



Issue Date: 24 May 2016

Case Number: 2013-FLS-00004

In the Matter of:

**ZL RESTAURANT CORPORATION
d/b/a FAMOUS WOK; and
LIXIN ZHANG, an individual**

Respondents

Appearances:

**Jennifer Johnson, Esq.
Dallas, Texas
For the Complainant**

**Lixin Zhang, pro se
Tempe, Arizona**

Before:

**Stephen R. Henley
Chief Administrative Law Judge**

DECISION AND ORDER REDUCING CIVIL MONEY PENALTY

Procedural Background

This case arises under the Fair Labor Standards Act of 1938 (“FLSA”), as amended, 29 U.S.C. § 201 *et seq.*, and the regulations at 29 C.F.R. Parts 578 and 580. On January 31, 2013, the Office of Administrative Law Judges (“Office”) issued a *Notice of Docketing* in the above captioned case.¹ On May 29, 2013, this Office issued a notice scheduling the matter for hearing on July 9, 2013. The hearing was subsequently continued by separate order on June 20, 2013.

¹ On January 4, 2013, the Administrator, Wage and Hour Division, U.S. Department of Labor (“Complainant”) filed an *Order of Reference* with this Office alleging Respondents owed civil penalties in the amount of \$2,200.00 for willfully and repeatedly violating the minimum wage and overtime compensation provisions of Sections 6 and 7 of the FLSA, 29 U.S.C. §§ 206, 207. According to the June 20, 2012 letter initiating the matter sent to Respondents by the Wage and Hour Division, U.S. Department of Labor, Albuquerque, New Mexico Office, Respondents failed to pay two employees \$22,378.24, the requisite minimum wage and/or overtime pay. Respondent Lixin Zhang filed an exception to the assessment on July 10, 2012 contesting the amount alleged due and assessed civil money penalty and

On October 17, 2013, the Office issued an *Order Granting Motion to Stay Proceedings* in this matter as a related action had commenced in the U.S. District Court for the District of New Mexico (Civil Action No. 1:13-cv-00075) (“District Court”) which could resolve several of the issues in the instant case.

On February 18, 2015, Complainant filed *Administrator’s Motion to Lift Stay*, stating that final judgment had been entered in District Court awarding Complainant compensatory damages of \$25,168.08, liquidated damages in the same amount, a permanent injunction prohibiting Lixin Zhang and ZL Restaurant Corporation (“Respondents”) from violating the FLSA, and attorneys’ fees and costs. Complainant also averred that a default judgment had previously been entered against ZL Restaurant Corporation d/b/a/ Famous Wok.

On May 26, 2015, Complainant filed a *Motion for Summary Decision and Brief in Support* (“Motion”). Respondents filed a *Response to Motion for Summary Judgment* on June 23, 2015. On July 8, 2015, this Office issued an *Order Lifting the Stay of Proceedings* and an *Order to Show Cause* directing Respondents to file a responsive brief to Complainant’s Motion. On September 22, 2015, Respondents filed a *Memorandum in Opposition to the Motion for Summary Judgment* (“Opposition”). On October 20, 2015, Respondents filed a *Motion for Hearing*. On December 15, 2015, Complainant filed *Administrator’s Reply to Respondents’ Response to the Administrator’s Motion for Summary Decision* (“Reply”).

In its Motion, Complainant argued that there were no genuine issues of material fact and that it was entitled to summary decision on the assessment of civil money penalties. (Motion at 11). Complainant asserted that Respondents repeatedly and willfully violated the FLSA’s provisions on minimum wage and overtime; that the FLSA allows for civil money penalties for repeated or willful violations; and that the civil money penalties assessed in this case are appropriate. (Motion at 11-16).

