

**UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
33 WHITEHALL STREET, 5th Floor
NEW YORK, NEW YORK 10004**

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**SANDRA N. McCONNELL, ET. AL.,
A/K/A VELVA B., CLASS AGENT,**

Complainant,

v.

**MEGAN J. BRENNAN, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,**

Agency.

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**EEOC Hearing Nos.: 520-2019-00271X; 520-2010-00280X
Previous Appeal Nos.: 0720160006, 0720160007, 0720080054
Agency Case No.: 4B-140-0062-06**

ORDER APPOINTING SPECIAL MASTERS

The New York District Office on behalf of the Commission hereby ORDERS the appointment of Special Masters in this matter. This ORDER supersedes the February 28, 2019 Case Management ORDER denying the appointment of Special Masters.

The February 28, 2018 ORDER denied the Complainants' request for the appointment of Special Masters. The denial mirrored the Office of Federal Operation's (OFO) November 7, 2018 decision which refrained from ruling on the appointment of Special Masters because "...neither party...provided an accurate number of disputed claims for individual relief" *See Velva B., v. USPS*, Appeal No. 0120182505, Request Nos. 0520180094, 0520180095, Hearing No. 520-2010-00280X (November 7, 2018).

However, the number of claims in dispute is no longer a mystery. It is now clear that the Agency is disputing approximately 29,000 claims. The Agency did not disclose its intent to dispute all claims until the matter was squarely before the undersigned Administrative Judge (AJ). The Agency relies heavily on 29 C.F.R. §1614.204 (1)(1) for the proposition that the Commission has no authority to appoint special masters as the regulation directs Commission AJs to retain jurisdiction over the complaint to resolve any disputed claims by class members. The Agency's reliance on this argument, however, is misplaced. OFO did not foreclose the need for the appointment of special masters, it merely abstained from making a ruling precisely because it was ignorant to the actual number of disputed claims. This is no longer true.

AUTHORITY TO APPOINT A SPECIAL MASTER

It is a common convention within the Commission's Federal Sector practice to rely on the Federal Rules for guidance if its own regulations are silent, unclear or inapt to address a novel issue facing Commission AJs. The appointment of Special Masters in this matter is one such unique circumstance. Moreover, AJs are given broad discretion in the management of hearings and the relief process. *See Horace H. v. VA*, EEOC No 01220150773 (2017) (AJs are given broad discretion in the conduct of hearing and related proceedings); *Alex L. v. Dep't of Transportation*, EEOC No. 120140970 (2016) (the AJ has wide latitude in directing the administrative hearing process...); *Kathleen O v. Dep't of Health and Human Services*, EEOC No. 01A2398 (2006); *Ronald P. v. Dep't of Transportation*, EEOC No. 01200091329 (2010).

The Federal Rules of Civil Procedure (FRCP) Rule 53 (B) (i) (ii); (C) states that, unless a statute provides otherwise, the appointment of a special master is appropriate to hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by either some exceptional condition; or the need to...resolve a difficult computation of damages; or address pretrial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

All such exceptional circumstances are present herein. There are thousands of disputed claims that need to be reviewed, assessed and determinations made, the claims require the computation of damages of at least six (6) distinct categories of harm¹ that, in many instances may overlap, the considerable gap between the parties regarding settlement amount, the patent tension that exists between the parties and the absence of direct precedential guidance, the appointment of Special Master(s) is not only efficient, but necessary.² *See, e.g. EEOC v. Western Distributing*

¹ The six categories as discussed in the Commission's Decision dated September 25, 2017 are: (1) unlawful disability related medical inquiry/release of confidential medical information; (2) Subjecting class members to an assessment of their eligibility for "necessary work" (disparate treatment); (3) Subjecting class members to a hostile work environment; (4) class members receiving a no work available determination (disparate treatment and withdrawal of reasonable accommodations); (5) class members receiving a new work assignment; (6) class members being separated, resigned or retired during the NRP period (constructive discharge);

