ARB No. 2023-0007

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

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

v.

TAFS CORPORATION d/b/a WHISTLE STOP,
SHALIMAR DISTRIBUTORS, LLC
d/b/a PROMISED LAND TRUCK STOP, and
MOHAMMED TAHIR
Respondents.

On Appeal from the
Office of Administrative Law Judges
ALJ Nos. 2021-FLS-00005 & 2021-FLS-00006

ADMINISTRATOR'S OPENING BRIEF

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The Acting Administrator ("Administrator") of the Wage and Hour Division ("WHD") respectfully requests that the Administrative Review Board ("Board") reverse the portion of the Administrative Law Judge's ("ALJ") October 13, 2022 Decision and Order that reduced the civil money penalties assessed for Respondents' minimum wage and overtime violations of the Fair Labor Standards

Act ("FLSA" or "Act") and affirm the Administrator's determination regarding civil money penalties assessed.

In a related proceeding on FLSA liability for back wages, the U.S. District Court for the Middle District of Pennsylvania granted summary judgment for the Department of Labor, holding that Shalimar Distributors LLC, TAFS Corporation, and Mohammed Tahir had violated the minimum wage, overtime, and recordkeeping provisions of the FLSA. The district court also concluded that liquidated damages were proper because Respondents did not have a good faith defense, that their violations were willful, and that an injunction was necessary to ensure future compliance.

This matter arises under the civil money penalty ("CMP") provisions of the FLSA, 29 U.S.C. 216, and its implementing regulations at 29 C.F.R. Parts 578 to 580. In determining the appropriate penalty for Respondents' minimum wage and overtime violations, the Administrator properly considered the mandatory and discretionary factors, and assessed the appropriate penalty due to the seriousness of the violations. The ALJ, however, drastically reduced the CMPs assessed. In doing so, the ALJ made several errors in his analysis, and the Board should reverse his reduction and reinstate the penalties assessed by the Administrator.

STATEMENT OF THE ISSUE

Whether the ALJ erred by determining that, when evaluating the seriousness or gravity of violations of the FLSA's minimum wage or overtime pay provisions in order to assess CMPs, the Administrator must take into consideration the amount of back wages owed to each individual employee and then adjust the per-employee CMP assessment in proportion to the individual back wages unlawfully withheld, despite that such a requirement is not compelled by the statute, regulations, Board precedent, or the Eighth Amendment, and is contrary to the purposes of the Act.

STATEMENT OF THE CASE

A. Relevant Statutory and Regulatory Framework

The FLSA requires every employer to pay covered employees at least $7.25 for every hour worked. 29 U.S.C. 206(a)(1)(C). 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 employees' regular rate of pay for the hours worked over 40. 29 U.S.C. 207(a)(1).

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." 29 U.S.C.

216(e)(2).[1] 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." 29 C.F.R. 578.3(b)(1). 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." 29 C.F.R. 578.3(c)(1).

In exercising discretion to determine the appropriate penalty, the Administrator "shall" consider both the gravity of the violation and the employer's size. 29 U.S.C. 216(e)(3); *see also* 29 C.F.R. 578.4(a).[2] "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. 29 C.F.R. 578.4(b).

[1] Pursuant to a statutory directive, this statutory maximum is regularly adjusted by regulation. The current, inflation-adjusted CMP maximum for FLSA minimum wage or overtime pay violations is $2,374. 29 C.F.R. 578.3(a)(2); *see also* Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat 584 (2015); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2022, 87 Fed. Reg. 2328, 2022 WL 124260 (Jan. 14, 2022).

[2] The regulation repeats the statutory requirements, though phrases the "gravity" consideration as a requirement to consider "the seriousness of the violations." 29 C.F.R. 578.4(a).

B. Wage and Hour Division's Civil Money Penalty Assessment Procedures

The Administrator implements these mandatory and discretionary considerations, in part, through detailed instructions to WHD investigators and others in its Field Operations Handbook ("FOH"). The FOH describes the regulatory factors and the procedures designed to implement them. FOH §§ 54f01, 52f14–52f17.[3]

WHD calculates a CMP for each individual employee who suffered FLSA monetary violations. FOH § 54f01(b). To determine the amount, the investigator first assesses whether the employer's conduct was repeated, willful, or repeated and willful, whether the employer has agreed to come into compliance, and whether the employer paid back wages due before the investigator came on site. *Id.* (including a table showing the penalty starting point that ranges from 5 percent of the statutory maximum to 100 percent, depending on these considerations). This initial penalty is then reduced by 15 or 30 percent, depending on whether the employer employs 20–99 employees or 1–19 employees, respectively. § 54f01(c)(2)-(3). If the employer refuses to come into compliance by paying the back wages due, the CMP amount (after the adjustments above) is then increased by 25 percent (though the amount can never go above the statutory maximum).

[3] Cited FOH provisions are included in the attached addendum.

§ 54f01(c)(4). This CMP amount is then multiplied by the total number of unduplicated employees who experienced a violation that resulted in an employee being owed more than $20 in back wages over the period of investigation. § 54f01(c)(5). The WHD Regional Administrator retains discretion to increase or lower the CMP assessed. § 52f17(a).

C. Statement of Facts and Procedural Background

1. Mohammed Tahir operated two gas stations and convenience stores in Pennsylvania – TAFS Corporation, doing business as Whistle Stop, and Shalimar Distributors, LCC, doing business as Promised Land Truck Stop ("Promised Land"). *TAFS Corp., et al*, ALJ Nos. 2021-FLS-00005, 00006, slip op. at 4 (ALJ Oct. 13, 2022) ("D.O.").[4]

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. D.O. at 4. At the close of that investigation, the WHD investigator advised Mr. Tahir regarding his FLSA minimum wage, overtime, and recordkeeping obligations. April 19, 2022 Hearing Transcript ("Tr.") at 31:7-33:1. WHD did not assess a CMP for this violation. D.O. at 4. Mr. Tahir never paid the back wages owed to this worker. *Id.*; *see also* Tr. at 31:24-32:6.

[4] While Promised Land is still in operation, Whistle Stop is no longer in business. D.O. at 7.

3. WHD investigated Promised Land again and also Whistle Stop in 2018, for a period of time spanning April 11, 2015 to April 10, 2018 for Promised Land and July 16, 2015 to April 10, 2018 for Whistle Stop. D.O. at 2. That dual investigation revealed violations of the FLSA at both gas stations. *Id.* at 2. The lead investigator testified that Mr. Tahir had, among other things: failed to pay all workers the minimum wage due to deductions from their pay; paid some workers straight time pay for hours worked over 40 hours in a work week; failed to pay some workers any pay for hours worked over 40 hours in a work week; and incorrectly classified some of his employees as salaried exempt managers resulting in overtime violations. Tr. at 36:8-37:15. WHD determined that the violations affected 52 employees who were collectively owed $39,944.90 in back wages. D.O. at 2. At the conclusion of the investigation, WHD issued determination letters on June 18, 2018 informing Mr. Tahir that he owed this amount of back wages to his employees. Tr. at 53:2-25 (identifying exhibits AX-12 and AX-14, assessment letters for Promised Land and Whistle Stop, respectively).

4. In these same determination letters, WHD also assessed CMPs of $17,010 and $28,712.25 against Whistle Stop and Promised Land gas stations, respectively, and Mr. Tahir individually, for violations of the FLSA's minimum wage and

overtime provisions (for a total of $45,722.25 in CMPs). D.O. at 2, 4-5.[5]

WHD followed the CMP assessment process outlined in the FOH to arrive at the penalty amount. WHD first determined that Respondents had repeatedly and willfully violated the FLSA's minimum wage and overtime requirements. Tr. at 45:3-14. WHD further determined that the back wages owed were significant; violations were ongoing; they represented a pattern of non-compliance; there was no good faith basis for the violations; Mr. Tahir generated payroll documents in ways to create an "illusion of compliance" where none existed; and Mr. Tahir refused to comply with the FLSA by paying the back wages found due. Tr. at 46:16-24; 47:4-48:17; 45:3-14; 48:25-49:11; 50:18-24.