On December 29, 2015, I granted partial summary judgment and set a hearing date to resolve the remaining issues. I found that the final judgement entered in District Court had resolved the issue of whether Respondents violated sections 6 and 7 of the FLSA. The District Court’s findings also resolved the question of whether Respondents’ violations were repeated and willful. I found that Respondents’ behavior was deemed to be “repeated” under 29 C.F.R. § 578.3(b)(1) and (2) pursuant to the District Court’s findings that Respondents violated sections 6 and 7 in the time period corresponding to the Wage and Hour Division’s first investigation, and Respondents received notice of that violation. Additionally, I found that Respondents’ behavior was deemed to be “willful” pursuant to 29 C.F.R. § 578.3(c)(2) and (3) pursuant to the District Court’s findings that Respondents were informed by the Wage and Hour Division that their conduct was unlawful. I further found that Respondents either knew or were in reckless disregard of the requirements of the FLSA. Accordingly, I found that it was proper to assess civil money penalties. However, there remained the appropriateness of the amount of the assessed civil money penalty as this issue was not resolved by the U.S. District Court order. Therefore, Complainant’s motion for summary decision was granted **only** as to whether Respondents violated sections 6 and 7 of the FLSA, whether Respondents’ violations were repeated or willful and whether a civil

“contest[ed] the calculation of any underpayments.” Respondent Lixin Zhang stated that the investigator assigned the case was “unwilling to provide any information as to the calculation of a shortage.”

money penalty was authorized. Complainant's motion for summary decision was denied as to whether the \$2,200.00 assessed penalty is appropriate under 29 C.F.R. §578.4.

On February 23, 2016, after a continuance at Complainant's request, I convened a formal hearing at the U.S. Historic Courthouse located at 421 Gold Ave, SW, in Albuquerque, New Mexico. The proceeding was limited to the issue of whether the \$2,200.00 assessed penalty was appropriate under the FLSA. Both parties were in attendance. An interpreter was also in attendance at Respondent's request.² Complainant submitted Government Exhibits 1 through 15, 16A, 16B,³ 16C, 17, and 22.⁴ (Tr. 12.) GX-23 through GX-29 were withdrawn. (Tr. 13.) Two witnesses testified in addition to Respondent Lixin Zhang. Respondents were given one week to submit post-hearing exhibits RX-1 and RX-2 for consideration in this matter. (Tr. 77.) On March 2, 2016, Respondents filed exhibits with this Office. On February 29, 2016, Complainant also filed exhibits, which included GX-1 through GX-29.⁵ The parties were also given the option of filing post-hearing briefs. (Tr. 79.) On April 26, 2016, Respondents filed their post-hearing brief ("Resp. Post-Hearing Brief"). On May 3, Complainant filed *Administrator's Post-Hearing Brief* ("Compl. Post-Hearing Brief").

Positions of the Parties

Respondents

Respondents assert that they properly paid back wages to the affected employees after Complainant's first investigation. (Tr. 53-56.) Respondents contend that they compensated the affected employees with significant non-wage benefits, including room and board. *See* RX-2. Additionally, Respondents contend that Plaintiff "failed to make a thorough investigation" and provided "false information and witnesses" to the court. (Resp. Post-Hearing Brief.)

Complainant

Complainant states that "the CMP assessment was calculated and based in accordance with Part 578" of the FLSA. (Compl. Post-Hearing Brief at 5.) Complainant contends that "[t]he amount of CMPs assessed by Wage and Hour accurately reflects the seriousness of the violations, the size of Respondents' business, past history, and failure to take appropriate steps to comply with the Act and its applicable regulations." (Compl. Post-Hearing Brief at 4.) Complainant argues that the amount of CMPs are appropriate because of "Respondents' behavior following the first investigation and continuing through the second investigation, cover up of their noncompliance, and continued refusal to pay the back wages due for the second investigation." (Compl. Post-Hearing Brief at 7-8.) Complainant emphasizes that "Respondents cannot show any good faith efforts to comply with the provisions of the Act, and have shown no commitment to future compliance." (Compl. Post-Hearing Brief at 8.)

² Interpreter Jason Yuen interpreted the proceedings for Respondent from English to Mandarin and Cantonese.

