant who purposes to challenge its constitutionality faces an especially steep uphill climb."); *Malewicka*, 664 F.3d at 1106; *United States v. Dodge Caravan Grand SE/Sport Van, VIN No. 1B4GP44G2YB7884560*, 387 F.3d 758, 763 (8th Cir. 2004) ("'[I]f the value of the property forfeited is within or near the permissible range of fines using the sentencing guidelines, the forfeiture almost certainly is not excessive.'") (citations omitted); *see also Cooper Indus. Inc.*, 532 U.S. at 435 (directing courts to consider "sanctions imposed in other cases for comparable misconduct" when assessing whether a punitive damages award is excessive).

[119] D. & O. at 4-5.

cases.[120] This case simply is not an outlier compared to other per-employee CMPs.[121]

Finally, we review the monetary and non-monetary harms caused by Respondents' violations.[122] Unlike *Bajakajian*'s reporting violation, the harm was not minimal. At the time WHD assessed the CMPs, WHD found that Tahir's actions deprived 52 employees of their lawfully owed wages, totaling $39,944.90.[123] Employers who repeatedly and willfully violate the FLSA, in addition to directly harming their own workers, also undercut those employers that follow the law, thereby conferring the type of unfair advantage in the marketplace that the Act was also designed to prohibit.[124]

We also note that even if we were to consider an employer's ability to earn a livelihood or the financial state of his business in analyzing proportionality under the Eighth Amendment, the record does not support a conclusion that either consideration weighs in favor of reducing the CMP assessments in this case. Here, the ALJ noted that one of the two gas stations had ceased operations, the other's financial state was "precarious," and that Tahir testified that he owed $97,500 in back rent for the gas stations.[125] However, there is no record evidence suggesting that the CMPs assessed constitute a "ruinous monetary punishment that might

---

120 Applying an ad hoc penalty and back wage tables, like the one the ALJ developed for this case, arguably undermines that consistency across cases. D. & O. at 10.

121 *See, e.g.*, *Best Miracle Corp.*, ARB No. 2014-0097, slip op. at 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 n.2 (affirming the application of the maximum civil penalty after reducing the penalty for the size of the employer and increasing it due to the employer's failure to pay back wages found due).

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

123 Ultimately, at the conclusion of the district court litigation, 65 employees were owed $59,690.57 in back wages, *Shalimar*, 2020 WL 4335020, at *6, which was greater than the CMPs that WHD assessed (as well as the maximum CMPs that it could have assessed). *See also United States v. Suarez*, 966 F.3d 376, 386 (5th Cir. 2020) ("This court has repeatedly held that the 'ongoing' nature of a defendant's conduct contributes to the gravity of the offense" under an Excessive Fines Clause analysis).

124 29 U.S.C. § 202 (finding that the existence of unfair labor practices "constitutes an unfair method of competition in commerce"); *see also George*, 779 F.3d at 124 (finding that the exploitation of immigrant worker for labor not only harms the immigrant worker, but also the government and "those citizens and lawful residents whose ability to secure work consistent with the protections of federal law was necessarily hampered" by the defendant's actions).

125 D. & O. at 7, 9.

conceivably be so onerous as to deprive [Tahir] of his "future ability to earn a living[.]"[126] To the contrary, the ALJ also noted that in 2020 Tahir's combined *positive* net income from both stations was $72,000 and was between $80,000 and $90,000 between 2015 and 2018.[127] Tahir also testified that the closure of one of his gas stations was largely due to the COVID-19 pandemic, and not the actions of the Department of Labor.[128]

In sum, an evaluation of each factor demonstrates that WHD's CMP assessment in this case results in a penalty amount that is proportionate to the violations under Eighth Amendment precedent. Tahir caused significant harm by repeatedly and willfully violating the FLSA; he is the precise type of person that Congress envisioned deterring when it authorized CMPs for minimum wage and overtime pay violations; and the CMP is consistent with penalties arrived at in like cases. Furthermore, neither Supreme Court precedent nor the express terms of the governing regulations require consideration of the employer's financial health when determining the appropriate CMP amount. Thus, WHD's CMP assessment process here, which is consistent with its process generally, does not violate the Eighth Amendment's prohibition against excessive fines. More importantly, the Excessive Fine's clause analysis does not compel the conclusion that tying the CMP amount to the individualized back wage owed to each individual worker is the only way to comply with the Eighth Amendment.

---

126 *Chin*, 965 F.3d at 58 (internal quotation marks and alterations omitted); *see also Sepulveda-Hernandez*, 752 F.3d at 37 ("[I]t is the defendant's burden to establish a record at the district court level that could sustain a deprivation of livelihood claim.").

127 D. & O. at 7, 9.

128 Tr. at 81:14-82:11; *see also* Resp. Br. at 5-6.

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 $45,722.75 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