Because of the seriousness of the violations and their repeated and willful nature, the case merited the maximum per-employee penalty as the starting point. Tr. at 49:22-51:16 (identifying exhibits AX-16 and AX-17). The investigator then reduced the amount by 30 percent since Mr. Tahir ran a small business. Tr. at 45:15-46:15 (noting that the small number of workers employed at both gas stations merited a reduction); 50:14-17. The investigator then increased the CMPs by 25 percent because Mr. Tahir refused to pay the back wages found due. Tr. at

[5] In what appears to be a typographical error, the ALJ refers to the $28,712.25 CMP against Promised Land later in his decision as $26,712.15. D.O. at 5; *but see* AX-12 – Promised Land Corrected Assessment Letter, at 1 (noting that the WHD assessed a total CMP for $28,712.25 against Promised Land).

50:18-24; 52:7-12. The final CMP amount per violation was then multiplied by the number of employees who experienced a back wage violation of more than $20. Tr. at 46:5-10; 72:9-23. WHD therefore assessed a CMP for each employee whose FLSA rights were violated and assessed the same amount for each employee, without regard to the amount of back wages owed to each employee. D.O. at 4-7; Tr. at 73:3-7. The maximum CMP applicable at the time was either $550 or $1,080, depending on the employees' period of work in the investigation.[6] With the various adjustments outlined above, WHD assessed $481.25 for 9 of the employees and $945 for the remaining 43 employees, which were below the respective maximums. D.O. at 4-6. As noted above, the total CMPs assessed were $45,722.25, which was less than the total possible maximum of $51,390. *Id.* On June 26, 2018, Respondents timely objected to WHD's determination. D.O. at 2.

5. The Secretary of Labor ("Secretary") subsequently filed a complaint for FLSA violations against Respondents in U.S. District Court for the Middle District of Pennsylvania. D.O. at 2. On July 28, 2020, the district court granted summary judgment in favor of the Secretary, concluding that, among other things, Respondents owed $119,381.10 to 65 employees – consisting of $59,690.57 in back wages and an equal amount in liquidated damages – and had willfully

[6] *See generally* Civil Money Penalty Inflation Adjustments, Wage and Hour Division, https://www.dol.gov/agencies/whd/resources/penalties (accessed February 28, 2023); D.O. at 4 n.7 (describing the then prevailing maximum CMP amount).

violated the FLSA. *Id.* at 2; *see also Scalia v. Shalimar Distributors, LLC*, No. 4:18-CV-01642, 2020 WL 4335020, at *4-5, 7 (M.D. Pa. July 28, 2020) ("*Shalimar*").[7] Mr. Tahir eventually paid the back wages and liquidated damages due, but only after his accounts were garnished to do so. D.O. at 7.

6. On February 2, 2021, the Administrator, through its attorneys, referred both cases to the Office of Administrative Law Judges for a final determination of the appropriateness of the CMP assessment, which the ALJ consolidated. D.O. at 2-3. On February 2, 2022, the ALJ partially granted the Administrator's motion for summary decision that, based on the district court's summary judgement order, Respondents had willfully violated the FLSA and that CMPs were authorized, but denied summary decision that $45,722.25 in CMPs were appropriate. *Id.* at 3.

D. The Administrative Law Judge's Decision

After holding a hearing on April 19, 2022, the ALJ issued the Decision and Order on October 13, 2022, concluding that the CMPs assessed for each employee were "grossly disproportionate to several violations in this case" and reducing the total CMP amount from $45,722.75 to $13,800. D.O. at 9-11. The ALJ arrived at this figure after applying penalty tables he created for this matter. *Id.* at 10.

[7] The number of employees owed back wages and the amount of back wages due were higher at the conclusion of the district court litigation due to Respondents' continuing FLSA violations after WHD concluded its investigation in April 2018. Tr. at 54:9-20; 55:7-24; 55:15-56:19; 66:24-67:8.

Before detailing his rationale, the ALJ made several findings. He determined that Mr. Tahir's FLSA violations were repeated and willful. D.O. at 4, 8. The ALJ further determined that the WHD investigator reduced the total CMPs due to the employer's size and increased them because of the employer's refusal to pay the back wages found due, but that the investigator failed to consider other factors. D.O. at 4-5.[8] The ALJ also noted that the CMPs imposed were greater than the total amount of back wages owed. D.O. at 7.[9]

The ALJ then determined that when assessing the seriousness or gravity of a violation – a mandatory consideration under 29 U.S.C. 216(e)(3) and 29 C.F.R. 578.4 – the CMP assessed must not be "grossly disproportionate to the offense committed," but instead "'must bear some relationship to the gravity of the offense.'" D.O. at 8 (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). The ALJ determined that whenever "a CMP is predicated on a failure to pay required wages, the assessed penalty *must* bear some reasonable relationship to

[8] The ALJ noted that a 25 percent increase in the CMP for 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." D.O. at 8 n.10. Such a policy, the ALJ reasoned, would also lead to penalties that exceed the statutory maximum. *Id.*

[9] As noted above, 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.

the actual amount of back wages owed *to each individual*." *Id.* at 8 (emphases added).

The ALJ noted that several workers were owed less than $100 and some as little as $22.50 in back wages. D.O. at 7. Relying on *Bajakajian*'s discussion of principles of proportionality when evaluating whether financial penalties violate the Eighth Amendment's prohibition against excessive fines, 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 employees. D.O. at 8–9. The ALJ noted that many of the individual CMP assessments were ten times larger than the back wages owed (and in one case 42 times larger). *Id.* at 9.

To correct this disproportionality, the ALJ created two tables that consisted of ranges of back wage amounts that corresponded to fixed CMP amounts. *Id.* at 10. 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 the fixed CMP, and then added the resulting amounts. *Id.*

Finally, in evaluating the CMP assessment generally, the ALJ also considered the financial state of Respondent's businesses. D.O. at 9 (citing to *United States v. United Mine Workers*, 330 U.S. 258 (1947)). In reducing the total CMPs, the ALJ noted that neither business was profitable, Whistle Stop has ceased

operations, and Promised Land's financial state was "precarious." *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Board has been given the 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). Delegation of Auth. and Assignment of Responsibility to the Admin. Rev. Bd., Sec'y's Order No. 01-2020, 85 FR 13186, 2020 WL 1065013 (Mar. 6, 2020).

Section 557(b) of the Administrative Procedures Act states, in pertinent part, that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision ...." 5 U.S.C. 557(b). Therefore, the ARB may conduct *de novo* review of ALJ determinations regarding CMP assessments based on the record before the ALJ. *Five M's, LLC*, ARB No. 2019-0014, 2020 WL 7319288, at *3 (ARB Nov. 13, 2020); *Elderkin Farm*, ARB Nos. 99-033 and 99-048, 2000 WL 960261, at *9-10 (ARB June 30, 2000). *De novo* review is also appropriate to determine whether a penalty is excessive under the Eighth Amendment. *United States v. Bajakajian*, 524 U.S. 321, 336–37 (1998).

SUMMARY OF THE ARGUMENT

When assessing CMPs against Respondents in this case, the Administrator, through investigators and regional staff, acted within her discretion to assess a per-employee penalty amount that was consistent with the mandatory and discretionary

factors identified in the statute and regulations. The CMP amount assessed was reasonable and appropriate under those factors, as interpreted by the Board.

