



Issue Date: 24 July 2019

CASE NO.: 2019-FLS-5

In the Matter of:

**Petition for Review of Special
Minimum Wage Rate Pursuant to
Section 14(c)(5)(A) of the Fair Labor
Standards Act by:**

JONATHAN DAVIS

Petitioner

v.

MEXIA STATE SUPPORTED LIVING CENTER

Respondent

DECISION AND ORDER

On April 15, 2019, Petitioner Jonathon Davis filed a Petition for Review of the Special Minimum Wage paid to him by his employer, Mexia State Supported Living Center (“MSSLC”), under Section 214(c) of the Fair Labor Standards Act (“Act” or “FLSA”). *See* 29 U.S.C. § 214(c). That Petition for Review was referred for hearing pursuant to 29 U.S.C. § 214(c)(5)(B) and 29 C.F.R. § 525.22. A hearing was held on June 26, 2019, in Dallas, Texas. The Solicitor did not appear at the hearing or participate in these proceedings.

For the following reasons, the Petition for Review is DISMISSED.

BACKGROUND¹

Mr. Davis is employed in MSSLC’s woodshop, located in Mexia, Texas. MSSLC is one of 13 state supported living centers operated by Texas Health and Human Services. *See* TEX. HEALTH & SAFETY CODE, Chapter 531.² State supported living centers are defined by state law as “state-supported and structured residential facility operated by [the State] to provide to clients with an intellectual disability a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills.” TEX. HEALTH & SAFETY CODE § 531.002(19). Petitioner and Respondent both agree that MSSLC is an arm of the State of Texas.

¹ The following facts are undisputed, and unless noted otherwise, are taken from the parties’ briefs, exhibits, hearing testimony, and stipulations.

² MSSLC’s public webpage is available at <https://hhs.texas.gov/services/disability/intellectual-or-developmental-disabilities/state-supported-living-centers-sslcs>.

Mr. Davis is an individual with mental, intellectual, and physical disabilities (Resp't Ex. 12.). He lives in MSSLC's residential facility and receives, among other services, employment and vocational counseling from the Texas Workforce Commission. As relevant here, Mr. Davis' first job at MSSLC was in its recycling center. In that job, he was paid less than minimum wage. Mr. Davis later requested and received a transfer to a job in MSSLC's woodshop. Mr. Davis was initially paid less than minimum wage in that job as well, but his pay increased to the federal minimum wage by January 2019.³

MSSLC is able to pay certain workers with disabilities less than the federal minimum wage under Section 14(c) of the FLSA after receiving authorization in the form of a document titled Certificate Authorizing Special Minimum Wage Rates ("Special Certificate") (Resp't Ex. 11.). Section 14(c), titled "Handicapped Workers," directs the Secretary of Labor ("Secretary") "to the extent necessary to prevent curtailment of opportunities of employment, shall by regulation or order provide for the employment, under special certificates, of individuals whose earning or productive capacity is impaired by . . . physical or mental deficiency" at wages which are "lower than the minimum wage" and "commensurate with those paid to nonhandicapped workers employed in the vicinity . . . for essentially the same type, quality, and quantity of work" and "related to the individual's productivity." 29 U.S.C. § 214(c)(1). A Special Certificate does not constitute a statement of compliance by the Department of Labor nor does it convey a good faith defense to an employer should violations of the Act occur (Resp't Ex. 11.).

Any employee receiving less than minimum wage, referred to in the Act as a "special minimum wage," may petition for review of the special minimum wage rate under Section 214(c)(5)(A) of the Act. *See* 29 U.S.C. § 214(c)(5)(A). The Petition for Review in this case was received on April 15, 2019 by the Acting Administrator of the Wage and Hour Division, who is then directed by the Act to issue an Order of Referral to the Chief Administrative Law Judge within 10 days pursuant to 29 U.S.C. § 214(c)(5)(B). That Order of Reference was received by OALJ on April 30, 2019, and assigned to me for hearing on May 10, 2019. The Act specifies that a hearing on the record shall be conducted within 30 days after assignment by the Administrator, and the ALJ is to issue a decision within 30 days after the termination of the hearing.⁴ *See* 29 U.S.C. § 214(c)(5)(B)-(E); 29 C.F.R. § 525.22. Regulations provide that such hearings are to be conducted under OALJ's Rules of Practice and Procedure found in 29 C.F.R. Part 18 generally, but direct that there shall be a minimum of formality in the proceeding consistent with orderly procedure. The employer must serve on the Petitioner and the Associate Solicitor the employee's records, as identified in the regulation, no later than 15 days prior to the hearing, or as soon as practical after receiving the notice of hearing. *See* 29 C.F.R. §§ 525.22(c); 525.16(a)-(d). The Administrator shall be permitted to participate by counsel in the proceeding upon application. 29 C.F.R. § 525.22(c). The burden of proof on all matters relating to the propriety of a wage at issue rests with the employer. 29 C.F.R. § 525.22(d). In the absence of evidence sufficient to support the conclusion that the proper wage should be less than the minimum wage, the ALJ shall order that the minimum wage be paid.