³ Government Exhibits 16A and 16B were entered into evidence on behalf of Respondent. (Tr. 67.)

⁴ This order will utilize the following abbreviations: "GX" for a Government Exhibit; "RX" for a Respondent Exhibit; and "Tr." for the hearing transcript.

⁵ Although Complainant indicated during the hearing that GX-23 through GX-29 were withdrawn, I construe their filing as an implicit motion to submit them into evidence and hereby GRANT it.

Complainant requests that this tribunal deny any reduction in the assessed penalties for “alleged room, board, and transportation costs Respondents paid” for the affected employees. Complainant points out that Lixin Zhang “lived in the same two-bedroom apartment as his three employees,” and that he “benefited from the food that was purchased.” Complainant further objects because “Respondents have provided no evidence that they put the employees on any such notice that these alleged payments for room, board, and transportation were to be part of their salary.” (Compl. Post-Hearing Brief at 6.)

Summary of the Evidence⁶

The parties did not agree to any stipulations. (Tr. 10.)

Testimony

Theodore J. Trujillo (Tr. 16-52.)

Mr. Trujillo has been the Assistant District Director in the Albuquerque District Office of the Wage and Hour Division (WHD), U.S. Department of Labor for five years and employed by the WHD for ten. (Tr. 17.) As Assistant District Director, he is “responsible for case assignments, supervision of investigators . . . , case file review, and assessment of civil money penalties upon conclusion of the investigations.” (Tr. 17-18.) There were two WHD cases in this matter. Mr. Trujillo assigned and supervised the investigators, reviewed both cases, and assessed the civil money penalty at issue. (Tr. 18.)

First Investigation:

Mr. Trujillo assigned the first investigation to Christina Marwan. (Tr. 18.) The facts set forth by the United States District Court for the District of New Mexico in pages five through eight of GX-1 are identical to the factual findings of the WHD investigation. (Tr. 19-20.) Mr. Trujillo considered those facts when assessing civil money penalties. (Tr. 20.) GX-11 is commonly referred to as a Wage Hour 56 Form (WH 56). It is a summary of unpaid wages pursuant to the first investigation, signed by Mr. Zhang. (Tr. 20-21.) The WH 56 is presented at the conclusion of an investigation during the final conference that the investigator holds with the employer, if the employer commits to future compliance. (Tr. 21-22.) Exhibit GX-16C is a letter that was mailed to Mr. Zhang on September 21, 2011. It is called the F239 and was drafted by Mr. Trujillo after he reviewed the completed investigation. (Tr. 22.) GX-12 and GX-13 are copies of checks issued to affected employees Ana Vasquez and Camilo Pichardo. (Tr. 23-24.) GX-14 and GX-15 are copies of a WH 58 from the employer. Form WH 58 is used by WHD as a receipt to serve as proof of payment. (Tr. 24.) One of the affected employees contacted the investigator and reported that they had not received payment. That, as well as a request by Mr. Zhang to speak with a supervisor, prompted Mr. Trujillo to contact Mr. Zhang by telephone. (Tr. 25.) During that phone call, Mr. Zhang reported that he had paid the employees with cash after depositing the checks copied in GX-12 and GX-13. (Tr. 26.) WHD received signed copies of WH 58 from the affected employees, but those employees also advised WHD that they had not known the significance of what they were signing. (Tr. 26-27.)

⁶ The Summary of the evidence is not intended to be an exhaustive analysis of each exhibit or a verbatim transcript of the hearing but merely to highlight certain relevant portions.

Second Investigation:

During the second investigation, investigator Marwan spoke with three employees. (Tr. 44.) Among those the investigator spoke to were Ana Vasquez and Camilo Pichardo. The investigator resigned in 2014. (Tr. 45.) GX-8 contains “back wage computations developed by Investigator Marwan as a result of information developed during the course of the investigation as it relates to the specific work weeks that the affected employee was engaged in work for the Employer and the number of hours the employee was working on a weekly basis.” (Tr. 46.)