The ALJ erred by creating a new mandatory consideration that would require the Administrator to take into consideration the back wages owed to each individual employee and adjust downward the resulting CMP assessment based on the back wages owed. Neither the text of the FLSA CMP provision nor its implementing regulations require this approach. Such an approach is inconsistent with the purpose that CMPs were designed to fulfill (e.g., deterring future violations of the Act), and would weaken the deterrent effect for low-wage workers in particular, a result that would be directly at odds with the purpose of the FLSA's minimum wage and overtime provisions. Moreover, no ARB decision has adopted this novel approach to CMP assessments. On the contrary, the Board has consistently approved of the assessment process that WHD used in this case. Finally, contrary to the ALJ's invocation of the principle of proportionality derived from Eighth Amendment case law, WHD's CMP assessment process as used here is proportional to the underlying FLSA violations. The relevant Eight Amendment case law neither justifies nor requires the approach the ALJ adopted in this case.

ARGUMENT

A. THE ADMINISTRATOR APPROPRIATELY DETERMINED THE AMOUNT OF CIVIL MONEY PENALTIES FOR RESPONDENTS' WILLFUL MINIMUM WAGE AND OVERTIME VIOLATIONS.

The CMP assessments in this case were proper and reasonable. They were consistent with agency practices and Board precedent in cases where the employer is a small business, the underlying FLSA violations were repeated and willful, and the employer committed neither to pay back wages nor to come into compliance with the FLSA. *See, e.g.*, *Five M's*, 2020 WL 7319288, at *5–7 (ARB Nov. 13, 2020) (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 Medical Services, Inc.*, ARB No. 02-067, 2004 WL 2205227, at *2 n.2 (ARB Sept. 23, 2004) (affirming WHD assessment, which included a 25 percent increase for failure to pay back wages found due).

Here, WHD assessed a total of $45,722.25 in CMPs for Mr. Tahir's repeated and willful minimum wage and overtime violations, consistent with internal WHD guidance in the FOH. D.O. at 2, 4-5. As the WHD investigator explained at the April 19, 2022 hearing, this figure was reached first by identifying the correct maximum CMP amount that corresponded to the relevant period of time that an

employee experienced a violation. Tr. at 49:23-50:9; AX-16; AX-17. WHD started with the maximum base CMP because Mr. Tahir committed repeated and willful FLSA violations. Tr. at 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). WHD then considered the size of the business, reducing the CMP assessed by 30 percent. Tr. at 50:10-17; FOH § 54f01(c)(2). WHD then increased the CMP assessed by 25 percent due to Mr. Tahir's failure to pay the back wages found due. Tr. at 50:18-24; FOH § 54f01(c)(4).[10] The final CMP amount was then multiplied by the number of employees who experienced a back wage violation of more than $20. Tr. at 46:5-10; 72:9-23; FOH § 54f01(c)(5).

[10] The ALJ's comment that a 25 percent increase in the CMP for 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," D.O. at 8 n.10, mischaracterizes WHD policy. 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. § 54f01(b). If, after an investigation, WHD identifies wages due to affected workers and the employer refuses to pay the back wages, the CMP is then enhanced by 25 percent. § 54f01(c)(4). 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. *Id.* Thus, the penalty enhancement, as applied, is intended to encourage compliance, not punish challenges to the WHD's investigations. Moreover, the Board has affirmed CMP assessments that increase the total penalty for failure to pay back wages found due. *A-one Medical*, 2004 WL 2205227, at *2 n.2. The ALJ was also incorrect that WHD's policy could lead to penalties above the statutory maximum. The Board made clear in *Best Miracle* that such CMPS are not permitted. *Best Miracle Corp.*, ARB 14-097, 2016 WL 4718916, at *7 (ARB Aug. 8, 2016); *see also* 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).

1. The Administrator properly balanced the mandatory factors in assessing the civil money penalties.

The FLSA's CMP provision and its implementing regulations require WHD to consider the size of the employer's business and the gravity or seriousness of the violations in determining the amount of CMPs to assess. 29 U.S.C. 216(e)(3); 29 C.F.R. 578.4(a). In this case, WHD carefully considered and balanced these two mandatory factors.

As explained by WHD's investigator at the hearing, WHD considered the size of Mr. Tahir's businesses as required by the statute and regulations and reduced the applicable CMPs by 30 percent. Tr. at 45:20-46:15; 50:10-17. This is consistent with WHD's internal policies, as well as Board precedent. Tr. at 49:12-17 (identifying and explaining the CMP computation sheets used in the investigation); FOH § 54f01(c)(2)-(3); *Five M's*, 2020 WL 7319288, at *7 ("[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.").[11]

In determining the seriousness of Mr. Tahir's violations, WHD properly relied upon the repeated and willful nature of the violations. The statute and regulations are silent regarding what determines the seriousness of the violations.

[11] Importantly, a reduction in CMPs simply because an employer is a small business is not required. What is required is the consideration of the employer's size. *Elderkin*, 2000 WL 960261, at *11.

But the statute does state that, to warrant CMPs under section 16(e), the conduct must be either repeated or willful. 29 U.S.C. 216(e)(2). Given that these two factors are the types of conduct Congress was concerned with, it is reasonable to conclude that, while the presence of either one might justify a CMP assessment, the presence of *both* constitutes the most serious violation. The Board appears to view it similarly. *See, e.g.*, *Hong Kong Entm't (Overseas) Invs., Ltd.*, ARB Case No. 13-028, 2014 WL 6850013, at *6 (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 Case No. 14-097, 2016 WL 4718916, at *7 (ARB Aug. 8, 2016) (affirming maximum penalty for violations characterized as "repeated" and "willful").

Here, WHD properly considered the repeated and willful nature of Mr. Tahir's violations when evaluating the gravity of the violations. Tr. at 31:10-33:6 (explaining how the WHD investigator advised Mr. Tahir of his FLSA minimum wage, overtime, and recordkeeping obligations at conclusion of the first investigation in 2015, but that Mr. Tahir 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]"). This accords with the district court's conclusion in the corresponding case against Respondents. *Shalimar*, 2020 WL 4335020, at *1, 4-5 (noting that, at the conclusion of WHD's

2015 investigation, WHD investigators "advised [Mr.] 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, [Mr.] Tahir continued to discard timesheets, otherwise keep inaccurate records, and failed to pay required minimum wage and overtime.").

2. The Administrator properly considered the discretionary regulatory factors, all of which further support the civil money penalties assessed.

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. 29 C.F.R. 578.4(b). Each of these factors was considered by WHD, as the WHD investigator's testimony confirms, and supports the CMP assessment.

The WHD investigator testified that Mr. Tahir did not demonstrate a good faith effort to comply, Tr. at 45:12-14, and, in fact, demonstrated a reckless disregard for compliance after the first WHD investigation, Tr. at 31:7-33:6. The district court's conclusion confirms the investigator's conclusion that Mr. Tahir did

not show a good faith effort to comply. *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.").

The investigator further testified that Mr. Tahir did not provide any justification for WHD's substantiated findings. 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). 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." Tr. at 48:5-17. The investigator also noted in her testimony these were "very serious violations" affecting, at the end of the second investigation, 52 workers. Tr. at 45:22-46:1; 51:7-14.

Mr. Tahir refused to commit to compliance going forward. On the contrary, he demonstrated an on-going pattern of violating the FLSA's minimum wage and overtime provisions going back to at least 2015. Tr. at 29:24-30:4. At the conclusion of the first investigation, WHD provided Mr. Tahir with detailed information about how to come into compliance. Tr. at 32:7-33:6 (describing counseling and information provided after the first investigation). Yet, he continued violating the FLSA, as WHD determined in its second investigation. Tr. at 45:3-14 (noting that Mr. Tahir's conduct "reflected a pattern of violations from

the previous investigation"). And he continued violating the FLSA even after the conclusion of the second investigation when he was again given information about how to comply. 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, Mr. Tahir continued to violate the FLSA). Indeed, his actions required the district court to issue an injunction to ensure future compliance. *Shalimar*, 2020 WL 4335020, at *7.