³ The parties stipulated at the hearing that MSSLC began paying Mr. Davis the federal minimum wage no later than that date.

⁴ Due to administrative delays beyond my control, previously scheduled hearings, military duty, and a federal holiday the hearing could not be conducted within 30 days. I did not receive case until May 13, 2019, roughly 13 days after the petition was received by OALJ, which left no more than 17 days to schedule and hold the hearing. Due to scheduling conflicts and logistical challenges, and to ensure the parties had sufficient time to prepare for and receive a meaningful hearing, I scheduled the hearing for June 27, 2019, the earliest practical date. Neither Petitioner nor Respondent objected, and both parties clarified at the hearing that they consented to this delay. Therefore I find that there were compelling reasons for the delay. *See* 29 C.F.R. 525.22(b) ("requests for postponement shall be granted only sparingly and for compelling reasons").

DISCUSSION

Sovereign immunity bars these proceedings.

Respondent asserts that this petition should be dismissed based on the principle of Sovereign Immunity, as articulated by the U.S. Supreme Court in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) (“FMC”). In *FMC*, the Court held that a state’s sovereign immunity prevents a private party from litigating a complaint before a federal agency’s administrative tribunal in the same way that it prevents a private party from suing a state in federal court. *Fed. Mar. Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002). The Court explained that, even though an administrative tribunal “does not exercise the judicial power of the United States. . . . [T]his Court has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.” *Id.* at 754. The Court’s analysis focused on the fact that the administrative adjudication at issue there was presided over by an administrative law judge and the proceedings followed formal, trial-like procedures. Put succinctly, it “walk[ed], talk[ed], and squawk[ed] very much like a lawsuit.” *Id.* at 757 (quoting the Court of Appeals).

The Court brushed aside concerns that the Commission’s orders were not self-executing and could only be later enforced by a federal district court in an action brought by the United States, reasoning that it was of little consequence because review by the sanctioned party in federal court did not include a review of the merits of the Commission’s order. *Id.* at 979-80. The Court concluded that, “if the Framers thought it an impermissible affront to a State’s dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency.”

The case of *Connecticut Department of Environmental Protection v. OSHA*, 356 F.3d 226 (2nd Cir. 2004) (“CDEP”), is also instructive, insofar as it helps delineate the boundaries of a State’s sovereign immunity when a federal agency seeks to enforce federal law in an administrative forum. In that case, the State of Connecticut argued that, not only did sovereign immunity protect it against administrative adjudication of a private complaint, but its protections extended to prevent OSHA from even investigating an employee’s whistleblower complaint or conducting an administrative adjudication in which OSHA participated as a party. OSHA conceded that *FMC* prevented it from holding a hearing to adjudicate the private whistleblower claim so long as OSHA was not itself a party to the proceedings. *Conn. Dep’t Env’tl. Prot.*, 356 F.3d at 230. OSHA argued, however, that it may investigate a complaint for the purpose of deciding whether to intervene in the action and that sovereign immunity would not bar it from either initiating its own administrative proceeding against a State or from intervening as a party in an administrative proceeding originally brought by a private citizen against a nonconsenting state agency. *Id.* at 232-34. The U.S. Court of Appeals for the Second Circuit agreed, noting that *FMC* explicitly stated that its decision did not foreclose the federal government from enforcing its laws through its own investigation of a claim (whether on its own initiative or upon information supplied by a private party) or to institute its own administrative proceeding against a State. *Conn. Dep’t Env’tl. Prot.*, 356 F.3d at 232 (emphasis added) (citing *Fed. Maritime Comm’n*, 535 U.S. at 768). It explained that the investigation there was driven by OSHA and had none of the hallmarks of an adversarial trial found to be significant by the Supreme Court. *Id.* Similarly, it found that an administrative adjudication, which would have the hallmarks of trial, is “transformed from a prohibited suit by a private party against a state to a permitted one by the federal government against a state” when OSHA becomes a party to the administrative adjudication. *Id.* at 234; *see also Solis v. Texas*, 488 F. App’x 837 (5th Cir. 2012)

(nonprecedential) (holding that a suit by the Secretary under the Act is a suit in the public interest, notwithstanding the fact that the money obtained passes to private individuals).