Assessment of Civil Money Penalties:

Mr. Trujillo states that he does not “believe a credit under 3M was ever discussed as it relates to room and board” provided to the affected employees. Mr. Trujillo further stated that he did not consider the provision of room, board, and other benefits to the two employees as a factor in determining the penalty. (Tr. 52.) Mr. Trujillo issued the civil money penalty (CMP) assessment after considering Part 578.4. (Tr. 27-28.) GX-6 is the assessment letter issued to Mr. Zhang on June 20, 2012. It assessed a \$2,200.00 penalty for two violations - one violation for each affected employee. GX-22 is Part 578.4. (Tr. 28.) \$2,200.00 is the maximum penalty that can be assessed for two violations of the FLSA.

Seriousness of the Violations. In assessing the CMP, Mr. Trujillo considered the seriousness of the violations. Mr. Trujillo found the violations to be “very serious because the violations identified in both investigations were identical.” (Tr. 29.)

Repeated and Willful. Mr. Trujillo also identified the violations as repeated and willful. (Tr. 29.) There were both minimum wage and overtime violations in both investigations. (Tr. 30.)

Size of the Employer. Mr. Trujillo testified that the size of the employer had no effect on his consideration of the CMP because he believed the violations were repeated and willful. (Tr. 30.) While there are times when the size of an employer will allow for an increase or decrease in the size of the penalty, according to Mr. Trujillo, that would occur “[i]f there was an instance where the civil money penalties were repeated or willful and the employer, as an example, the employer has refused to pay the back wages. So in that investigative process, during the final conference, the employer may have agreed to future compliance but then upon seeing the summary of unpaid wages, and being made aware of the amount of back wages, they may well have refused to pay the back wages.” In that case, CMPs could be increased. (Tr. 30-31.) “The flip side to that would be that if the employer agreed to future compliance, agreed to pay the back wages, and civil money penalties were appropriate, taking that into consideration, there very well could be a reduction” of the CMP. (Tr. 31.) In this case, Mr. Trujillo testified that there was no reduction “because of the size and because the violations identified in the second investigation were identical” and because it was repeated and willful. (Tr. 31-32.)

Good Faith Efforts at and Commitment to Future Compliance. Mr. Trujillo also considered whether the employer made good faith efforts to comply with the FLSA. Mr. Trujillo stated that “it was all based on the initiation of a second investigation, and the results of that investigation identifying that the violations were identical to the previous investigation. So there was nothing to

indicate in the case file that would have supported that the employer had made changes in the establishment practice to come into compliance.” (Tr. 32.) Mr. Trujillo further stated that “we had already had developed information that the two affected employees in the first investigation had not been paid the back wages due.” Mr. Trujillo did not consider whether the employer’s explanation for the violations were the result of a bona fide dispute of doubtful legal certainty “because the employer didn’t convey that information . . . regarding any sort of legal argument,” and the investigator had discussed the violations with Mr. Zhang and provided him a pamphlet on the FLSA. Mr. Trujillo had also discussed compliance with Mr. Zhang in the telephone conversation following the first investigation. (Tr. 33.) It was Mr. Trujillo’s understanding that Mr. Zhang was aware of the violations from the first investigation. It was determined that “because the violations were identical, that no effort was made to come into compliance.” (Tr. 34.) Although Mr. Zhang “had verbally stated . . . that he was committed to future compliance . . . his actions revealed otherwise because he did not pay the back wages that were identified to the affected employees in the first investigation. And the violations . . . in the second investigation were identical to the violations in the first investigation.” (Tr. 34-35.) At the end of the second investigation, Mr. Zhang refused to come into compliance and refused to pay the back wages for the second investigation.” (Tr. 35.) “The second investigation would support that there was no attempt and the practices that were in place during the first investigation remained in place and were continuous through the second.” (Tr. 36.) Mr. Zhang’s actions in submitting cancelled checks and WH 58 receipt forms showed that “he was not doing anything to come into compliance” because Mr. Zhang reported that he had deposited those checks back into his own account. (Tr. 36.) That “was indicative of him not paying the back wages as he agreed to in the first investigation, in tandem with the information that was developed in the second investigation where the affected employees advised that they had . . . signed the WH 58 receipt form but did not know what they were signing.”