² *See, U.S. v. Wilson*, 21 F.R.D. 173 (1957) (Where...government sought appointment of special master because of voluminous evidence to prove quantity, percentages, market value and ownership at time of alleged conversions, which involved great number of separate transactions over 21-month period, and because assistance of special master skilled in such matters was necessary to understanding of such evidence, special master would be appointed in view of fact that question of defendants' liability had been determined by court); *Foster v. City of Detroit*, 254 F.Supp. 655, (1966) aff'd 405 F.2d 138 (the number of potential intervenors in a class action was extremely large and most of these intervenors there would be no new question of law or fact, but largely matters of proof and computation of claimed damages, an "exceptional condition" was present warranting appointment of special master); *U.S. v. Conservation Chemical Co.*, 106 F.R.D. 210 (1985) (Number of parties involved and nature and volume of evidence to be presented are relevant to determination of whether "exceptional circumstances" exist within meaning of Federal Rule 53, which provides for the appointment by a trial court of a special master); *Ellison v. Rock Hill Printing & Finishing Co.*, 64 F.R.D. 415 (1974) (Computation of back pay in class actions for discrimination against blacks in employment presents exceptional circumstances warranting appointment of a special master); *Hart v. Community School Bd. of Brooklyn, New York School Dist. No. 383* F.Supp. 699 (1974), appeal dismissed 497 F.2d 1027, aff'd 512 F.2d 37 (1975) (Requirement...that case referred to master be "exceptional" is satisfied when court is faced with a polycentric problem that cannot easily be resolved through a traditional courtroom-bound adjudicative process, municipal agencies supplying court with remedial plans, involving housing programs and educational administration, any solutions would involve a multitude of choices affecting allocation of educational, housing and other resources and the problems called for informal consultations and weighing of complex alternatives using managerial decision-making process, a skilled master with expertise in government housing laws and in educational administration to coordinate efforts of parties would be appointed); *Burgess v. Williams*, 302 F.2d 91 (1962) (District judge did not act beyond his discretion in referring to master for preliminary findings matters presented in suit by trustee

Company, 2019 WL 2208512 (May 22, 2019) (the appointment of a Special Master due to the contentious relationship between the parties and the numerous protracted, unresolved discovery disputes). Finally, although the Agency cites to 29 C.F.R. 1614.204 (l) (1), that statute does not explicitly forbid or foreclose Administrative Judges from appointing special masters in exceptional circumstances, it simply states that the AJ will “retain jurisdiction over the complaint in order to resolve any disputed claims by class members.” The appointment of Special Masters does not void the Commission’s jurisdiction over this matter.³

ORDER

APPOINTMENT OF SPECIAL MASTERS

1. In accordance with FRCP Rule 53 (B)(i)(ii); (C) and the broad authority granted to Commission AJs, the Commission finds that it is necessary for the appointment of five special masters to assist in the processing of these claims
2. The Special Masters are appointed to either bring the parties to a class-wide settlement or, if settlement is not possible, resolve each disputed claim, with oversight, review and approval from the undersigned AJ.

in bankruptcy to set aside alleged preferences to individuals where, to determine whether bankrupt was insolvent when payments were made, it was necessary to decide as to each of 1500 individual contributors to investment company, whether he was creditor of bankrupt, as trustee maintained, or joint adventurer with him, and where reference order preserved right to jury trial); *Howe v. City of Akron*, 801 F.3d 718 (2015), *on remand* 2016 WL 916701(2016) (District court did not abuse its discretion, in firefighters’ action against city under Title VII and ADEA for discriminatory failure to promote, by appointing court monitor to ensure that city fire department used promotional process in next promotional cycle that did not have disparate impact on protected groups, where court found that complexities involved in creating promotional process and existence of collective bargaining agreement required tactful court monitor’s skill).