Petitioner argues that *FMC* is distinguishable from the facts here and that these proceedings are more analogous to an investigation or an enforcement action than a lawsuit by a private citizen in Federal court. It points out that these proceedings are less formal than those described in *FMC* and that regulations for petitions for review require a minimum of formality. The rules of evidence applicable in Federal court do not apply, and while regulations state that OALJ's Rules of Practice and Procedure apply, in actual practice there is limited opportunity for discovery and motion practice in light of the short timelines provided by the Act. In addition, it is the employer that bears the burden of proof once the petition is filed.

While Petitioner's points are well-taken, I am forced to conclude that *FMC* is applicable to this case. Based on my reading of *FMC*, the key inquiry is not whether the procedures used are more or less formal than those in *FMC*, but whether these proceedings are analogous to a civil lawsuit filed by a private party against a State in federal court. *Id.* at 761 n.12. Although these proceedings are less formal than those described in that case, the core features shared by this administrative adjudication and judicial proceedings lead me to find in the affirmative. While formality is to be minimized to the extent practical, OALJ's Rules of Practice and Procedure are modeled on the Federal Rules of Civil Procedure and adopt those rules in any situation not provided for or controlled by some other governing authority. *See* 29 C.F.R. § 18.10. Discovery in these proceedings is practically limited due to the short-time frames provided, but it is possible, and Respondent is required to produce certain records in its possession within 15 days of the hearing. *See* 29 C.F.R. § 525.22(c). Most importantly, these proceedings are adversarial in nature, they are conducted by a neutral trier of fact insulated from political influence,⁵ each party is entitled to present his or her case by oral and/or documentary evidence, and a written decision must be issued based on the exclusive evidence of record.

The exceptions in *CDEP* also do not apply here. Regulations provide that upon receipt of a petition for review, the Secretary *shall* assign the petition to an administrative law judge to conduct a hearing on the record. 29 U.S.C. § 214(c)(5)(B). Thus, once the petition was filed, referral to the OALJ for hearing, without investigation, was automatic. The Administrator did not appear at the hearing and did not participate as a party.⁶ The above reflects that these proceedings are driven by a private party rather than the federal government. They have the hallmarks of an adversarial trial sufficient to show that they are more like a lawsuit than an investigation. The mere fact that the FLSA has placed the burden of proof on a 14(c) employer does not render these proceedings non-adversarial, as the FLSA also does this in other civil litigation contexts. *See, e.g., Meza v. Intelligent Mexican Marketing Inc.*, 720 F.3d 577, 580-81 (5th Cir. 2013) (recognizing that the employer bears the burden of proving that an exemption from overtime provisions is "plainly and unmistakably" applicable to the employee).

Accordingly, I find that this is not an investigation or an enforcement action brought by the federal government outside the scope of the States' Eleventh Amendment sovereign immunity. *See also*

⁵ The Court explained that the role of administrative law judge is "functionally comparable" to that of a trial judge. *Fed. Maritime Comm'n*, 535 U.S. at 756.

⁶ The Solicitor requested leave to file an amicus (friend-of-the-court) brief after the hearing, and that request was granted. *See* 29 C.F.R. 18.24 (briefs from amicus curiae). However, no brief was received. At no time did the Administrator or Solicitor participate as a party, though they have the right to do so. *See* 29 C.F.R. 525.22(c) ("The Administrator shall be permitted to participate by counsel in the proceeding upon application."); *see generally Texas v. Dep't of Energy*, 754 F.2d 550, 553 (5th Cir. 1985) (distinguishing "third-party" amicus status versus intervention).

Tennessee v. DOT, 326 F.3d 729, 735-37 (6th Cir. 2003) (conducting a similar analysis and holding that *FMC* did not apply to the filing of a petition that triggered procedures similar to informal rule-making rather than civil litigation.)

Respondent has not waived its Eleventh Amendment sovereign immunity and Congress has not abrogated it.

Alternatively, Petitioner asserts that Respondent consented to jurisdiction and waived any claim to sovereign immunity for purposes of these proceedings by seeking and obtaining a Special Certificate from the Department of Labor, which is conditioned on compliance with the Act and subject to petitions for review. To hold otherwise, it argues, would render the issuance of the Special Certificate a nullity and would leave Petitioner, and other vulnerable individuals with disabilities like him, a right without a remedy.

