**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.**

**LOUIS DeJOY, 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 DENYING POSTAL SERVICE'S MOTION TO VACATE THE COMMISSION'S ORDER APPOINTING SPECIAL MASTERS AND CLARIFYING THE SHARING OF COSTS

The New York District Office on behalf of the Equal Employment Opportunity Commission hereby **DENIES** the Postal Service's Motion to Vacate the Commission's July 14, 2020 ***ORDER Appointing Special Masters*** in this matter. The July 14, 2020 Order appointing special masters was issued in light of the approximately 29,000 claims the Postal Service is disputing and the parties' inability to engage in good faith negotiations for a fair and reasonable settlement. The Agency argues that the July 14, 2020 Order is *ultra vires* and unenforceable because the Commission does not have the authority to appoint special masters. The Agency additionally contends that even if special masters could be appointed, the Commission does not have the authority to order the Agency to pay for special masters in part or in whole, and the Order is ultimately unworkable. The Postal Service's arguments are misplaced and unpersuasive and, therefore, its motion is DENIED.

After careful consideration of the submissions from Complainants (both *pro se* and represented), the previous July 14, 2020 clarifies the issue regarding the cost of special masters and how that cost will be apportioned.

## I. THE COMMISSION'S AUTHORITY TO APPOINT SPECIAL MASTERS

### *STATUTORY CONSTRUCTION, DEFERENCE AND CHEVRON ANALYSIS*

As per 29 U.S.C. § 794a(a)(1), 42 U.S.C. § 2000e-16(b):

> The Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a)[1] through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

In the current matter, the Commission is tasked with administering 29 U.S.C. § 794a(a)(1) which provides the remedies available for complaints made under § 791.[2] Neither this statute nor any of the ones it references specifically addresses its authority to appoint special masters to help determine relief in a class action. Nevertheless, Congress clearly gives the Commission authority to issue rules, orders, and instructions as it deems necessary and appropriate to provide remedies for complaints filed under 29 U.S.C. § 791.[3] While this alone establishes Congress' intent to delegate authority to the Commission in carrying out 29 USC § 794a(a)(1), Congress also gives the Commission power to engage in adjudication and provide for a relatively formal administrative procedure for remedying claims of discriminatory practices at the hands of federal agencies.[4]

Indeed, the Supreme Court spoke on this issue in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*[5]. In *Chevron*, the Supreme Court established guidelines for reviewing an agency's construction of the statute which it administers. A reviewing court must first ask "whether Congress has directly spoken to the precise question at issue."[6] If Congress' intent is clear based on the plain language of the statute or legislative history, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[7] However, where the statute is silent or ambiguous on the specific issue, "the question for the court is

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[1] 42 U.S.C. § 2000e-16(a) provides that "[a]ll personnel actions affecting employees or applicants for employment ... in the United States Postal Service ... shall be made free from any discrimination based on race, color, religion, sex, or national origin" and includes discrimination based on disability under 29 U.S.C. § 749a(a)(1).

[2] 29 U.S.C. § 749a(a)(1): The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary workplace accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

[3] This case is distinguished from *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (no *Chevron* deference to agency guideline where congressional delegation did not include power to "promulgate rules or regulations").

[4] The Department of Justice's Office of Legal Counsel (OLC) has also used this analysis in a formal opinion requested by the USPS to determine whether the EEOC had the authority to promulgate certain class action regulations. Using the *Chevron* analysis, OLC found that the regulations were within the EEOC's authority to promulgate. *Legality of EEOC's Class Action Regulations*, 28 U.S. Op. Off. Legal Counsel 254, 259-61, 2004 WL 5640807.

[5] 467 U.S. 837, 842 (1984).

[6] *Id.*

[7] *Id.* at 842-43.

whether the agency's answer is based on a permissible construction of the statute."[8] The Supreme Court has held that "the power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[9]

Congress is silent on the appointment of special masters by Commission AJs as this is a case of first impression. Therefore, the Commission must demonstrate that Congress either explicitly or implicitly gave it authority to make rules carrying the weight of law and that the Commission's appointment of special masters would be in exercise of that authority. The Commission relies on the reasoning outlined in *Chevron* and its sister case upholding the ruling, *U.S. v. Mead*, 533 U.S. 218, 229 (2001) in support of its ORDER appointing special masters.

The Court in *Chevron* reasoned that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and such "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[10] The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."[11]

In *U.S. v. Mead Corp.*, the Supreme Court extended this doctrine, holding that "administrative implementation of a particular statutory provision[12] qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[13] Even when Congress has not expressly given an agency authority to implement a provision or fill a gap, "it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result."[14]

*Mead* further ruled that "delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking,[15] or by some other indication of a comparable Congressional intent.[16] It is [also] fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[17]

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[8] *Id.* at 843.
[9] *Id.* (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).
[10] *Id.* at 843-44.
[11] *Id.* at 844.
[12] Administrative implementation of a statutory provision may include "adjudication that produces regulations or rulings." 533 U.S. 218, 229 (2001).
[13] *Id.* at 226-27.
[14] *Id.* at 229 (quoting *Chevron*, 467 U.S. at 845).
[15] A lack of notice-and-comment rulemaking authority does not decide the case. *Id.* at 231.
[16] *Id.* at 227.
[17] *Id.* at 230.