³ See *Chicago Housing Authority v. Austin*, 511 F.2d 82 (1975)(District court’s order referring dispute as to implementation of judgment orders in public housing, desegregation cases to a master did not constitute an abdication of judicial decision-making responsibility, on ground that the master had been authorized to render specific factual findings which might be prejudicial to city housing authority and would become binding unless they were erroneous, where order of reference did not, in terms, require the master to make findings of fact and conclusions of law, master was required to submit his report to the court for review and district judge retained ultimate responsibility in the matter; in any event, should housing authority demonstrate error and resulting prejudice an appeal would lie); see also *U.S. v. Conservation Chemical Co.*, 106 F.R.D. 210 (1985) (Reference to special master to prepare report and recommendation on issues involved in Government’s motion for injunctive relief in context of its suit seeking court-ordered cleanup of chemical waste disposal site did not deprive district court of essential attributes of the judicial power in view of the carefully defined delegation of authority, including that court had power to terminate master’s authority, parties were afforded opportunity to object, respond, or comment on any recommendation filed by master, court was required to review independently all recommendations filed by master, court retained authority to adopt, modify or reject any recommendation, court planned to hold hearing following filing of report on issues so that it could determine whether to adopt, modify, or reject the report, receive further evidence or recommit it with instructions, and master’s recommended conclusions of law were subject to a rigorous standard of review as well as his conclusions of mixed fact and law); also, *American Honda Motor Co., Inc., v. Vickers Motors, Inc.*, 64 F.R.D. 118 (1974) (Reference by court to magistrate [now magistrate judge] of discovery disputes that had arisen between respective counsel did not constitute an abdication of the judicial function, where district judge retained ultimate responsibility for discovery proceedings in this court and jurisdiction, and where the magistrate [now magistrate judge] was not being called upon to exercise ultimate adjudication or decision making, such as ruling on a motion to dismiss or for summary judgment, but was being called upon to assist the court with a recommendation, after hearing, on discovery issues in a situation brought about in considerable measure by actions of defendant's counsel himself).

3. Therefore, **WITHIN THIRTY (30) days of receipt of this ORDER.** the parties will confer and provide the AJ with a list of five candidates to be appointed Special Masters that **all** interested parties have agreed upon. If the parties cannot agree, each party is to provide the AJ a list of no more than five candidates outlining their qualifications and why they should be appointed. The AJ will select the five Special Masters from the lists of candidates supplied by the parties.
4. Once the candidates are chosen, the Special Masters' appointment will become effective upon the filing of an affidavit that clearly outlines no conflict of interest that would be grounds for disqualification or that the parties have waived any potential conflicts of interest.
5. The Special Masters' duties may be expanded with the consent of the parties. Any party who wishes to present issues outside the duties outlined herein for the Special Masters' consideration first will submit a brief written statement to the AJ describing the issue and argument in support of the request. A party objecting to a request will submit a written response with five (5) days of the date of the request. Otherwise, the AJ will assume the request is unopposed. Thereafter, the AJ will determine whether the issue will be referred to the Special Masters.
6. The Special Masters will have the rights, powers, authority and duties set forth in FRCP Rule 53. They may adopt procedures that are consistent with Rule 53 and the other Orders in this case. They may take all appropriate measures to fairly and efficiently perform the assigned duties.
7. The Special Masters are subject to any limitations established in Rule 53. They shall not act as an advocate, representative, fiduciary, or counsel for any party and has no formal coercive authority to compel the making of any agreement or the granting of any concession.
8. The Special Masters may communicate *ex parte* with the AJ. When practicable, Special Masters will give the parties notice of such communications. If notice is not practicable, the parties will be informed that an *ex parte* communication has occurred. All such communication with the AJ will be privileged and will not be subject to discovery.

DUTIES OF THE SPECIAL MASTERS

9. The Special Masters have the authority to regulate all proceedings before them. They may set motion/briefing schedules, request documents, schedule oral arguments, conduct hearings and order further written submissions as is necessary.
10. The Special Masters may schedule and hold periodic status conferences.
11. The Special Masters may exercise the power of this tribunal to compel, take and record evidence, if presiding over an evidentiary hearing.

