ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of: ADMINISTRATOR, WAGE & HOUR DIVISION, Prosecuting Party, v. FIVE M's, LLC, d/b/a L&W AUTO SALVAGE (L&W AUTO PARTS) and JOHN MORGAVAN, and FIVE M's LLC, d/b/a VALPARAISO CAR CARE TRANSMISSION and JOHN MORGAVAN, Respondents.	)	ARB Case No. 19-014 ALJ Case Nos. 2015-FLS-00010 2015-FLS-00011

ACTING ADMINISTRATOR'S OPENING BRIEF

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In the Matter of:	
ADMINISTRATOR, WAGE & HOUR DIVISION,	ARB Case No. 19-014
Prosecuting Party,	ALJ Case Nos. 2015-FLS-00010 2015-FLS-00011
v.	
FIVE M's, LLC, d/b/a L&W AUTO SALVAGE (L&W AUTO PARTS) and JOHN MORGAVAN,	
and	
FIVE M's, LLC d/b/a VALPARAISO CAR CARE TRANSMISSION and JOHN MORGAVAN,	
Respondents.	

ACTING ADMINISTRATOR'S OPENING BRIEF

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") November 19, 2018 Decision and Order that reduced the civil money penalties assessed for Respondents' minimum wage and overtime violations.

In a related proceeding on FLSA liability and back wages, the U.S. District Court for the Northern District of Indiana granted summary judgment for the Department of Labor ("Department"), holding that Five M's, LLC and John Morgavan ("Five M's," "Respondents") had violated the minimum wage, overtime, and recordkeeping provisions of the FLSA. The district court also concluded that Respondents did not have a good faith defense, that their violations were repeated and willful, and that an injunction was necessary to ensure future compliance.

This matter arises under the civil money penalty ("CMP") provisions of the Fair Labor Standards Act of 1938, as amended ("FLSA"), 29 U.S.C. 216, and 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 in this case properly considered the mandatory and discretionary factors, and assessed the maximum penalty due to the seriousness of the violations. The ALJ, however, drastically reduced the minimum wage and overtime penalties. 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.

ISSUE

Whether the ALJ erred in reducing the minimum wage and overtime civil money penalties assessed by the Administrator by over 75 percent.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The FLSA generally requires an employer to pay an employee who works in excess of 40 hours in a workweek "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. 207(a)(1). Section 7(i) of the FLSA provides an exception to this requirement for employers of certain employees in retail and service establishments. *See* 29 U.S.C. 207(i). Such employers can only claim an overtime exemption, however, if the regular rate of pay for such employees is in excess of 1.5 times the FLSA minimum wage and more than half of the employees' compensation represents commissions on goods or services. *See id.*

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). A violation is willful if the employer knew the conduct was prohibited by the FLSA or showed reckless disregard for the FLSA's requirements. *See* 29 C.F.R. 578.3(c). A violation is repeated if an employer previously violated the FLSA minimum wage or overtime provisions and was so notified by the Wage and Hour Division ("Wage and Hour"), or a court or tribunal has previously made a

finding that the employer committed such a violation. *See* 29 C.F.R. 578.3(b)(1), (2).

The Administrator exercises his discretion to determine the appropriate penalty, during which process the Administrator "shall" consider both the seriousness of the violation and the employer's size. 29 U.S.C. 216(e)(3); 29 C.F.R. 578.4(a). "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).

B. Statement of Facts and Course of Proceedings

1. Five M's, LLC is the parent company of a vertically integrated enterprise made up of three businesses in Valparaiso, Indiana: Valparaiso Transmission (also known as Valparaiso Car Care and Transmission), an auto repair shop; L&W Auto Salvage, a salvage yard; and Premier Auto Sales, a used car lot. *See* Nov. 19, 2018 ALJ Decision and Order ("D&O") 4. John Morgavan is an owner of Five M's and a section 3(d) employer under the FLSA, 29 U.S.C. 203(d). *See* April 5, 2018 ALJ Order Granting Partial Summ. Decision, Den. Mot. to Dismiss & Establishing Location of Hr'g ("Partial Summ. Decision Order") 5.