Number of Employees Affected. Mr. Trujillo considered the number of employees affected. Three employees were identified in the second investigation. However, CMPs were assessed only for the two employees due back wages from minimum wage and overtime violations. (Tr. 37.) Mr. Trujillo stated that Complainant “was unable to establish coverage for the third employee.” (Tr. 43.)

Pattern of the Violations. Mr. Trujillo considered whether there was a pattern to the violations. (Tr. 37.) He stated that “[t]he violations were identical and there was nothing to support that there had been any changes between the first and second investigation that would support there was an attempt to come into compliance.” (Tr. 37-38.)

Computation of the CMP. GX-7 is the CMP report of the proposed CMP. (Tr. 39.) Section A of GX-7 identifies the CMP as repeated and willful. For each employee, the starting CMP amount is \$1,100. Mr. Trujillo stated that he would then consider certain reductions or increases. Mr. Trujillo would “consider a 30% reduction for an establishment that has one to 19 employees, or a 15% reduction for an establishment that has 20 to 99 employees.” He would consider a 25% increase for a refusal to pay.” (Tr. 40.) In this case, Mr. Trujillo assessed a \$1,100.00 penalty per employee because the violations were repeated and willful – even though Mr. Zhang’s establishment has 19 or less employees. (Tr. 40-41.) Had the violations simply been

repeated or willful, Mr. Trujillo would have given Mr. Zhang the 30% reduction. But here, there was also “a refusal to comply by Mr. Zhang at the end of the second investigation.” (Tr. 41.)

Respondent - Lixin Zhang (Tr. 53-65.)

Mr. Zhang testified that he did not speak with the investigator during the second investigation. (Tr. 53.) He received GX-11 from WHD investigator Christina Marwan after the first investigation. He signed GX-11. (Tr. 54.) On November 11, 2011, he also signed GX-14 and GX-15 before mailing them to WHD after the first investigation. (Tr. 54-55.) He also provided WHD copies of checks dated November 11, 2011, shown in GX-12 and GX-13. (Tr. 55.) Mr. Zhang stated that he does not recall telling anyone at WHD that the employees received payment in cash instead of the checks in GX-12 and GX-13. (Tr. 56.)

Mr. Zhang testified to non-wage benefits that he provided to the two employees. He stated that he provided room and board and transportation. (Tr. 56.) He rented an apartment at 64 Rancho Carrera in Santa Fe that Ms. Vasquez and Mr. Pichardo stayed at all times they worked for him, free of charge. Ms. Vasquez’s employment was from May 2009 to January 14, 2012; Mr. Pichardo’s employment was from June 2009 to January 14, 2012. (Tr. 57-58.) Rent cost about \$980 a month plus utilities. (Tr. 58.) A third employee also lived in the two-bedroom apartment, in addition to Mr. Zhang when he was in town. (Tr. 58, 62.) Mr. Zhang stated that he also provided the employees with food and “everything they need in the living environment, including transportation.” Mr. Zhang stated that the employees had his credit card to purchase food with, or that alternatively, they could purchase food with cash and he would reimburse them. (Tr. 58.) Mr. Zhang did not keep records of the expenses. (Tr. 63.) He estimated that for Ms. Vasquez, he paid \$265.41 a month in transportation to and from work, which included the use of his car and his payment for gasoline; \$96.52 per month for non-work transportation; \$325 per month for food; \$250 per month for her share of the apartment; \$100 per month for car repair and utilities; and \$70 a month for incidental expenses such as clothes and household items. (Tr. 59.) Mr. Zhang stated that he paid \$15 per month for Mr. Pichardo’s cell phone; \$265.41 for transportation to and from work; \$96.52 for non-work transportation; \$325 for food; \$250 for his share of the rent; \$70 for incidentals; \$100 for car repairs and utilities. (Tr. 59-60.) Mr. Zhang reports that on September 21, 2011, he told the investigator, Christina, that he paid employee expenses beyond wages. (Tr. 60.) Mr. Zhang states that in a 2013 meeting he also told Jennifer Johnson that he paid employees benefits beyond wages. (Tr. 60, 64.) Mr. Zhang states that he did not present records of incidentals, transportation, food, or rent costs to the District Court as it was not accepted because it was not notarized. (Tr. 64.)