12. Unless waived, hearings before the Special Masters will be transcribed by a court reporter at the expense of the parties.
13. The Special Masters may meet with the parties and their counsel to receive and or hear evidence and legal arguments on issues pertaining to disputed claims for individual relief.
14. The Special Master may preside over and facilitate mediations/settlements negotiations between the parties to resolve the matter herein.⁴
15. Within forty-five (45) days upon the appointment of a Special Master(s), the parties are **ORDERED** to provide the Special Master with the names of 2,224, split evenly between the Agency and the Complainants' counsel, thus 1,112 each.
16. Within one (1) year of receipt of the names, the Special Masters will review each claim to determine proper class membership, facts underlying the alleged harm, the claim for damages, the Agency's opposition and administrative file and hold hearings, if necessary. The 2,224 claims will be representative of the six categories of harm alleged herein and will establish an expected monetary range of damages for each category. The Special Master will, with input from the AJ when necessary, determine the monetary range for each area of harm.
17. Once these ranges are established, the parties can negotiate an approximate amount for settlement by extrapolating those numbers for purposes of reaching a class-wide settlement.

REPORTS AND OBJECTIONS

18. The Special Masters will make written orders, including findings of fact, conclusions of law or memoranda, with respect to all matters presented to them by the parties. They will issue any such orders within thirty (30) days of the date disputed issues are fully submitted to them.
19. Any and all orders and/or recommendations issued by the Special Master is subject to review and approval by the AJ prior to issuance
20. The Special Masters may recommend to the AJ a contempt sanction against any party and sanctions against any non-party for review and approval.
21. Any party may file objections to or a motion to adopt or modify an order, report, recommendation of the Special Master. Objections shall be filed no later than ten (10) days after the order, report, or recommendation is filed, unless the Special Masters or the

⁴ To assist the Special Masters with bringing the parties to a possible settlement, they will be provided with the model articulated in the memo prepared by EEOC expert Dr. Romella Janene El Kharzazi, a Social Science Research Analyst with over 15 years of experience in Organizational Research, Strategy and Compliance Assessment.

AJ enters an order allowing a greater period of time. Objections will be specific and accompanied by a memorandum describing the legal and factual basis for the objection.

22. The AJ will decide, *de novo*, objections to finding of facts or conclusions of law made or recommended by the Special Master. The AJ will modify or set aside the Special Masters' decisions/orders with respect to procedural matters only for abuse of discretion.

CONFIDENTIALITY

23. The parties are reminded that this is a confidential process. Therefore, documents, information, testimony, reports, orders, etc. should not be posted in any public forum.

COSTS

24. Within fourteen (14) days of appointment of the Special Masters and after consultation with the parties, the Special Master will submit to the AJ a proposed budget for six months of work, including a proposed hourly rate and an estimate of expenses. After consulting with the Special Masters, the AJ will approve the proposed budget, with any revisions deemed appropriate.
25. Every three (3) months, the Special Masters will provide to the AJ and the parties a statement of time spent performing their duties, as well as any expenses incurred including the cost of any experts or staff.
26. The parties shall each pay a 50% share of the Special Masters' fees and other costs related to the proceedings to ensure both parties have an incentive to make timely progress in the resolution of this matter. Objections, if any, will be made directly to the AJ within fourteen (14) days of receipt of the invoices, failure to submit such objections in a timely matter will be deemed waived.

MISCELLANEOUS

27. The Special Masters will enjoy the same protections from being compelled to give testimony and from liability from damage as those enjoyed by other adjudicative officers performing similar functions.
28. The Special Masters will preserve all records, including but not limited to all billing records, all formal written orders/decisions, all documents received from the parties until relieved of this obligation by order of the undersigned Judge.
29. The parties will cooperate in good faith with the Special Masters to facilitate the efficient resolution of this matter.

30. The undersigned Judge retains jurisdiction to enforce this ORDER and to amend it for good cause.

So ORDERED

Date: July 14, 2020

For the Commission:

/s/Monique J. Roberts-Draper

Monique J. Roberts-Draper

Administrative Judge

U.S. Equal Employment Opportunity Commission

Redacted

CERTIFICATE OF SERVICE

For timeliness purposes, it will be presumed that this **ORDER** was received immediately upon electronic transmission. I certify this **ORDER** was sent to the following parties on July 14, 2020:

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