THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
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December 1, 2001

The Honorable John M. McKay
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 68 (2002)** – Senator Richard Mitchell
Relief of Howard L. Miller

SPECIAL MASTER'S FINAL REPORT

THIS IS A $117,432.31 EQUITABLE CLAIM (INCLUDING $41,776.86 IN INTEREST AND $941.50 IN COSTS INCURRED IN PURSUING THE CLAIM), PAYABLE FROM FUNDS OF THE FLORIDA PAROLE AND PROBATION COMMISSION, BASED UPON A CLAIM THAT THE COMMISSION, IN 1982, UNLAWFULLY DEMOTED MR. MILLER AND, FURTHER, UNLAWFULLY DENIED HIM A 7 PERCENT PAY RAISE THAT THE LEGISLATURE HAD ORDERED ALL CAREER SERVICE EMPLOYEES TO RECEIVE EFFECTIVE SEPTEMBER 1, 1982, AND THAT THIS ILLEGAL ACTION CAUSED HIS SUBSEQUENT SALARY AND RETIREMENT BENEFITS TO BE LOWER THAN THEY SHOULD HAVE BEEN.

FINDINGS OF FACT:

From 1960 to 1993, Howard L. Miller was an employee of the Florida Probation and Parole Commission, except for a brief period when he worked for the municipal magistrate system in St. Petersburg, Florida. He returned to the parole commission in 1973 and, in 1978, became Field Services Supervisor for that agency. Beginning in December 1979, when he was still a Field Services Supervisor, his immediate superior was Judith A. "Judy" Wolson, Supervisor of Parole Services. Both Mr. Miller and Ms. Wolson had applied for that position, but Ms. Wolson was chosen. In her evaluations of his job performance, she initially rated him as

Above Satisfactory, but, subsequently, she gave him lower ratings, first a Satisfactory rating, then, beginning April 7, 1982, a Conditional rating—which is one step below Satisfactory and one step above the lowest rank of Unsatisfactory. He filed a grievance of the Satisfactory rating, but it was rejected as insufficiently specific.

On June 7, 1982, he again received a Conditional rating. On August 5, 1982, Ms. Wolson wrote a special performance appraisal in which she noted that Mr. Miller's performance was still Conditional and that he would, therefore, have to be demoted. Apparently, Mr. Miller was not informed of this special performance appraisal until April 9. A memorandum that Mr. Miller wrote to himself on August 13, 1982, indicates that on April 9, 1982, the personnel director for the commission, George Dillard, told Mr. Miller of the special performance appraisal and informed him that the commission chairman would, in accordance with state personnel rules, have to demote him. In conversations between Mr. Miller and the commission chairman, Anabel Mitchell, which took place on or before April 11, Ms. Mitchell assured him that she did not want him to be financially harmed by the demotion. At the Special Master's hearing, Ms. Mitchell testified that she had, indeed, made such statements. However, on August 11, 1982, Ms. Mitchell sent Mr. Miller a certified letter (which he received August 13) informing him that he was to be demoted effective August 16 to Parole Examiner I, and would thereafter receive an annual salary of $19,000. Mr. Miller was perturbed, since his salary as Field Services Supervisor had been $25,750.52 per year.

In response to his objections that this proposed salary violated the oral assurance that he would not be financially harmed, Mr. Miller was called to a meeting on August 19, 1982, and asked to sign, before the end of that day, a document requesting his voluntary demotion which was to replace his involuntary demotion of April 16 and which read in pertinent part:

V*OLUNTARY REQUEST FOR DEMOTION*

I, Howard L. Miller, voluntarily request a demotion, reduction in pay, and transfer from my current position of Field Services Supervisor, pay grade 22, in Tallahassee, Florida at the salary of $25,750.52 to the position of Parole examiner I, pay grade 19, in Chattahoochee, Florida at the

salary of $25,164.58 per year, and that this [will] take effect September 3, 1982. I realize that the 7% annual legislative increase that is effective September 1, 1982 will not be added to the $25,164.58. I am aware that the referenced reduction pay is to an amount that is the maximum of the pay range plus 15%, which is within the chairman's authority to allow. Also, I am aware that I will receive direct contact pay as provided by the legislature which is currently $1,560.00 per year.

I realize that by requesting the voluntary demotion, reduction in pay, and transfer that I waive any rights I have to contest these actions in any forum, including but not limited to a Career Service Commission appeal. I realize that my grievance currently pending will proceed to resolution.

[The remainder of the document consists of signatures and an acceptance by Kenneth W. Simmons, Vice-chairman of the commission, acting on behalf of Chairman Anabel Mitchell, who was out of town.]