Mr. Zhang also testified that he estimated that employees made \$260 per month in cash tips. (Tr. 59.) He explained that the workers pool the tips and divide them, and that he had gotten the estimate from other employees not involved in this matter. (Tr. 62-63.)

George Watkins (Tr. 68-71.)

Mr. Watkins testified that he does not know Mr. Zhang. He does know Mr. Marquez.⁷ (Tr. 69.)

Exhibits

RX-1

RX-1 is a copy of Plaintiff's prehearing exchange from March 2013.

RX-2

RX-2 consists of notarized declarations from Yolanda Gomez, Yadira Trevizo, Oscar Sosa, Isabel Montenegro, and Javier Pichardo. Yolanda Gomez stated that Ms. Vasquez "would use [Mr. Zhang's] car for her personal errands on her days off and she would put gas with his credit card and she would also buy hers and Camilos stuff from sams club with [Mr. Zhang's] credit card." Isabel Montenegro stated that she received tips of \$150.00 every two weeks. Javier Pichardo stated that that he, Ana, and Camilo "all lived in Lixin's apartment and shared Lixin's car. Lixin paid for everything like food, phones, gas, and insurance car. He also paid our rent and utilities and many time paid for our clothes." Mr. Pichardo also stated that he made \$120.00 in tips every month.

GX-1; GX-2; and GX-3

GX-3 is an order, filed October 29, 2013, from the U.S. District Court of New Mexico adopting the report and recommendation of the Magistrate Judge and entering default judgment against ZL Restaurant Corporation. GX-1 is another opinion and order from the U.S. District Court, filed December 30, 2014. It grants summary judgment against Mr. Zhang; awards liquidated damages to the extent allowed; and issues an injunction against further violations of the FLSA against Mr. Zhang. GX-2 is the corresponding judgment issued in the case, signed by U.S. District Judge Martha Vazquez.

GX-6

GX-6 is an assessment of \$2,200.00 in civil money penalties, dated June 20, 2012.

GX-7

GX-7 is WH Form 467, dated June 19, 2012, with \$2,200.00 in civil money penalties recommended by investigator Christina Marwan. There is also an illegible signature on the line "ADD/DD Reviewer."

⁷ At this point, Ms. Johnson stated that "Mr. Marquez was a typo in a prehearing exchange." (Tr. 70.) See RX-1 ("Mr. Watkins and Mr. Marquez may also testify that they had a number of meetings with Respondents in which they asked Respondents to come into compliance"). It appears that the sentence should have read "Mr. Watkins and *Mr. Trujillo* may also testify that they had a number of meetings"

GX-9

GX-9 is a summary of unpaid wages for the second investigation. It indicates that Mr. Pichardo's unpaid wages are \$12,077.44 and Ms. Vasquez's unpaid wages are \$10,300.80 for the period from August 20, 2011 to January 14, 2012.

GX-12 and GX-13

GX-12 and GX-13 are copies of online banking documents, including checks from Lixin Zhang to Ana Vasquez and Camilo Pichardo dated November 11, 2011, in the respective amounts of \$15,232.56 and \$10,048.08. The documents indicate that the checks were both posted on November 23, 2011. They are marked as received by the U.S. Department of Labor, Wage and Hour Division, Albuquerque District Office on November 29, 2011.

GX-14 and GX-15

GX-14 and GX-15 are receipts for payment of back wages signed by Camilo Pichardo and Ana Vasquez⁸ on November 11, 2011. These documents were marked as received by the Albuquerque Wage and Hour Division on November 29, 2011.