Congress expressly delegated the Commission authority to elucidate any specific provision regarding the remedies for discrimination by regulation and such "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." The Commission's appointment of special masters in a case where the Agency is disputing 29,000 claims of relief brought by Complainants from all over the nation coupled with the inability or unwillingness of the parties to engage in reasonable and good faith settlement negotiations is neither random, arbitrary or contrary to the letter or spirit of the statute the Commission is charged to enforce.

## II. THE POSTAL SERVICE'S CITATIONS ARE INAPPLICABLE

The Agency argues that because "[the appointment of] special masters is not mentioned or contemplated in the Commission's authorizing statute, regulations, the MD-110, or Enforcement Guidance publications," nor is the issue mentioned in any Commission cases, consequently, the Commission does not have the authority to order special masters.[18] On the contrary, such silence only evidences the fact that the *McConnell* class action remedial phase presents a novel procedural and adjudicative issue before the Commission that neither Congress nor the Commission had heretofore contemplated, yet appointment of special masters fall squarely within a permissible construction of the statute. Given the discussion *supra*, it is clear that the Commission's order appointing special masters meets the test outlined in *Chevron* and *Mead*. The Agency's motion, nonetheless, cites to and relies upon several cases to support its contention that the Commission does not have authority to appoint special masters. Such reliance, however, is inapposite, misplaced or otherwise inapplicable.

Initially, the Agency cites *Numrich v. Sullivan* where OFO held that, to the extent relief "had been ordered that w[as] not authorized by law, the order was unenforceable." EEOC Doc. 05910961, 1991 WL 1189772; USPS Motion to Vacate at 2. However, *Numrich* is distinguishable from *McConnell*. *Numrich* does not address monetary relief in general or the structure under which relief will be determined, but specifically speaks to whether the awarding of attorney's fees under the ADEA is permissible. The Agency also cites to *Rosario v. Espy*, which states that "the majority of the AJ's recommendations contravened legal mandates, and therefore were *ultra vires*." EEOC Doc. 05920881 (1993); USPS Motion to Vacate at 2. The Agency's Motion, however, fails to identify the offending recommendations or legal mandates. The Agency further cites to *Kentucky ex rel. Education v. US*, here the court held an arbitration panel's authority under the Randolph Sheppard Act was only to determine whether a federal agency's actions violated the Act, while Congress left remedial action to the head of the federal entity. WL 7375566 (WD Ken. Dec. 29, 1014); USPS Motion to Vacate at 2. However, *Kentucky ex rel. Education* deals with the interpretation of an express statute governing arbitration panels, and the court's analysis of *Chevron* deference is consistent with the argument that the Commission has the Congressionally delegated authority to promulgate rules in the exercise of its authority pursuant to 42 USC § 2000e-16(b). *Id* at 6. The Agency also cites to *Anderson v. Holder*, claiming an order that an "agency has no jurisdiction to [issue] ... is always *ultra vires* and void." 673 F.3d 1089, 1096 (9th Cir. 2012); USPS Motion to Vacate at 3. The full sentence, however, reads: "An order of removal issued against a U.S. citizen is always *ultra vires* and void,

[18] USPS Motion to Vacate at 4.

because the agency has no jurisdiction to order citizens removed: 'Jurisdiction in the executive to order deportation exists only if the person arrested is an alien.'"*Anderson* 673 F.3d at 1096. Again, *McConnell* is distinguishable from this case because the Commission has jurisdiction to adjudicate discrimination claims in the federal sector and has the authority to remedy unlawful discrimination when found and order appropriate relief.

Finally, the Agency cites to *G.H. Daniels III & Assocs., Inc. v. Perez* to support its statement that "courts have repeatedly found that sub-delegations to outside parties are assumed improper absent an affirmative showing of congressional authorization."[19] This case is distinguishable as it concerns the Department of Homeland Security's improper effort to completely delegate its decision-making authority granted by Congress to an ***entirely different*** agency, the Department of Labor.[20] The Commission's July 14, 2020 Order did not contemplate any such delegation to an entirely different agency. In fact, the Order specifically outlines areas where the Commission would exercise oversight and ultimate decision-making authority over the special masters. *See* specifically *Commission's July 14, 2020 Order Appointing Special Masters,* paragraphs 2, 5, 8, 16, 19, 21, 22, 24, 25, 28, 30.