The investigator further identified similar minimum wage, overtime, and recordkeeping violations across the two investigations of Mr. Tahir's businesses. *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 (detailing the same violations, but also violations regarding the misclassification of workers as exempt managers resulting in additional overtime violations). And the interval of time between the violations was minimal. Tr. at 34:5-6 (noting that the second investigation included the year that the first investigation was conducted).

Despite this testimony, the ALJ found that WHD had considered only the size of Mr. Tahir's business and his failure to comply with the FLSA when determining the CMP assessment. D.O. at 4-5 (noting, when describing the CMP assessed, that WHD considered only the size of the business and the refusal to pay

back wages and that "[n]o other factors were considered"). Yet, as the preceding discussion amply demonstrates, the investigator in this case not only considered the mandatory factors but weighed each of the discretionary factors when determining the proper CMP to assess, contrary to the ALJ's determination.[12] *See Keystone Floor Refinishing Co., Inc.*, ARB Nos. 03-056, 03-067, 2004 WL 2205230, at *9 (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.") Not only did the ALJ erroneously conclude that WHD failed to consider these factors, but WHD's consideration of them strongly supports the CMP assessment in this case.[13]

[12] Similarly, the ALJ failed to consider that Mr. Tahir continued committing violations after the close of the second investigation. This fact further demonstrates the appropriateness of the WHD's approach regarding CMPs in this case.

[13] In addition, the ALJ seems to suggest that Respondents' payment of the back wages and liquidated damages is relevant as a mitigating factor. But this is contrary to the undisputed record. Not only did Mr. Tahir continue to violate the FLSA up until the district court reached judgment, but garnishments were required to satisfy the judgement. Regardless, prompt payment of back wages is generally not a condition warranting lower CMP assessments. *Cf. Micro-Chart, Inc., et al*, ARB No. 98-080, 1998 WL 787288, at *4 (ARB Nov. 4, 1988) (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"). While mitigation may be warranted for an employer attempting to rapidly resolve FLSA violations in a good faith manner, it would not apply to this case where there was no voluntary compliance and instead continued violations.

B. THE ADMINISTRATIVE LAW JUDGE ERRONEOUSLY DETERMINED THAT WHEN ASSESSING THE GRAVITY OF THE VIOLATION, THE CIVIL MONEY PENALTY ASSESSED MUST BE PROPORTIONAL TO THE BACK WAGES OWED TO EACH INDIVIDUAL.

ALJs have significant discretion when reviewing WHD's CMP assessments, 29 C.F.R. 580.12(b), (c); *Thirsty's, Inc.*, ARB No. 96-143, 1997 WL 453588, at *4 (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).

Notwithstanding that discretion, the ALJ here erroneously mandated that, when assessing the seriousness or gravity of the violation, WHD must take into consideration the individualized back wages owed to workers and ensure that individual CMP assessments are in proportion to those back wages. This mandate is not compelled by the statute or regulations or Board precedent, and indeed, is at odds with both. And the ALJ misapplied Eighth Amendment case law in treating individualized back wages as a mandatory consideration. The Board should thus reverse the ALJ's reduction of the penalties and reinstate WHD's assessment.[14]

[14] The ALJ in this case also issued a substantially similar Decision and Order in *Vasquez Drywall, LLC*, ALJ No. 2020-FLS-00004 (ALJ April 20, 2021), where he reduced WHD's CMP assessment based on principles derived from Eighth Amendment case law. In addition, several CMP assessment cases are currently pending before the same ALJ. *See, e.g.*, *Caozheng Corp.*, ALJ Nos. 2023-FLS-00002, 2023-FLS-00003 (ALJ Dec. 5, 2022) (holding in abeyance pending the outcome of federal court litigation); *RBC Management, LLC*, ALJ No. 2023-FLS-00004

1. The text of the Fair Labor Standards Act and its implementing regulations do not require that civil money penalty assessments be based on back wages owed to individual employees, and such an approach is at odds with the purpose of civil money penalties.

There is no direct textual support in the FLSA for the ALJ's insistence that, when assessing the gravity of a violation under section 6 or 7 of the Act, the CMP must be set in proportion to the back wages unlawfully withheld from each individual worker. The regulatory language similarly does not support the ALJ's proposition. And the practical implications of such an approach illustrate its flaws and its potential to undermine the purpose of CMPs.

When determining the total amount of the penalty, the text of the FLSA does not require tying CMP assessments to back wages. Instead, the statute requires only that the "gravity of the *violation*" (and the size of the employer's business) be considered. 29 U.S.C. 216(e)(3) (emphasis added). In addition, the section of the statute that sets out the maximum penalty does so with reference to the individual violations, not the amount of back wages owed as a result of those violations. 29 U.S.C. 216(e)(2) (pegging the maximum penalty to "*each* [repeated or willful minimum wage or overtime] *violation*") (emphasis added). The regulatory factors likewise do not require the type of proportionality imposed by the ALJ, nor do they

(ALJ Dec. 5, 2022) (same); *Levering Regional Health Care Center, LLC*, ALJ No. 2021-FLS-00010 (ALJ March 26, 2021) (same).

suggest that individualized back wages (in the aggregate *or* individually) must be considered. 29 C.F.R. 578.4.

While the "gravity" of a given violation could theoretically be measured (in whole or in part) by the amount of back wages assessed for that violation, doing so would inevitably dull the deterrent effect of the penalty, since repeated or willful low-dollar violations would register lower CMPs. This outcome would be contrary to the primary aim of the 1989 FLSA amendments, which added the minimum wage and overtime CMP provision. That provision, as a House Report at the time noted, was intended to give "the Secretary the authority to assess fines for flagrant violations" which would act "as a deterrent to potential violators." H.R. Rep. No. 101-260, at 25 (1989).[15] No mention was made in the language of the statute or the report that repeat or willful FLSA violators who withhold only a small amount of wages (or simply pay low wages) should not be so deterred. Indeed, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 was passed to ensure that, among other things, the CMP amount would remain a robust deterrent. *See* Pub. L. No. 114-74, § 701, 129 Stat 584 (2015).

[15] As Congressman Miller wrote during the consideration of the 1989 amendments to the FLSA, the Government Accountability Office had contemporaneously released research suggesting 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.

Moreover, many of WHD's FLSA investigations result in ranges of back wages owed to employees. Requiring a lower CMP amount for those employees who are owed comparatively less in back wages than other employees for the same violations would lessen the deterrent effect of the CMP, since multiple factors could result in a lower CMP assessment – such as job tenure or work hours – that are unrelated to the employer's repeated or willful violations of the FLSA.

Such an approach would also result in relatively lower CMP assessments for violations against low-wage workers. Because lower-wage workers are paid at lower rates, they are entitled to relatively less back wages for the same violations committed against higher-wage workers. Thus, the ALJ's mandatory individualized approach to assessing CMPs would further dull the deterrent effect for employers of low-wage workers who may avoid the maximum penalty, in part, because they pay their workers relatively less money (money which makes up an even larger share of their total income compared to other workers). Such a result is contrary to the purpose of CMPs, which is to deter future violations of the FLSA's minimum wage and overtime pay requirements.[16]

[16] WHD's current practice eliminates CMP assessments for those employees who are owed $20 or less in back wages. FOH § 54f01(c)(5). However, that practice does not necessarily lead to the conclusion that every CMP assessed must be calibrated to an individualized back wage amount. That practice more accurately reflects a standardized approach to WHD's discretion, rather than a statement of policy regarding whether the agency thinks individualized back wages should be used to modify per-employee CMP assessments in all cases. *See also id.* at § 52f14(a)(3) (directing WHD staff to "not confuse the amount of CMPs with the amount of back wages. Back

Here, Mr. Tahir's actions included intentionally obscuring or failing to keep time records, paying some workers on a salary basis when working over 40 hours, or simply not paying them after 40 hours of work. Tr. 36:13-37:8; 48:3-17; *see also Shalimar*, 2020 WL 4335020, at *2-4. Some of the practices, such as deducting cash shortages from a worker's pay, resulted in some workers' total wages falling below $7.25 per hour. Tr. 55:7-14; *see also Shalimar*, 2020 WL 4335020, at *3. These are the type of violations that the FLSA is meant to deter, especially among employers committing repeated and willful violations. *See* 29 U.S.C. 202(a) (noting that the FLSA embodies a policy aimed at eliminating "labor conditions detrimental to the maintenance of the minimum standard of living").