GX-16C

GX-16C is a letter from Albuquerque Wage and Hour Division, signed by Ted Trujillo and dated September 21, 2011 with back wages set out from the first investigation. The letter states

Investigator Marwan has advised me that you have agreed to comply fully with all the provisions of the FLSA in the future. Specifically, you have stated that you will properly classify employees as hourly employees and pay time and one half for hours worked in excess of 40 hours in a seven consecutive day period. Investigator Marwan further advises me that you have agreed to pay the above-described back wages in full by November 30, 2011. No civil money penalties were assessed in this letter.

Applicable Law

This Office reviews a determination of civil money penalty de novo. 29 C.F.R. § 578.3; *see also Administrator, Wage and Hour Div. v. Keystone Floor Refinishing Co., Inc. d/b/a Keystone Floor Refinishing Co.*, ARB Nos. 03-056, 03-067, ALJ No. 2002-CLA-017 (ARB Nov. 29, 2004) (a Wage and Hour form is not a substitute for an "ALJ's independent review of the appropriateness of the assessed penalty [for child labor violations of the FLSA]; it is merely a starting point"). A civil money penalty assessed for repeated or willful violations of section 6 or 7 must take into consideration "the seriousness of the violations and the size of the employer's business," 29 C.F.R. § 578.4(a), and may take into account other relevant factors. 29 C.F.R. § 578.4(b) contains the following illustrative list of factors:

⁸ I note that it appears the correct spelling of the employee's name is *Vazques*, as signed by her, rather than *Vasquez*.

- (1) Whether the employer has made efforts in good faith to comply with the provisions of the Act and this part;
- (2) The employer's explanation for the violations, including whether the violations were the result of a bona fide dispute of doubtful legal certainty;
- (3) The previous history of violations, including whether the employer is subject to injunction against violations of the Act;
- (4) The employer's commitment to future compliance;
- (5) The interval between violations;
- (6) The number of employees affected; and
- (7) Whether there is any pattern to the violations.

Other relevant factors may be considered as well. § 578.4(b). A civil money penalty for repeated or willful violations of § 206 or § 207 after January 7, 2002 is capped at \$1,100.00 per violation.

Findings of Fact and Conclusions of Law

I find the following after reviewing and considering the entire record.

The Administrator's Assessment and Calculation

Mr. Trujillo testified that he considered the seriousness of the violations; their repeated and willful nature; the size of the employer; good faith efforts at compliance; commitment to future compliance; number of employees affected; and the pattern of the violations. (Tr. 29-41.) Mr. Trujillo testified that there was no reduction "because of the size [of the business] and because the violations identified in the second investigation were identical" and because it was repeated and willful. (Tr. 31-32.) However, the size of the employer factor is distinct from the repeated and willful nature of the violation and good faith efforts to future compliance factors and Mr. Trujillo appears to conflate all three rather than consider each separately. Mr. Trujillo also stated that he did not consider whether Mr. Zhang provided non-wage benefits, such as room and board, food, and transportation. I find Mr. Zhang provided significant non-wage benefits to the two affected employees. Mr. Trujillo further stated that he did not "believe a credit under 3(m)⁹ was ever discussed as it relates to room and board" that may have been provided to the affected employees. (Tr. 52.)

It also appears that Mr. Zhang was at a significant disadvantage in the investigations because of language barriers. Had Mr. Zhang been able to effectively communicate – or engaged legal counsel – he may have been more successful. It is already established that Respondents repeatedly and/or willfully violated the FLSA. However, I find that it is appropriate to take into account Respondents' provision of non-cash benefits¹⁰ when making the penalty determination.

⁹ Mr. Trujillo appears to be referencing 29 U.S.C. § 203(m) ("wage" paid to any employee includes the reasonable cost, as determined by the Administrator [Secretary], to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee").