## III. AUTHORITY TO ORDER AGENCY TO PAY FOR SPECIAL MASTERS

The Commission, as well as federal court clerks, are not allowed to tax the costs for special masters.[21] Rule 53(g) provides the most authority on compensating special masters and requires the compensation be fixed, but allows the judge to allocate payment among the parties in consideration of "the nature and amount in controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master."[22] To the extent the Agency argues that the Commission's instruction that the parties shall pay a 50% share of the Special Masters' fees and other costs related to the proceedings as some type of sanction, it is incorrect. Specials masters' fees are remedial in nature and are to cover procedural costs necessary to resolve the Agency's wide-scale discrimination.[23] Moreover, comparing the means of the Agency with the those of the Complainants it is clear the Agency has the ability to pay and is ultimately responsible for the reference to special masters in the first place.

Complainants' argument regarding the danger of establishing a precedent where complainants are forced to fund the processing of their EEO complaints, whether during the liability or the damages phase, creating a chilling effect is persuasive. By demanding only victims of discrimination who have the means to participate in the federal EEO process will eventually create an unequal, tiered system, that only benefits a few. The Complainants' reliance on *United States v. City of New York*, 847 F. Supp. 2d. 395 (EDNY 2012) is apt and persuasive, given its similarity to the case presently. As with this matter, the City of New York was found to have participated in a large-scale program for selecting firefighters that was in violation of Title VII. The court ruled that the City of New York would bear the cost of Special Masters to decide relief due to it being "wholly responsible for the situation" necessitating special masters. The

[19] *Id.*; 626 F. App'x 205, 212 (10th Cir. 2015).
[20] *G.H. Daniels III & Assocs., Inc.*, 626 F. App'x at 207.
[21] 29 CFR § 1614.501(e)(2)(ii)(C); 28 USC § 1920.
[22] FRCP 53(g)(3).
[23] USPS Motion to Vacate at 13;

Second Circuit upheld most of the trial judge's remedies, including appointment of a Court Monitor to oversee hiring and ruled that the trial judge would maintain jurisdiction. *U.S. v. City of New York*, WL 1955782 (2d. Cir. May 14, 2013). The Court outlined in its *Modified Remedial Order and Partial Judgement, Permanent Injunction and Oder Appointing Court Monitor*, 1:07-CV-02067, June 6, 2013, pg. 26) that the "City shall bear all costs incurred by the City, the United States and the Injunctive Relief Subclass in the…implementation of the remedy phase of this case…" Similarly, the U.S. Postal Service was found liable for creating and implementing a years-long, nation-wide program that discriminated against thousands of disabled USPS employees. The Agency has necessitated the referral to Special Masters because it has disputed every, single claim for damages and argues that the Commission has to hear and decide all 29,000 disputed claims, knowing that the Commission has limited resources to do so and such a task would be near impossible to complete, effectively creating an insurmountable impasse. Any discussion of settlement is stalled as no party wishes to proffer an opening bid; and thus, Complainants are left in limbo, with only a decision stating that the Agency is in violation of the statute. None of the Complainants have been made whole, several have passed away and many more are ill and unable to work or participate in this litigation. Therefore, the Order of July 14, 2020 allocating that costs be split between the Agency and the Complainants is REVOKED. The Agency is ORDERED to bear the full and complete cost for the appointment of Special Masters.

## IV. ORDER REGARDING COMPLAINANTS' RIGHT TO OBTAIN A FINAL AGENCY DECISION\OR TO ADJUDICATE THEIR CLAMS IN FEDERAL DISTRICT COURT

Complainants who wish to obtain a Final Agency Decision (FAD) or who wish to have their damages claims adjudicated in Federal District Court, may do so.

Complainants who wish to pursue remedies through the Phase II Remedial Process overseen by the Commission appointed Special Masters, may do so.

Complainants, however, cannot do both.

Allowing Complainants to request FADs/or litigate in federal district court and be involved in the Phase II Remedial Process could potentially create several situations where a complainant who may not agree with the amount allocated to her in the Phase II Remedial Process, subsequently request that the Agency issue a FAD. Such FADS are appealable to the EEOC-OFO who will then have to decide that particular claim. That claim can then be remanded to the AJ in the field or the complainant can relitigate the issue before a federal magistrate/judge. This scenario may play out hundreds if not thousands of times. This begs the question, where is the finality to a Complainant's claim? Complainants cannot have multiple bites at the proverbial apple; Complainants must choose a course for remediation and commit to that course.

**FURTHER**, the decisions/relief found by the Special Masters on the 2,224 claims identified by the Parties will be binding on the Agency and, upon Commission review, it will be So Ordered to provide such relief.

**FINALLY,** there is no need to address Complainant's issue regarding whether Complainants will be compensated for the upfront cost for Special Masters as per the discussion *supra.*

However, to the extent there are costs (i.e. travel, postage, transcripts, etc.) such will be consistent with cost sharing regulations as outlined in 29 C.F.R. 1614.

## CONCLUSION

The Postal Services Motion to Vacate the Commission's Order Appointing Special Masters is DENIED. Further, this ORDER has clarified the issue regarding the cost of special masters and how such cost will be apportioned.

**So ORDERED** **Date:** February 5, 2021

**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 February 5, 2021:

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