The grievance committee did continue its proceedings, but it decided against Mr. Miller and issued a report to that effect dated September 17, 1982. Mr. Miller protested that the committee was improperly constituted, in that he had been told that neither a commissioner nor a lawyer for the commission could serve on a grievance committee, but that the chairman, Enoch J. "Jon" Whitney, was the commission's lead attorney. He also maintained that he was not provided with due process because he was denied the right to present witnesses.

Mr. Miller now argues that the commission acted improperly by denying him the 7 percent raise that the Legislature had mandated, effective September 1, 1982, for all Career Service employees and by setting the date of his demotion at more than 120 days after the inception of his Conditional rating, in violation of Rule 22A-9.03, Florida Administrative Code. He contends that the 7-percent raise should be applied to the annual salary that he received as a Field Services Supervisor because his demotion was void ab initio due to the commission's trying to effectuate it in a manner that violated required procedures. The applicable language of subsections (6), (7), and (9) of FAC Rule 22A-9.03 (entitled "Required Procedures [for employee performance

evaluations]") reads:

(6)…If at the time of receiving such an evaluation [i.e., Conditional or Unsatisfactory], the employee is retained by the agency, the employee's performance shall be reevaluated at least each 60 days thereafter until:

(a) The employee's performance has improved and is evaluated as at least Satisfactory, or

(b) One hundred twenty calendar days have elapsed without the employee receiving a rating of at least satisfactory. In such cases, management shall take action to remove the employee from the class.

(7) The agency head may remove the employee from the class at any time if adequate improvement is not made in the employee's performance from the effective date of the initial Conditional or Unsatisfactory rating. ***In no case shall an employee be retained in the class for more than 120 calendar days from the effective date of the Conditional or Unsatisfactory rating if the employee's performance continues to be less than satisfactory during the 60-day rating intervals.*** *(emphasis mine)*

(9) If an employee failed to receive an evaluation by the end of the required evaluation period, the employee's performance for that period shall be considered satisfactory. *(emphasis mine)*

On August 6, 1984, Mr. Miller, represented by attorney Ben Patterson, filed a complaint in federal court (Case No. TCA 84-7282 WS, filed in the United States District Court, Northern District of Florida, Tallahassee Division, styled as HOWARD L. MILLER, Plaintiff, vs. JUDY WOLSON et al., defendants).

The complaint alleges that the action arises under the Fourteenth Amendment to the United States Constitution and under Title 42 U.S. Code, section 1983.

The complaint further alleges that defendant Wolson's conditional ratings of Mr. Miller were not based on the quality of his job performance but, instead, were based on her "animosity" toward him and that she and defendant Malcolm

Greenfield, the commission attorney, "conspired and confederated [to] construct a case to support the removal of the plaintiff from his position."

The requested relief includes "a permanent injunction requiring the defendants to reinstate the plaintiff to his position of employment as it existed prior to August 16, 1982"; "actual, special and punitive damages in excess of Ten Thousand Dollars"; and other, incidental relief. The case was settled without going to trial. By court order dated June 20, 1985, Chief Judge William Stafford endorsed the "STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE," which provided that Mr. Miller would be paid $3,500 (less required deductions for withholding tax and Social Security), and that attorney Patterson would receive $3,205 for attorney's fees and court costs. The stipulation required the commission to "make the required adjustments and contributions to the Plaintiff's state retirement account and [to] place Plaintiff's performance evaluations dated April 7, June 7, August 5, and August 12, 1981, in an unsealed envelope marked invalid," which was to be retained in Mr. Miller's personnel file. (Florida's public records law proscribed the sealing of the envelope.) The stipulation also stated: "Likewise, Plaintiff has agreed by accepting this stipulation to a compromise in settlement of "*all claims which have arisen or which may arise in the future based upon the issuance of the above stated performance evaluations" (emphasis mine).*

In conjunction with the stipulation, Mr. Miller, on June 28, 1985, signed a GENERAL RELEASE, which reads:

KNOW ALL MEN BY THESE PRESENTS:

THAT I, Howard L. Miller, first party, …

HEREBY remise, release, acquit, satisfy, and forever discharge the said second party [Judy Wolson and the other named defendants], of and from all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever, in law or in equity, which said first party ever had, now has, or

which any personal representative, successor, heir, or assign of said first party hereafter can, shall, or may have against said second party, for, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of these presents."

On December 31, 1993, Mr. Miller retired from the parole commission, after 35.58 years of service in state government. Between 1985 and 1998, he took no further action toward seeking redress.

When I asked Mr. Miller at the Special Master's hearing why he waited so long to reopen the matter, he said that he had become "discouraged" but that, later, when serious health problems rendered him unable to obtain insurance and thereby provide for his wife's future financial security, he decided to try again. Accordingly, in 1998, he asked Senator Charles Williams to file a claim bill on his behalf and, in 2001, he asked Senator Richard Mitchell to file a claim bill. After conducting a preliminary hearing, Senator Mitchell filed Senate Bill 68, the subject of this report.