¹⁰ The amount of back wages owed to affected employees has been decided in District Court. Accordingly, because the amount of cash tips earned by the affected employees is relevant only to the issue of back wages, I will not consider it in this decision.

Required Factors

Seriousness of the Violations

The violations resulted in significant underpayments and were the result of Respondents' prolonged, systemic failure to provide proper overtime and minimum wage.

Size of the Employer's Business

Smaller businesses are generally less equipped to navigate and implement complex regulations, and are more affected (and deterred) by smaller penalties. The size of Respondents' business, with 19 or fewer employees, weighs in heavy favor of a reduction in the assessed penalty.

Other Relevant Factors

I find that it is appropriate to take into account factors in addition to the seriousness of the violations and the size of the employer. I find the following factors to be relevant.

Good Faith Effort to Comply and Employer's Explanation

As discussed above, Respondents asserted that they had been in compliance with wage and overtime rates because of the provision of non-wage benefits, such as room and board.¹¹ I credit Mr. Zhang's testimony that he provided transportation, room and board to the affected employees.¹² Mr. Zhang testified that he paid all of the expenses of Ms. Vasquez and Mr. Pichardo, which he estimated monthly to be \$1,106.93 for Ms. Vasquez and \$1,121.93 for Mr. Pichardo. *See* Tr. 59, 60. The affidavits Mr. Zhang submitted from other employees also indicate that Mr. Zhang was providing considerable non-cash benefits to Ms. Vasquez and Mr. Pichardo. *See* RX-2. I find that Mr. Zhang's provision of non-cash benefits mitigates Respondents' violations.¹³

Previous History of Violations

There is a dispute between Complainant and Respondents regarding whether back wages were paid to employees at the conclusion of the first investigation. Mr. Trujillo testified that it was the Administrator's position that the wages had not been paid, and therefore that Mr. Zhang had not cooperated in the first investigation. Mr. Zhang filled out and returned forms to Complainant indicating that he had paid Ms. Vasquez and Mr. Pichardo by check. However, Mr. Trujillo testified that the employees had informed Complainant that they had not been paid, and had been

¹¹ The FLSA includes as wages employer-provided board, lodging, or other facilities, subject to certain criteria. *See* 29 U.S.C. § 203(m).

¹² I note that some of the expenses claimed by Mr. Zhang appear to be exaggerated, such as employee car use (quoted at over \$350.00 per employee per month).

¹³ I emphasize that this finding is distinct from the already-decided issue of the amount of back wages owed, and furthermore, that it is not dependent upon the non-cash benefits being classified as wages under 29 U.S.C. § 203(m).

told to sign form WH-58 (GX-14, GX-15), but had not known the significance of signing it. Mr. Trujillo testified that Mr. Zhang informed him in a telephone conversation that the employees had signed the checks over to Respondents, who had then paid the employees in cash. Mr. Zhang testified that he does not recall telling Complainant that he paid the employees back wages in cash. I find that the telephone call between Mr. Trujillo and Mr. Zhang took place, and further, that Respondents failed to pay the back wages pursuant to the first investigation.

* * *

After considering the above factors as well as the record as a whole, I find that Respondents' civil money penalty should be reduced. Although Respondents' violations were serious and repeated, Respondents' provision of substantial non-wage benefits and its relatively small size weigh in favor of a reduction in the assessed penalty.¹⁴

Order

It is hereby ORDERED that the civil money penalty assessed against Respondents Lixin Zhang and ZL Restaurant Corporation is reduced to a total amount of \$1000.00. Respondents are hereby ORDERED to pay Complainant **\$1000.00 in two installments of \$500.00 each** with the first installment due 45 days after the date this Order becomes final and the second 45 days thereafter.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

¹⁴ That Respondent lived in the same apartment and ate some of the same food as the two affected employees does not diminish the fact that he provided them significant non-wage benefits, which were not considered in assessing the amount of the CMP.

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Administrative Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 580.13. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents. Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

At the time you file the appeal with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 580.13.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no appeal is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 580.12(e).