2. Five M's has a history of FLSA violations dating back to at least 2005. *See* D&O 5. In 2005, WHD investigated Valparaiso Transmission and determined that it had failed to pay an employee his last paycheck, resulting in a minimum wage violation; that it had paid hourly employees who worked more than 40 hours per workweek their regular rates for all hours worked, resulting in an overtime violation; and that it failed to keep a record of hours worked. *See* D&O 5; *Perez v. Five M's*, No. 2:15-cv-176, 2017 WL 784204, at *10 (N.D. Ind. Mar. 1, 2017). In 2012, Five M's went through conciliation, a process by which WHD attempts to administratively resolve payment disputes between employers and employees, because it again failed to pay an employee his final paycheck, resulting in a minimum wage violation. *See Perez v. Five M's*, 2017 WL 784204, at *10. After both the 2005 investigation and the 2012 conciliation, WHD advised Five M's and Morgavan of the FLSA's requirements and provided Respondents with specific FLSA guidance and compliance publications. *See* D&O 5; *Perez v. Five M's*, 2017 WL 784204, at *10.

In 2014, WHD again investigated Five M's. *See* D&O 4. As a result of the investigation, WHD determined that Five M's had violated the recordkeeping, minimum wage, and overtime requirements of the FLSA. *See* D&O 4-5. Specifically, Five M's failed to maintain accurate time records for its employees. *See* Partial Summ. Decision Order 5. Time cards were not maintained and

Respondents' payroll records failed to accurately reflect the number of hours employees worked. *See Perez v. Five M's*, 2017 WL 784204, at *2-*3. Through employee interviews and other evidence, WHD determined that employees at Valparaiso Transmission worked a 50-hour workweek, and that employees at L&W Auto Salvage worked a 47-hour workweek. *See id.* at *3. WHD's investigation nevertheless found that certain employees at both Valparaiso Transmission and L&W Auto Salvage were paid their regular rates for all hours worked, resulting in overtime violations when employees worked more than 40 hours in a workweek. *See id.* at *9. WHD also found that one employee was shorted on his last paycheck, and that another employee was paid by a check with insufficient funds, which resulted in minimum wage violations. *See id.* at *3-*4.

In addition to those violations, Five M's was found by WHD to have paid certain technicians at Valparaiso Transmission using a "book rate" method, claiming a section 7(i) overtime exemption of the FLSA for those employees. *See Perez v. Five M's*, 2017 WL 784204, at *4. Under this "book rate" system, the employees were paid based on the amount of time it should take an average employee to perform a specific task, rather than being paid based on actual hours worked. *See id.* However, WHD determined that Five M's failed to properly compensate those workers at the rate required to claim the exemption. *See id.* at *4, *9. In fact, WHD's investigation determined that four technicians who were

paid using the book rate method were not even paid the full federal minimum wage for all hours worked. *See id.* at *4. And because those four technicians were also not paid at least $10.88 per hour (1.5 times the federal minimum wage) for every hour, as is required to claim the section 7(i) exemption, this resulted in overtime violations as well. *See id.* at *9.

At a conference with WHD following the 2014 investigation, Five M's refused to agree to comply with the FLSA and refused to pay back wages. *See* D&O 6. Because Five M's refused to comply with the FLSA going forward, when WHD was assessing civil money penalties, it did not reduce the CMPs based on Respondents' business size. *See* ALJ Hr'g Transcript ("Tr.") at 113:4-114:4; 119:12-15; 120:1-4; 120:19-25; 123:2-7; 132:24-133:6.

On April 24, 2015, WHD issued determinations to Five M's, assessing a CMP of $1,100 for each of the 35 employees of L&W Auto Salvage and Valparaiso Transmission affected by Respondents' violations of the minimum wage and overtime protections of the FLSA, for a total of $38,500 in CMPs ($15,400 for L&W Auto Salvage and $23,100 for Valparaiso Transmission). *See* D&O 4.