2. Board precedent does not hold that individualized back wage evaluations are necessary to assess civil money penalties and has approved of assessments that were not tied to individual back wages.

Contrary to the ALJ's holding in this case, the Board has never found that individualized back wage evaluations were a mandatory consideration. Moreover, the Board has affirmed assessments that used the same WHD procedures used in this case – where the back wage amounts for the same violations varied among individual employees, but WHD assessed the same CMP for each employee –

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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).

without requiring that the CMP be assessed proportionately to the individual back wages owed. *See, e.g.*, *Five M's*, 2020 WL 7319288; *Best Miracle Corp.*, 2016 WL 4718916; *Hong Kong Entertainment*, 2014 WL 6850013; *A-One Medical*, 2004 WL 2205227; *Baystate Alternative Staffing, Inc.*, No. 94-FLS-22, 1996 WL 737281 (ARB Dec. 19, 1996).

In *Best Miracle*, for instance, the ALJ assessed above the statutory maximum penalty on a per-employee basis (the ALJ applied the 25 percent increase for failure to comply, which brought the CMP per violation above the maximum). 2016 WL 4718916, at *7. On appeal, the Board reduced the ALJ's assessment to the statutory maximum for each employee and excluded employees who experienced violations after the investigation concluded. *Id.* While the decision did not specify the degree, if any, that the amount of back wages per employee varied, the Board did not identify a comparison or proportionality requirement between the individual back wages owed and the individual CMPs assessed, only that the assessment be based on the violations experienced. *Id.*; *accord A-One Medical*, 2004 WL 2205227, at *2 n.2 (affirming the per-employee CMP assessment regardless of back wages owed, though centering its holding on the employer's challenge to the WHD's willfulness determination).

Even when the Board has affirmed cases in which the amount of back wages owed was considered a mitigating factor, it has not adopted a rule requiring WHD

to assess CMPs based on individualized determinations of back wages owed to each employee. In *Five M's*, the Board agreed with the ALJ that the "gravity or seriousness of the Respondents' conduct is mitigated by the relatively small size of the amounts owed by Respondents to each employee." *Five M's*, 2020 WL 7319288 at *7. The Board noted that the back wages for 22 of the 35 underpaid employees were less than $200, for 11, they were less $100, and that 50 percent of the total back wages were due to 2 employees. *Id.* While these were mitigating facts, in determining the final CMP amount, the Board assessed the *same CMP amount* for each of the 35 employees. *Id.* This contrasts with the ALJ's conclusion here, which mandatorily links the back wages assessed for each employee with a corresponding CMP amount that the ALJ created for this case. D.O. at 10.

In any event, the back wages owed in this case do not resemble those in *Five M's.* For instance, nearly half of the workers in this case were owed more than $300 in back wages (24 out of 52 employees), D.O. at 5–6, unlike the lopsided back wages owed in *Five M's*. 2020 WL 7319288 at *7. The average back wages per employee in this case were nearly twice as high as the average back wages in *Five M's*. *Compare* D.O. at 7 (finding the average per-worker back wages at Whistle Stop and Promised Land to be $826.53 and $737.27, respectively), *with Five M's,* 2020 WL 7319288, at *4 (finding that the average back wages were $414 per worker). And several workers in this case who were owed small amounts

of back wages simply had shorter tenures at Mr. Tahir's businesses during the relevant investigative period. D.O. at 5 (showing, for example, that Laura Redding, who was owed $22.50 in back wages, worked eight days during the work period investigated). A rule that would discount CMP assessments based on the happenstance of an employee's tenure with the employer would further erode the deterrent effect of the penalty for willful violations of the FLSA. A violation is no less real because the employee who suffered it happened to have worked for the employer for a shorter period than other employees.

Finally, in other cases in which the Board took back wages or other factors into consideration, it did not apply an individualized proportionality rule. *Hong Kong Entertainment*, 2014 WL 6850013, at *7–8 (affirming ALJ's $191,400 CMP assessment as "appropriate given the seriousness of the violation stemmed from the large number of employees involved, and the amount of wages that were owed to the employees") (internal quotation marks omitted); *Baystate Alternative Staffing*, 1996 WL 737281 at *6 (ARB Dec. 19, 1996) (affirming an ALJ's $150,000 CMP assessment after considering that, among other things, the amount of back wages was "almost equal" to the CMP); *ZL Rest. Corp.*, ARB Case No. 16-070, 2018 WL 2927674, at *3 (ARB Jan. 31, 2018) (affirming an ALJ's reduction of CMPs

assessed because, among other things and unlike in this case, WHD did not take into consideration the employer's small size).[17]

These cases demonstrate that the ARB has held that back wages paid to each employee may be considered as a basis for lowering a CMP assessment, but do compel the ALJ's conclusion in this case, i.e., that the CMP assessment *must be* linked to back wages owed to each employee.

3. The Eighth Amendment does not compel civil money penalties to be linked to individualized back wages and the Wage and Hour Division's procedures for assessing civil money penalties do not violate the Eighth Amendment.[18]

The ALJ relied on *United States v. Bajakajian*, 524 U.S. 321 (1998), and its interpretation of the Eighth Amendment's bar against excessive fines, for his

[17] Moreover, in *Five M's*, the Board agreed with WHD's assessment of the employer's conduct, conduct which resembles the aggravating factors in this case. For instance, the Board noted that relevant factors justifying the CMP assessment included the employer's willful and repeated conduct, the evident pattern of similar violations in each case, the employer's failure to comply with the FLSA or follow detailed advice about future compliance, the large portion of the employer's workforce affected by the violations, and that there was no reasonable explanation for the violations – all of which were conclusions arrived at by the investigator in this case. 2020 WL 7319288 at *5-6; *supra* section A. And, unlike the approach in *Five M's*, WHD here properly took the employer's size into consideration and mitigated the final CMP assessment by 30 percent. 2020 WL 7319288 at *7; *supra* section A.

[18] The ARB does not have general jurisdiction to rule on the constitutionality of any congressional enactment, *Minthorne v. Commonwealth of Va.*, ARB No. 09-098, 2011 WL 3228319, at *4 (ARB July 19, 2011); *cf.* 29 C.F.R. 580.12(b) (noting that ALJs shall not render determinations on the constitutionality of a statutory provision). However, the Board may consider constitutional principles, such as when determining if the amount of a punitive damage award is excessive in light of constitutional due process concerns. *Youngerman v. United Parcel Service, Inc.*, ARB No. 11-056, 2013 WL 1182311, *5-6 (ARB Feb. 27, 2013).

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. D.O. at 8. As the ALJ correctly noted, D.O. at 8, 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." *Bajakajian* 524 U.S. at 334. Meeting this standard, however, is "by no means onerous"; it will be an "infrequent instance" where a penalty is grossly disproportionate. *U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 408 (4th Cir. 2013).

Bajakajian noted that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." 524 U.S. at 336 (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.")). The Court expressly cautioned against "requiring strict proportionality" because "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *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).

However, the ALJ's application of *Bajakajian* is problematic and, at best, incomplete. The ALJ failed to explain or apply the multi-factor test the Supreme Court and circuit courts have articulated to assess gross disproportionality under the Eighth Amendment. Those factors include an assessment of: (1) the nature or essence of the substantive offence; (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. *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 similarly). Because the Supreme Court in *Bajakajian* did not lay out the factors in a formalized manner, circuit courts have formulated the factors with the same general scope, though sometimes with different language. *See, e.g.*, *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1314 (11th Cir. 2021) (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").