These arguments are also unpersuasive. The U.S. Supreme Court has instructed that the circumstances under which a State will be found to have waived its Eleventh Amendment sovereign immunity for purposes of federal jurisdiction are extremely stringent. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). “Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.” *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). A state will be found to have waived sovereign immunity from private suits “only where stated ‘by the most express language or by such overwhelming implications . . . as will leave no room for any other reasonable construction.’” *Id.* The mere fact that a State participated in a federal program or accepted federal funds is insufficient to find a waiver of sovereign immunity. *Id.*; see also *Florida Dep’t Health Human Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 150 (1981) (“[T]he fact that the Department agreed explicitly to obey federal law in administering the [Medicaid] program can hardly be deemed an express waiver of Eleventh Amendment immunity.”).

Respondent also cites *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996), for the proposition that its Eleventh Amendment sovereign immunity has not been abrogated by the FLSA. In that case, the U.S. Supreme Court ruled that Congress may unilaterally abrogate the States’ immunity from suit only if it has “unequivocally expressed its intent to abrogate the immunity” and has acted “pursuant to a valid exercise of power.” *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996). While Congress may abrogate the States’ sovereign immunity under § 5 of the Fourteenth Amendment, it may not do so under the Commerce Clause. *Id.* at 72. While recognizing the FLSA’s unmistakable intent to abrogate the States’ sovereign immunity,⁷ Federal courts since *Seminole Tribe* have uniformly determined that this Congressional exercise of power was invalid because it was enacted and amended pursuant to the Commerce Clause. See *Alden v. Maine*, 527 U.S. 706 (1999); *Henley v. Simpson*, 527 F. App’x 303 (5th Cir. 2013) (nonprecedential) (by implication); see also *Michigan Corrections Org. v. Michigan Dep’t Corrections*, 774 F.3d 895 (6th Cir. 2014); *Rodriguez v. Puerto Rico Fed. Affairs Div.*, 435 F.3d 378 (D.C. Cir. 2006); *Abril v. Virginia*, 145 F.3d 182 (4th Cir. 1998); *Close v. New York*, 125 F.3d 31 (2nd Cir. 1997); *Raper v. Iowa*, 115 F.3d 623 (8th Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813 (10th Cir. 1997); *Keeler v. Florida Dep’t Health*, 397 F. App’x 579 (11th Cir. 2010) (nonprecedential). Petitioner apparently concedes this issue, as he has not argued the point. Accordingly, I find no basis to conclude that Respondent has waived its Eleventh Amendment sovereign immunity or that Congress has abrogated it.

⁷ 29 U.S.C. § 203(e)(2)(C) defines “employee” to include “any individual employed by a State, political subdivision of a State, or an interstate government agency”

The parties' remaining arguments are moot.

Respondent argues in the alternative that this matter should be dismissed because the Petitioner was not an “employee receiving a special minimum wage” at the time he filed his petition. *See* 29 C.F.R. 525.22(a). This petition was filed on April 9, 2019. At the hearing, the parties verbally stipulated that the Petitioner has been paid federal minimum wage since at least January 1, 2019.

Petitioner responds that an “employee receiving a special minimum wage” should be construed as including anyone that has received a special minimum wage in the past or anyone “still subject to 14(c) wages,” meaning anyone who could receive a special minimum wage from a 14(c) employer in the future. In support, Petitioner argues that the term “receiving” should be read in context and consistently with the Act’s stated purpose of encouraging employment opportunities for workers whose productive capacity has been impaired by disability. *See* 29 U.S.C. § 214(c). Petitioner cautions that accepting Respondent’s interpretation would allow 14(c) employers to avoid review by increasing a worker’s wage to the federal minimum wage before hearing.

In light of my decision that Respondent has not waived its Eleventh Amendment sovereign immunity, I am without authority to adjudicate the foregoing issue. I pause, however, to observe that the parties have agreed that Petitioner was being paid minimum wage months before he filed this petition, and thus it does not appear that the increase in wages was causally related to this petition. Also, as mentioned above, it is settled that the federal government is not foreclosed from enforcing its laws against a State through its own investigation of a claim and/or by instituting its own administrative proceedings where the government is a party. *Fed. Maritime Comm’n*, 535 U.S. at 768. The Administrator, through counsel, could have intervened in these proceedings. In addition, FLSA regulations provide that the Administrator may conduct an investigation, which may include a hearing, prior to taking any action, and that such proceedings are separate from those here. *See* 29 C.F.R. § 525.19. Such enforcement actions, however, are at the discretion of the Administrator.⁹

ORDER

For the above reasons, this petition for review is DISMISSED.

J. ALICK HENDERSON
Administrative Law Judge

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

⁸ OALJ received written stipulations from the parties on July 15, 2019, to the effect that Petitioner was paid a special minimum wage at various times in the past and through April 9, 2019. It is unclear whether the parties’ written and verbal stipulations conflict.

⁹ I take no position, explicitly or implicitly, as to how that discretion should be exercised.

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 (e-File) 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).