3. On May 1, 2015, the Department filed a complaint in the U.S. District Court for the Northern District of Indiana against Five M's, alleging violations of the minimum wage, overtime, and recordkeeping sections of the FLSA, and

seeking prospective injunctive relief as well as back wages and liquidated damages. *See* D&O 2. In August 2015, the Administrator filed related Orders of Reference with the Office of Administrative Law Judges, assessing civil money penalties against Five M's in the total amount of $38,500 for violations of the minimum wage and overtime provisions of the FLSA, as described above. *See id.* The Administrator also assessed CMPs for child labor and child labor recordkeeping violations against Five M's. *See id.*[1] Upon the request of the Administrator, the administrative proceedings were stayed pending the resolution of the related litigation in district court. *See id.*

On March 1, 2017, the U.S. District Court for the Northern District of Indiana held that Five M's violated the minimum wage, overtime, and recordkeeping requirements of the FLSA and granted summary judgment for the Department. *See Perez v. Five M's*, 2017 WL 784204, at *11. On April 25, 2017, the Administrator filed a Motion for Partial Summary Decision with the ALJ, informing the ALJ of the district court's summary judgment decision. *See* D&O 2. After Five M's appealed the district court's judgment to the Seventh Circuit Court of Appeals, the administrative proceeding was again stayed. *See id.* On October 3,

[1] In his November 19, 2018 decision, the ALJ ultimately reversed the child labor violation and found that the child labor recordkeeping violation was de minimis. D&O 9. The Administrator did not petition the Board for review of the ALJ's decision on the child labor violations.

2017, Respondents withdrew their appeal. *See* Notice of Withdrawal of Appeal, *Acosta v. Five M's, LLC*, No. 17-1916, ECF No. 10 (7th Cir. Oct. 3, 2017).

The ALJ lifted the stay on the administrative proceedings on October 25, 2017. *See* D&O 3. By Order dated April 5, 2018, the ALJ granted partial summary decision in favor of the Administrator, determining that the district court decision resolved the issue as to whether Five M's violated sections 6 and 7 of the FLSA, whether those violations were repeated and willful, and whether a civil money penalty was authorized. *See* Partial Summ. Decision Order 5-6. The ALJ, however, denied summary decision on the appropriateness of the $38,500 civil money penalty for the minimum wage and overtime violations. *See id*. at 6.[2] The ALJ held a hearing on the unresolved issues on April 17, 2018, and issued a Decision and Order on November 19, 2018. *See* D&O 4. On December 19, 2018, the Administrator petitioned the Board for review, and on December 21, 2018, the Board accepted this case for review and issued a briefing schedule.

C. District Court's Decision on FLSA Liability

As previously noted, in March 2017, the U.S. District Court for the Northern District of Indiana granted summary judgment in favor of the Department, holding that Five M's violated the minimum wage, overtime, and recordkeeping

[2] The ALJ also denied summary decision as to the child labor violations and civil money penalties, because those were not addressed by the district court litigation. *See* Partial Summ. Decision Order 6.

requirements of the FLSA. *See Perez v. Five M's*, 2017 WL 784204, at *11. The district court awarded 35 employees of L&W Auto Salvage and Valparaiso Transmission a total of $14,477.06 in back wages for minimum wage and overtime violations, and awarded an equal amount in liquidated damages. *See id.*

The district court first concluded that Five M's had violated the FLSA's recordkeeping provision because it did not keep time cards or the records of employees it was paying using the "book rate." *See Perez v. Five M's*, 2017 WL 784204, at *3. The district court then determined that Five M's failed to pay six employees at least the minimum wage in certain weeks: one employee was shorted on his last paycheck; another employee was paid by a check with insufficient funds; and four technicians (paid using the "book rate"), when their pay was divided by their total hours worked, did not average a rate of $7.25 per hour during multiple workweeks. *See id.* at *3-*4. This also resulted in overtime violations for those four technicians because the "book rate" did not compensate them at the rate required by section 7(i). *See id.* at *9. The district court concluded that Five M's paid other employees the same rate for all hours worked, including those over 40, which resulted in further overtime violations. *See id.*