Some circuit courts have considered an additional factor of whether the fine would deprive the defendant of their livelihood, while others have rejected an

analysis that would give weight to the defendant's finances. *Compare United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007) (relying on *Bajakajian*'s discussion of the history of the Eighth Amendment as basis for concluding that "it is appropriate to consider whether the forfeiture in question would deprive [the defendant] of his livelihood"), *and United States v. Chin*, 965 F.3d 41, 58 (1st Cir. 2020) (the impact of a fine on defendant's ability to earn a livelihood may be relevant, but the fine must constitute a "ruinous monetary punishment that might conceivably be so onerous as to deprive a defendant of his or her future ability to earn a living") (internal quotations and alterations omitted), *with United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1311 & n.12 (11th Cir. 1999) (explaining that "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 that hardship "is not part of an inquiry under the Excessive Fines Clause" even if it may be "a legitimate and important part" of determining the appropriate fine where such consideration is specifically referenced in the appliable statutes), *and United States v. Bikundi*, 926 F.3d 761, 796 (D.C. Cir. 2019) (rejecting defendant's claim that forfeiture was excessive since it would sentence defendants to a "lifetime[] of bankruptcy," by noting that the Supreme Court has not weighed in on the issue and

that the "[t]he Excessive Fines Clause does not make obvious whether a forfeiture is excessive because a defendant is unable to pay").[19]

As described below, the ALJ in this case failed to adequately explain how the *Bajakajian* factors compel the conclusion that individual back wages must be considered in determining the appropriate amount of CMPs to avoid a disproportionate penalty. To the contrary, application of the factors to this case suggests that WHD's assessment is proportional to Mr. Tahir's violations of the FLSA.

a. Mr. Tahir's repeated and willful violations of the Fair Labor Standards Act confirm a high level of culpability.

Mr. Tahir's repeated and willful violations of the FLSA demonstrate a high level of culpability. The Court in *Bajakajian* evaluated the nature or essence of the violation by considering the level of the defendant's culpability. *Bajakajian* 524 U.S. at 339. The court noted that "the essence" of the defendant's crime in that case was "a willful failure to report the removal of currency from the United States." *Id.* at 337. The fact that his actions did not relate to other illegal activity and that the Sentencing Guidelines called for a relatively small fine for the same

[19] The Third Circuit, which is the circuit in which this case arises, does not consider this as a factor in the analysis. *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).

conduct suggested a "minimal level of culpability." *Id.* at 339. The Third Circuit has similarly focused on culpability. When reviewing the forfeiture of hundreds of weapons from a defendant, the court noted that the defendant was also engaged in other unlawful behavior, including possession of illegal narcotics, a fact that motivated the seizure of the weapons. *Cheeseman*, 600 F.3d at 284; *see also Pimentel*, 974 F.3d at 922 (finding higher levels of culpability when the behavior is "reckless," such as when a defendant willfully ignores "red flags" that their actions are potentially unlawful).

Mr. Tahir's FLSA violations were repeated and willful and effected many employees (52 at the time WHD concluded its investigation, 65 at the conclusion of the district court proceedings). D.O. at 3 n.4, 4-5; *Shalimar*, 2020 WL 4335020, at *4-6. Moreover, unlike the relatively simple reporting violation in *Bajakajian*, here, Mr. Tahir intentionally structured his business and recordkeeping practices over years to systematically deny his employees the minimum wages and overtime premiums to which they were entitled. *See Bajakajian* 524 U.S. at 339; *see also 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). Moreover, Mr. Tahir disregarded advice that WHD provided to him regarding how to comply with the FLSA when WHD investigators

found violations in the first investigation in 2015. *See, e.g.*, Tr. at 31:7-23 (noting the advice Mr. Tahir was given). Not only did Mr. Tahir apparently ignore the verbal warning and written guidance provided by WHD after the first investigation, but even continued violating the FLSA after the conclusion of the second investigation. Tr. at 54:9-55:24. Therefore, Mr. Tahir's culpability is high under these circumstances.

b. Mr. Tahir is the precise type of person whom civil money penalties were designed to deter.

Regarding the class-of-persons factor, Mr. Tahir, as an employer who repeatedly and willfully violated the FLSA, is precisely the type of person against whom Congress sought to impose CMPs for FLSA violations. *Micro-Chart*, 1998 WL 787288, 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"). While the ALJ acknowledged the nature of Mr. Tahir's violations, D.O. at 9, the ALJ failed to connect Mr. Tahir's actions with the purpose of CMPs, which is to deter *future violations* of the FLSA because of a pattern of repeated or willful conduct. *See supra* H.R. Rep. No. 101-260 at 25. And 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 violation that FLSA CMPs are meant to

deter (i.e., wage theft). *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).

c. The penalties issued in this case are similar to other cases pursued by the Wage and Hour Division.

When considering similar penalties for similar conduct, WHD's standardized treatment of CMPs across cases ensured that the resulting penalty in this case is comparable to those imposed for similar violations in other cases. Indeed, the ALJ's ad hoc penalty and back wage tables, developed for this case, undermines that consistency across cases. D.O. at 10. In *Bajakajian*, the Court compared the amount of cash the defendant was forced to forfeit as a result of his reporting violation to the Sentencing Guideline's fine for similar reporting violations and noted the wide disparity ($357,144 to $5,000). 524 U.S. at 338; *see also Collins v. S.E.C.*, 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."); *United States v. Sepulveda-Hernandez*, 752 F.3d 22, 37 (1st Cir. 2014)

(same); *Malewicka*, 664 F.3d at 1106 (7th Cir. 2011) (same). *United States v. Dodge Caravan Grand SE/Sport Van, VIN No. 1B4GP44G2YB7884560*, 387 F.3d 758, 763 (8th Cir. 2004) (same); *see also Cooper*, 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). The Board has upheld per-employee civil penalty assessments that are like the one applied in this case, confirming that this case is not an outlier. *See, e.g.*, *Best Miracle Corp.*, 2016 WL 4718916, at * 7 (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*, 2004 WL 2205227, at *2 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).

And in comparing penalties, even if a fine in a particular case is higher than fines for the same conduct in comparable cases, that does not automatically suggest disproportionality. As the Third Circuit noted in *Cheeseman*, the estimated value of the seized firearms at issue – ranging from $371,500 to $500,000 – was significantly higher than the Sentencing Guideline's fine for firearm possession while using illegal narcotics, which was up to $75,000. 600 F.3d at 284-85. However, the other factors in the analysis, particularly the fact that the statute was designed to remove firearms from the possession of those using illegal narcotics

such as defendant, suggested that the disparity was not dispositive on its own. *Id.* at 285. Here, Mr. Tahir's violations are the precise type of conduct that the FLSA is designed to stop, and therefore a singular focus on the individualized amount of back wages unlawfully withheld and any seeming disparity between those amounts and corresponding CMP assessments does not necessarily lead to a conclusion that the CMP is disproportionate.

Finally, 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 – deference the ALJ does not address. *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*, 21 F.4th at 1314 ("[Penalties] falling below the maximum statutory fines for a given offense ... receive a strong presumption of constitutionality.") (internal quotation marks omitted); *cf. Youngerman*, 2013 WL 1182311, at *6 ("[P]unitive damages awarded within limits set by statute do not implicate the constitutional due process concerns[.]"). 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. 21 F.4th at 1315. Here, WHD assessed CMPs lower than the maximum for each violation. D.O. at 4-5.

This was reasonable in this context, as the CMP falls below the statutorily authorized maximum CMP set by Congress.

d. Mr. Tahir's actions caused both significant monetary and non-monetary harms.