The district court also struck portions of an affidavit from Neal Guidarelli, the payroll manager for Respondents, submitted by Five M's in order to demonstrate its compliance with the FLSA. *See Perez v. Five M's*, 2017 WL

784204, at *4-*8. The affidavit purportedly set forth Mr. Guidarelli's personal knowledge of the hours worked by Respondents' employees. *See id.* at *4. However, the district court found that the detailed statements regarding certain employees' hours worked included in the Guidarelli Affidavit were not supported by actual payroll records, but were "simply reverse engineered" by "using the salary and total amounts paid to their employees to back into a calculation of how much time [Five M's] now claims employees worked." *Id.* at *7. In fact, the district court noted that the few time cards that Five M's provided to WHD actually rebutted the statements about hours worked included in the Affidavit. *See id.* at *7-*8.

With regard to liquidated damages, the district court concluded that Five M's could provide "no evidence that its conduct resulting in FLSA violations was in good faith and reasonable" and thus liquidated damages were appropriate. *Perez v. Five M's*, 2017 WL 784204, at *9. The district court also concluded that Five M's had repeatedly and willfully violated the FLSA, specifically noting that "because Five M's committed minimum wage, overtime, and recordkeeping violations in the 2005 investigation in the same manner as in this investigation, Five M's [was] on notice that [its] practices violated the FLSA." *Id.* at *10. The district court relied on the fact that WHD representatives had provided Five M's with specific guidance on FLSA compliance, including compliance publications,

during the 2005 investigation and 2012 conciliation process. *See id.* Finally, in addition to ordering the back wages and liquidated damages, the district court issued an injunction restraining Five M's from violating the FLSA in the future, stating that an injunction was necessary "to ensure future compliance." *Id.*

D. The ALJ's Decision

As explained above, the ALJ had previously issued a decision concluding that the district court's decision resolved in favor of the Administrator whether the Respondents had violated the minimum wage and overtime provisions (sections 6 and 7) of the FLSA, whether their conduct was repeated and willful, and whether a civil money penalty was authorized. *See* Partial Summ. Decision Order 5-6. Therefore, the ALJ stated that the "sole remaining issue for the Section 6 and 7 violations is the amount of the civil money penalties." D&O 7. The ALJ stated that "[t]he reason the Administrator did not apply any factors that would tend to mitigate the penalties was because Respondents refused to pay the back wages owed and did not agree to future compliance." *Id.* at 6.

In reducing the civil money penalty award, the ALJ faulted the Administrator for not taking any mitigating factors into account. *See* D&O 7. First, the ALJ looked at the size of the business, finding that Five M's "*was* less than 100 and *currently* employs only 5 individuals." *Id.* (emphases added). The ALJ also relied on the fact that "[s]even years elapsed between the 2005

investigation and the current investigation." *Id.* Analyzing the back wage calculations, the ALJ determined that the underpayment only amounted to "about $414 per employee over a two year period." *Id.* The ALJ then stated that the employer's refusal to pay back wages, which WHD relied upon as one of the reasons it did not mitigate the penalties, "stem[med] from Respondent's honest, though erroneous, belief that the 35 employees were exempt under the FLSA as auto service providers." *Id.* at 8.[3]

Because the ALJ gave weight to these mitigating factors, he reduced the minimum wage and overtime CMPs from the maximum of $1,100 per employee down to $250 per employee. D&O 8. This resulted in a total minimum wage and overtime CMP reduction from $38,500 to $8,750, a reduction of over 75 percent.

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). *See* Delegation of Auth. & Assignment of Responsibility to Admin. Review Bd., Sec'y's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378, 2012 WL 5561513 (Nov. 16, 2012). The Board reviews the ALJ's decision de novo. *See* 5

[3] The ALJ did acknowledge that the Respondents' belief was unreasonable, and that Five M's still believed that its employees were exempt and not due back wages (which militated against any reduction in CMPs). *See* D&O 6, 8.

U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Adm'r v. Fisherman's Fleet, Inc.*, ARB Case No. 03-025, slip op. at 4 (ARB June 30, 2004).

ARGUMENT

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

The Administrator assessed a total of $38,500 in CMPs for Respondents' repeated and willful minimum wage and overtime violations. As the WHD witnesses explained at the hearing, this figure was reached by assessing the maximum base CMP of $1,100 for each of the 35 Five M's employees affected by Respondents' minimum wage and overtime violations. *See* Tr. at 112:20-113:1; 119:19-25; 132:14-23.[4] WHD started with the maximum base CMP because Five M's committed repeated and willful FLSA violations. *See id.* WHD then considered the size of the business, but based on the gravity of the willful and repeated violations in this case, and based on Respondents' refusal to comply with

[4] The WHD witnesses at the hearing were Wage and Hour investigator Nancy Alcantara, who investigated this case, and Wilbur Valez, who was the Assistant District Director of the investigating Wage and Hour district office at the time of the investigation.

the FLSA in the future – as well as based on several of the discretionary regulatory factors – WHD did not reduce the CMPs. *See id.* at 113:4-114:4; 119:12-15; 120:1-4; 120:19-25; 122:25-123:7; 132:14-134:24.

A. The Administrator Properly Balanced the Mandatory Factors in Assessing the Civil Money Penalties.

The FLSA states that "[i]n determining the amount of any penalty under this subsection [CMPs for repeated or willful violations], the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered." 29 U.S.C. 216(e)(3). The relevant FLSA regulations closely mirror that statutory language, stating that "[i]n determining the amount of penalty to be assessed for any repeated or willful violation of section 6 or section 7 of the Act, the Administrator shall consider the seriousness of the violations and the size of the employer's business." 29 C.F.R. 578.4(a). In this case, the Administrator carefully considered and balanced the two mandatory factors, as the statute and applicable regulations instruct. As explained by witnesses at the hearing, WHD considered the size of the business, but correctly determined that, in light of the gravity of the repeated and willful violations, and Respondents' refusal to comply going forward, it was not appropriate to reduce the penalties. *See supra* at 14-15. This is consistent with WHD's internal policies, as well as Board precedent. *See* Tr. at 131:4-12; *see also Adm'r v. Best Miracle Corp.*, ARB Case No. 14-097, slip op. at 8-9 (ARB Aug. 8, 2016) (affirming ALJ's

use of $1,100 base-level penalty for violations characterized as "repeated" and "willful" when the employer refused to comply with the FLSA in the future); *Adm'r v. Merle Elderkin*, ARB Case Nos. 99-033, 99-048, slip op. at 16 (ARB June 30, 2000) (relying on "flaws in [the] assurances of future compliance" to determine that the gravity of the violation was great).

The Administrator is not required to reduce the size of the penalty just because a business is small – he merely has to consider its size in making his assessment, which the Administrator did in this case. *See Adm'r v. Keystone Floor Refinishing Co.*, ARB Case Nos. 03-056, 03-067, slip op. at 11 (ARB Sept. 23, 2004) ("The fact that Keystone is a small business, however, does not mandate a lesser penalty because the gravity of the violations must also be considered."); *Elderkin*, ARB Case Nos. 99-033, 99-048, slip op. at 14-15 ("The fact that the business is small, however, does not necessarily lead to the conclusion that the appropriate penalty should be significantly less than that assessed by the Administrator, because we also must weigh the gravity of the violations.").

In determining the seriousness of the violations, the Administrator properly relied upon the repeated and willful nature of the violations. The regulations and statute are silent regarding what determines the seriousness of the violations. But the statute does state that, in order to warrant CMPs under section 16(e), the conduct must be either repeated or willful. *See* 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 an award of CMPs, the presence of *both* constitutes the most serious violation, and the Board has affirmed similar CMP assessments in the past. *See, e.g.*, *Hong Kong Entm't (Overseas) Invs., Ltd.*, ARB Case No. 13-028, slip op. at 8, 11 (ARB Nov. 25, 2014) (affirming ALJ's consideration of employer's repeated and willful violations during analysis of the gravity of the violation). There is no doubt, as the district court concluded, that Respondents' violations here were both repeated and willful, *see Perez v. Five M's*, 2017 WL 784204, at *9-*10, and the Administrator acted properly in giving precedence to the gravity of the violations (based on that repeated and willful behavior) as part of his careful balancing of the two mandatory factors.