Regarding the harm factor, courts look to both monetary and non-monetary harms. *See, e.g.*, *Pimentel*, 974 F.3d at923 (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."). In *Bajakajian*, the Court noted that the defendant's reporting violation harmed only one party (the U.S.) and caused only minimal harm by depriving the government of the information that a specific amount of money had left the country (e.g., there was no fraud on the government or financial "loss to the public fisc"), but nonetheless led to a $357,144 criminal asset forfeiture. 524 U.S. at 339. 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 Mr. Tahir's actions deprived 52 employees of their lawfully owed wages, totaling $39,944.90 (and assessed $45,722.25 in CMPs, which was on par with the back wage total).[20] *See Cooper*, 532 U.S. at 435

[20] 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).

(looking at "the relationship between the penalty and the harm to the victim caused by the defendant's actions"); *United States v. George*, 779 F.3d 113, 124 (2d Cir. 2015) (finding that 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 and was not disproportionate). While assessments of the gravity of an offense will be "inherently imprecise," *Bajakajian*, 524 U.S. at 336, the Board has noted that repeated and willful violations that affect many employees are particularly harmful. *Hong Kong Entertainment*, 2014 WL 6850013, at *7 (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*, 2020 WL 7319288 at *5 (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 a larger penalty").

In assessing non-monetary harms, courts also look at factors such as "how the violation erodes the government's purposes for proscribing the conduct." *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 Towers v. City of Chicago*, 173 F.3d 619, 625 (7th Cir. 1999) (noting that a $500 civil penalty for simply lending a car that is then used for drug dealing – even when the defendant was unaware of the activity – was not excessive given the harm from the flow of drugs that the penalty was aimed at stemming). 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 course of fraudulent conduct." *Bunk*, 741 F.3d at 409.

Here, the harm that the FLSA CMPs are aimed at stemming is employer wage theft just like Mr. Tahir's, which Congress has proscribed through the minimum wage and overtime pay provisions of the FLSA. 29 U.S.C. 206, 207. Additionally, employers who repeatedly and willfully violate the FLSA 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. 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).

Finally, another way of viewing this factor is evaluating the defendant's financial gain from its violation. *Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 698-99 (9th Cir. 2000) (finding it relevant that a civil fine imposed for manipulating the price of almonds was nearly equal to the illegal profit from the conduct). Here, Mr. Tahir was able to directly profit from unlawfully withheld back wages for years, even during the litigation before the district court.

e. Even if considerations of Mr. Tahir's ability to earn a livelihood or the financial state of his businesses were required under the Eighth Amendment, there is not sufficient evidence to suggest that either consideration warrants reducing the Wage and Hour Division's civil money penalty assessments.

As noted above, the Supreme Court did not explicitly require consideration of the impact of a fine on the defendant's ability to earn a livelihood or the financial state of the defendant's businesses as part of its Eighth Amendment analysis, and the circuit courts that have addressed the issue have differed in whether such consideration is required. *See supra* section B(3). Even if there were controlling precedent that an employer's ability to earn a livelihood or the financial state of his business were a relevant consideration in determining the appropriate CMP amount, the evidence does not support a conclusion that either consideration

weighs in favor of reducing WHD's CMP assessments in this case. As the First Circuit observed, "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 punishment that might conceivably be so onerous as to deprive a defendant of his or her future ability to earn a living[.]" *Chin*, 965 F.3d at 58 (internal quotation marks and alterations omitted).

Here, there is no record evidence suggesting that a CMP in this case would be so financially ruinous to Mr. Tahir that he would not have the ability to earn a future living. *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."). On the contrary, while the ALJ noted that one of the two gas stations had ceased operations, the other's financial state was "precarious," and that Mr. Tahir testified that he owed $97,500 in back rent for the gas stations, the ALJ also noted that in 2020 Mr. Tahir's combined *positive* net income from both stations was $72,000 and was between $80,000 and $90,000 between 2015 and 2018. D.O. at 7, 9. Moreover, Mr. Tahir 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. Tr. at 81:14-82:11.[21]

[21] Relatedly, the fact that an employer closes its business prior to the imposition of CMPs has not been a factor when assessing penalties for repeated or willful violations of the FLSA. *Best*

While Mr. Tahir may owe back rent on both locations and suffer from weaker than expected finances, it would be an odd policy to conclude that the relatively poor state of an employer's finances years after the employer committed the violations and the CMP was assessed should later shield the employer from that very CMP assessment. *Cf. Micro-Chart*, 1998 WL 787288, at *2 ("[F]inancial hardship is no defense to failure to pay wages due on time").

In fact, the Board has noted that poor finances may be an *affirmative* reason to assess CMPs because it shows particularly willful misconduct, i.e., that the employer had employees perform work (benefitting the employer) while simultaneously not having the ability to pay them fully for the work. *Hong Kong Entertainment*, 2014 WL 6850013, at *8 (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).

Not only does the record not support the ALJ's conclusion that the financial state of Mr. Tahir's businesses warranted reducing the CMPs, but the case law that the ALJ relied on to support its consideration of "the current financial state of the

Miracle, 2016 WL 4718916, at *6 (upholding the Administrators assessment of CMPs even though the employer has closed its business).

business and the penalty's consequent burden on the employer" does not support inclusion of this factor in the analysis. D.O. at 9. (citing *United States v. United Mine Workers*, 330 U.S. 258 (1947), and *Elderkin*, 2000 WL 960261). *United Mine Workers* is inapt to this context. In that case, the Court was grappling with whether a $3.5 million contempt citation was excessive. 330 U.S. at 302.[22] The Court commented that, in determining the amount of a fine for contempt, a court must "consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant." *Id.* at 304. Yet, rather than rejecting the $3.5 million contempt fine outright, the Court held that 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. *Id.* at 304-05. Thus, the Court rejected the unconditional nature of such a large fine given that it was imposed, in part, to induce compliance with the restraining order such that if the union complied with the restraining order, the larger fine would not be necessary. *Id.* Nothing in *United Mine Workers* stands 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. This

[22] The contempt stemmed from the union's refusal to abide by a contract with the then-government run coal mine, for which the government obtained a temporary restraining order requiring the union to abide by the contract but which the union refused to do, resulting in contempt. 330 U.S. at 263-69.

is especially true where the CMP assessed is orders of magnitude lower than the gross receipts of Mr. Tahir's business and far lower than his net revenue. D.O. at 7, 9; *see also* Tr. at 89:8-17; *and* AX-1 at 18 (confirming that gross receipts from both gas stations were more than $2 million during the second investigation).

Elderkin is likewise inapposite. There, the Board assessed the appropriateness of a CMP for violations of the FLSA's child labor provisions, where the applicable regulations specifically require weighing a businesses' financial health. 2000 WL 960261, at *3, 8 (citing to 29 C.F.R. 579.5(b) which requires the Administrator to take into account the "dollar volume of sales or 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). Notably, the regulations governing CMP assessments for minimum wage and overtime violations do not require WHD, on a mandatory or discretionary basis, to consider the financial health of a business. 29 C.F.R. 578.4.

In any event, the Board's conclusion in *Elderkin* supports WHD's current practices. For instance, the ALJ in *Elderkin* reduced the CMP because the employer was a small business that "was in serious financial trouble and had filed for bankruptcy after the CMP were assessed." 2000 WL 960261, at *3. However, the Board reversed the ALJ and affirmed WHD's CMP assessment despite the

"serious financial difficulties to the business," such as $135,000 in back property taxes. *Id.* at 10-11. Instead, the Board weighed this financial strain against the gravity of the violations, noting that the full CMP assessment was appropriate given the particular facts of that case. *Id.* at *11-12. Since the gravity of the violation was high, the maximum CMP was appropriate, despite some financial stresses on the business. *Id.* at 12. Here, WHD assessed lower than the maximum CMP for Mr. Tahir's violations after considering the size of his businesses. Moreover, a significant number of workers were harmed by Mr. Tahir's repeated and willful violations of the FLSA; violations which he was made aware of and refused to correct, even *after* the second investigation of his establishments. Thus, even if the ALJ's consideration of the financial health of the businesses could be considered an appropriate discretionary consideration under the regulations, the record in this case would not support a reduction in the CMP based on the financial health of Mr. Tahir's businesses.