B. The Discretionary Regulatory Factors Support the Administrator's Civil Money Penalty Assessment.

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). These factors support the Administrator's

assessment of the maximum penalty, as WHD witnesses testified at the hearing. *See* Tr. at 133:15-134:2; 134:14-24.

As the district court recognized, respondents made no good faith efforts to ensure that their pay practices complied with the FLSA, even after having been specifically advised by WHD to do so in both 2005 and 2012. Instead, Respondents' explanation for its violations in this case was to argue, "unreasonably" in the view of the ALJ, that there was no violation at all. Five M's has a history of minimum wage and overtime violations, as determined by both WHD and the district court, and the interval between the most recent violations, in 2012 and 2014, was merely two years. Respondents also refused to commit to compliance going forward, acted in such a way that required the district court to issue an injunction in order to ensure future compliance, and have a demonstrated pattern of violating the FLSA's minimum wage and overtime provisions going back to at least 2005. Thus, the discretionary regulatory factors strongly support the Administrator's assessment of the maximum CMPs for these violations and demonstrate the ALJ's error in reducing the penalties.

II. THE ALJ ERRED IN DRASTICALLY REDUCING THE MINIMUM WAGE AND OVERTIME PENALTIES

An ALJ has the authority to determine the "appropriateness of the penalty assessed by the Administrator." 29 C.F.R. 580.12(b). 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). However, the ALJ's authority is not unlimited, and reductions must be reasonable and based on careful analysis of all the relevant factors. *See, e.g.*, *Fisherman's Fleet, Inc.*, ARB Case No. 03-025, slip op. at 9-10 (reversing ALJ's reduction of Administrator's penalty assessment because ALJ failed to consider the full context of employer's behavior). The ALJ here committed errors in his analysis of the appropriateness of the penalties assessed by the Administrator, and the Board should thus reverse his reduction of the penalties and reinstate the Administrator's assessment.

III. THE ALJ ERRED WHEN HE IGNORED THE DISTRICT COURT'S CONCLUSION THAT RESPONDENTS' VIOLATIONS WERE REPEATED AND WILLFUL AND CREDITED RESPONDENTS' UNSUPPORTED CLAIM OF "HONEST" ERROR.

The U.S. District Court for the Northern District of Indiana held that Respondents' minimum wage and overtime violations were repeated and willful. *See Perez v. Five M's*, 2017 WL 784204, at *10. In his April 5, 2018 decision on the Administrator's summary decision motion, the ALJ properly recognized that these "findings also resolved the question of whether Respondents' violations were repeated and willful" for the purposes of the CMP analysis. Partial Summ. Decision Order 5. The ALJ's recognition that he was bound by the district court's conclusion on this issue was correct and is in line with Board precedent. *See Adm'r v. ZL Rest. Corp.*, ARB Case No. 16-070, slip op. at 5 (ARB Jan. 31, 2018)

(affirming ALJ's decision that district court's determination that employer had repeatedly violated the FLSA resolved the question of whether the employers' violations were repeated and willful).

The district court had also concluded that Five M's "produced no evidence that its conduct . . . was in good faith and reasonable." *See Perez v. Five* M's, 2017 WL 784204, at *9. In fact, the district court's analysis of the Guidarelli Affidavit demonstrates that Five M's presented false information to the court as part of its attempt to avoid FLSA liability. *See id.* at *6-*8. The ALJ himself recognized that Five M's belief was "unreasonable" and "erroneous." D&O 6, 8.