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. Here, Mr. 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; the CMP is consistent with penalties arrived at

in like cases; and there is no indication that such a CMP assessment would deprive Mr. Tahir of his livelihood. Furthermore, neither Supreme Court precedent nor the express terms of the governing regulations require WHD to consider the employer's financial health when determining the appropriate CMP amount. Thus, at a minimum, WHD's CMP assessment process here, which is consistent with its process generally, does not violate the Eight Amendment's prohibition against excessive fines. More importantly, the resulting 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.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board reverse the ALJ's Decision and Order regarding Respondents' civil money penalties assessment and reinstate the Administrator's assessment.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of this brief and addendum to be served on the following individuals this 20th day of March 2023 via U.S. first class mail:

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ADDENDUM

FIELD OPERATIONS HANDBOOK

FOH Ch. 52f14

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§ 52f14(a)(3):

While it is important that CMPs be reasonable, do 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.

***

FOH Ch. 52f17

§ 52f17(a):

The RA has full authority to assess, modify, or not assess minimum wage and/or overtime CMPs with respect to *any* case, with no limits as to the amount a CMP may be increased or reduced. *See* FOH 52f16(c)(1) and (3). This authority *shall not* be delegated. The only limitation in this regard is that CMPs *must not* be assessed in an amount related to the amount of back wages. We do not want to leave an impression that CMPs are anything like liquidated damages. The RA can assess CMPs without making a computation on WH-467 (*i.e.*, he or she can assess any amount deemed to be appropriate in a given case). The RA shall inform the Deputy Administrator of any case that may be sensitive (*e.g.*, congressional interest), or cases that may generate significant media attention or publicity. Consultation with DDs on cases involving a penalty exceeding $100,000.00 (*see* FOH 52f17(b)(3) below and FOH 52f16(c)(5)) should be by telephone, except in unusual or extraordinary cases. The RA may request the case file where appropriate.

***

FOH Ch. 54f01

FLSA wages civil money penalty computations.

Under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (IAA) required agencies to adjust CMP levels for inflation through an initial adjustment by August 1, 2016, followed by annual adjustments every January thereafter. In accordance with the IAA, on July 1, 2016, the Department of Labor published an Interim Final Rule making the initial adjustments of all CMPs effective August 1, 2016. The adjusted CMP levels apply to all penalties assessed after the effective date, August 1, 2016, for associated violations that occurred after November 2, 2015. As required by the IAA, the Department will also adjust CMPs for inflation every January.

(a) Recommendation of CMPs

Recommendation of CMPs shall be made according to the instructions on FOH 52f14.

Where the employer has corrected violations and paid back wages more than 90 days before WHD entry into the establishment to conduct an investigation, CMPs shall *not* be computed.

(b) Penalty

The schedule in this section is to be used to determine the appropriate penalty assessment in a given investigation.

	Column I	Column II	Column III
Repeated	5% of max penalty	20% of max penalty	60% of max penalty
Willful	10% of max penalty	40% of max penalty	80% of max penalty
Repeated and Willful	15% of max penalty	50% of max penalty	100% of max penalty

See http://www.dol.gov/whd/flsa/index.htm#cmp for current CMP maximum penalty amounts.

The CMP is calculated separately for each individual employee with FLSA monetary violations. Monetary violations can be one or more FLSA minimum wage and overtime violations.

Column I: the penalties in this column are for repeated, willful, or *repeated and willful* violations where the employer is in compliance (*i.e.*, employees were paid time and one-half for hours worked over 40 in the current workweek, as opposed to no employees worked over 40 hours in the current workweek, but were paid straight time for hours worked over 40 the week before) at the time of WHD entry into the establishment to conduct an investigation, but one of the following situations exists:

(1) The employer has corrected violations sometime during the 2-year investigation period, but, prior to the WHD contact, and has *not* paid back wages.

(2) The employer has corrected violations and paid back wages within 90 days prior to WHD entry into the establishment to conduct an investigation.

If the circumstances in FOH 54f01(b)(1) or FOH 54f01(b)(2) above are repeated in any subsequent investigation, the employer should be charged under Column II.

If there are current violations, Column I shall *not* be used.

Column II: the penalties in this column are for repeated, willful, or *repeated and willful* violations where the employer *agrees* to comply with the FLSA in the future and back wages are due.

Column III: the penalties in this column are for repeated, willful, or *repeated and willful* violations where the employer: *refuses* to comply with the FLSA in the future, is under injunction, stipulation agreement, or compliance agreement; *or* is under previous administrative determination of repeated or willful and back wages are due. The intent here is to hold the employer to a higher standard where the employer has voluntarily entered into a written agreement with an authorized representative of the DOL committing to future compliance.

Note: there cannot be any mixing of columns or levels of penalties in the same case (*e.g.*, some violations charged as Column I repeated and some as Column II repeated; or, violations for some employees charged as repeated and violations for others as willful). The *one* penalty amount that is most appropriate for the violations in a given case shall be selected.

(c) CMP computation and adjustment factors

The basic formula for the CMP computation:

CMP = (penalty) × (adjustment factor) × (number of unduplicated employees due back wages as a result of repeated and/or willful violations of FLSA sections 6 and/or 7)

The CMP computation is automated in WHISARD based on the principles listed below:

(1) The appropriate CMP amount from the schedule is selected based on the violation data entries in WHISARD and the employer's agreement or refusal to comply with the FLSA in the future.

(2) If the *total number* of employees of the employer (*not* just the establishment, if a national or multiunit enterprise is involved) is less than 20 (*i.e.*, 1-19), the amount will be reduced by 30 percent.

(3) If the total number of employees is less than 100 but more than 19 (*i.e.*, 20-99), the amount will be reduced by 15 percent.

Note: there shall be *no* reduction in the penalty *or* increase (*see* FOH 54f01(c)(4) immediately below) if the violation(s) is repeated, willful, *and* the employer refuses to comply with the FLSA in the future (*i.e.*, where the penalty amount is initially determined to be the maximum CMP penalty amount).

(4) If the employer refuses to pay the back wages found due, increase the penalty amount determined at FOH 54f01(c)(1) above, or the adjusted amount on FOH 54f01(c)(2) or FOH 54f01(c)(3) by 25 percent and choose the lesser of the computed amount or the maximum CMP amount. The application of this increase to the first two cells in Column III is due to the implied refusal-to-pay that results from the refusal-to-comply. The 25 percent increase shall also be made in every refusal-to-comply case and in any other case sent to the RSOL in which a request for back wages is not made. If circumstances change and compliance is achieved at a later date, either administratively or through litigation, and the back wages are paid, the CMP assessment can be revised accordingly. Also, where back wages are paid on an installment basis and CMPs have been assessed based on the employer's agreement to pay, and the employer, after beginning to make payments, subsequently defaults on the agreement to pay, the case shall be considered as a refusal-to-pay case and the CMPs increased by 25 percent, unless the assessment has already been paid in full. Absent any further attempts to collect the back wages, the case shall be closed. If the assessment has not been paid in full, increase the penalty amount by 25 percent. If the WHD accepts an agreement to pay some employees and a refusal to pay others (*see* FOH 53c17(c)), CMPs shall *not* be increased by 25 percent. A case where an employer agrees to pay back wages, but refuses to submit checks to the WHD (*see* FOH 53c10(b)), shall not be considered a refusal-to-pay case for CMP computation purposes and CMPs shall not be increased by 25 percent.

(5) Multiply the appropriate penalty amount by the number of employees due back wages as a result of repeated and/or willful violations of the FLSA sections 6 and/or 7. This shall be an unduplicated count, and does not include employees due less than $20.00.