Nevertheless, in the Decision and Order on review here, the ALJ completely ignored the district court's conclusions, as well as his own earlier determination, instead relying on the unorthodox determination that the Respondents had an "honest, though erroneous belief" that their conduct was lawful. D&O 8. This is directly contradicted by the district court's conclusion – which the ALJ had *already* determined was controlling on this issue – that "Five M's [was] on notice that [its] practices violated the FLSA." *Perez v. Five M's*, 2017 WL 784204, at *10. In light of the district court's conclusions that Five M's was on notice that its practices violated the FLSA, and that their behavior was willful and not in good faith, it was error for the ALJ to put any weight whatsoever on Respondents'

alleged "honest" belief that it was not violating the law and to use that as a mitigating factor to reduce the penalties.[5]

A. The ALJ Erred in His Analysis of the Size of the Business and the Seriousness of the Violations.

In determining the appropriate penalty, the Administrator is required to, and as demonstrated *supra* did so here, consider the seriousness of the violation and the size of the business. The ALJ's analysis included errors on both of these mandatory factors. First, the ALJ erred when he relied on the current size of Five M's rather than only on its size at the time of the investigation. *See* D&O 7. The current size of the business is irrelevant to the appropriateness of the penalty. *Cf. Adm'r v. Chrislin, Inc.*, ARB Case No. 00-022, slip op. at 10 (Nov. 27, 2002) (analyzing size of business during period of investigation); *Keystone Floor Refinishing*, ARB Case Nos. 03-56, 03-67, slip op. at 10 (stipulation as to size of business during period of investigation). It was inappropriate to reduce the penalties based on the current size of the business. Rather, the ALJ should have taken into account that, at the time of the violation, Five M's employed at a

[5] Indeed, the ALJ's acknowledgement that Respondents' belief that the 35 employees at issue were exempt was "unreasonable" counsels against mitigation of the CMPs based on the discretionary regulatory factor of the "[t]he employer's explanation for the violations, including whether the violations were the result of a bona fide dispute of doubtful legal certainty." 29 C.F.R. 578.4(b)(2).

minimum 35 employees who suffered violations of the FLSA as a result of Respondents' actions.

The ALJ also erred with regard to the seriousness of the violation when he mitigated the penalty based on the average underpayment amounts of the back wages due to each employee. D&O 7. Crediting only the size of the average underpayment but failing to consider the repeated and willful nature of the Respondents' violations when analyzing the seriousness of the offense is not in line with Board precedent. *Cf., e.g.*, *Hong Kong Entm't (Overseas) Invs., Ltd.*, ARB Case No. 13-028, slip op. at 8, 11 (affirming ALJ's consideration of employer's repeated and willful violations during analysis of the gravity of the violation).

B. The ALJ Completely Disregarded the 2012 Conciliation, Which Provided Further Evidence of Respondents' Repeated and Willful Violations.

Finally, the ALJ erred when he ignored the 2012 conciliation in his analysis of the time interval between violations. The ALJ's decision, in fact, makes no reference whatsoever to the conciliation. The ALJ referenced "seven years" elapsing "between the 2005 investigation and the current investigation" and relied upon that as a mitigating factor. D&O 7. It is true that seven years elapsed between the 2005 investigation and the 2012 conciliation, but only two years elapsed between the 2012 conciliation and the opening of the current investigation.

The district court specifically relied on both the 2005 and the 2012 WHD determinations in reaching its conclusion that Five M's had repeatedly and willfully violated the FLSA. *See Perez v. Five M's*, 2017 WL 784204, at *10. It was error for the ALJ to completely ignore the 2012 conciliation, which constituted further evidence of the repeated nature and pattern of Respondents' FLSA violations. The most recent interval between violations was in fact only two years, and thus this factor should not have been relied upon to mitigate the penalties against Five M's, but instead it provides further support for WHD's decision not to reduce the penalties.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board reverse the ALJ's Decision and Order regarding Respondents' minimum wage and overtime civil money penalties, reinstate the Administrator's assessment, and require the Respondents to pay civil money penalties in the amount of $38,500.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of March 2019, a true copy of the foregoing Acting Administrator's Opening Brief and Appendix was sent via UPS overnight mail to:

Gordon Etzler, Esq.
Gordon A. Etzler & Associates, LLP
307 N. Washington
Valparaiso, IN 46383

And via first class mail to:

Hon. Stephen R. Henley
Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, NW, Suite 400
Washington, DC 20001-8002

/s/ Sara A. Conrath
SARA A. CONRATH
Attorney