CONCLUSIONS OF LAW:

At the Special Master's hearing, Mr. A. J. McMullian testified in support of the claimant that the Florida Probation and Parole Commission had, indeed, acted improperly in its demotion of Mr. Miller.

Mr. McMullian recently retired from his position as Director of Retirement for the State of Florida, after more than 40 years in state government. For 20 years, Mr. McMullian served as Director of Personnel and, in that capacity, wrote many of the personnel rules, including the rule quoted above. He testified that the 120-day rule was an absolute and that it was drafted in response to previous practices by state agencies which often adjusted ("jimmied," in his words) the dates of their actions in order to achieve desired results. He is widely accepted as an expert in personnel matters and, in fact, the current commission attorney, William Camper, stipulated to that expertise during the Special Master's hearing.

At the November 20 hearing, Mr. McMullian stated: "Now the agency [parole commission] was in error in making that part of their offer [i.e., withholding the seven percent salary adjustment]. They didn't have the authority at that late date

[August 19, the date on which the voluntary demotion document was signed], because the 120-day rule had already expired, and the only way the agency could have kept Mr. Miller from getting the seven per cent salary adjustment on September 1 was to extend that 120 days."

Mr. McMullian continued:

"If they could keep him in a nonsatisfactory performance status beyond September 1, the rules would permit and require that he not get a salary adjustment."

"But they lost that opportunity to keep him in that nonsatisfactory [rating] based on those performance evaluations status when they let August 5th or August 16th or whatever date we all agree was 120 days [pass]."

" …the agency …could not withhold that seven per cent legally at that point on September 3rd."

"They could have withheld it back then in early August or on August 5th if they effected everything properly."

…In fact Mr., Miller was not in an unsatisfactory rating on September 1."

"The law, if it had been followed and complied with, would have revoked that all[;] that was null and void, and he was back [to a] satisfactory [rating]."

"…they waited too late to demote, and they waited too late to try to withhold the seven per cent salary increase."

In view of Mr. McMullian's unchallenged reputation for integrity and his undoubted expertise, and upon my own reading of Rule 22A-9.03, I find his testimony persuasive.

However, the wording of the release that was signed by Mr. Miller on June 28, 1982, and that is quoted above (pp. 5 and 6 of this report) weighs heavily against awarding Mr. Miller any compensation under SB 68.

The attorney who represented the claimant at our hearing, Mr. Sidney Matthew, argued that the settlement is void because the entire federal case was based upon an

agreement that is void ab initio. Mr. Matthew contends that the commission did not have any quid pro quo to offer Mr. Miller in return for his signing the voluntary request for demotion on August 19, 1982, since the commission was representing that they would grant him a salary of $25,164 instead of the $19,000 which went with the involuntary demotion effective August 16, but the involuntary demotion was void because August 16 was 11 days past the mandatory maximum of 120 days after the initial Conditional rating of April 7. Moreover, Mr. Matthew points out that the substitute effective date, September 3, which was specified in the voluntary request for demotion was *149* days after the first Conditional rating.

That argument is buttressed by Mr. McMullian's position that, after August 5 (the 120th day), Mr. Miller reverted to satisfactory status and should have been restored to his previous position, since the agency then had no power to demote him in violation of the personnel rules.

Mr. Miller contends that his present claim is different from the claim he raised in federal court and that the release, therefore, does not apply to the relief that he now seeks. He argues that, in federal court, he claimed that Ms. Wolson based his performance ratings on something other than his job performance, but his present claim states that his being denied a 7-percent raise as of September 1, 1982, was illegal. However, I consider that distinction to be invalid. I believe that it is difficult or impossible to hold that the forfeiture of that raise did not arise out of the issuance of the conditional performance evaluations and demotion. Therefore, I find that the release signed by Mr. Miller on June 28, 1985, and quoted above (pp. 5-6) is applicable and that any court of law would have to abide by the terms of that release and reject Mr. Miller's claim.

The outcome of this claim, then, depends on whether the Legislature can decide, on an equitable basis rather than a legal basis, to override the release and compensate the claimant. On at least one occasion, the Legislature has passed a claim bill that overrode a court's ruling in order to compensate the claimant. The situation that prompted that 1995 claim involved a state employee who had retired and had chosen to take the retirement option that produced the highest monthly benefits but provided no benefits for his wife

after his death. The man had contracted cancer shortly before he retired, but doctors had given him some indications that their treatment of the cancer had been successful. However, the success was short-lived, and he died after receiving only four or five retirement checks. His widow argued that her husband had been mentally incompetent when he made his election of retirement options, some of the deceased's doctors supported that position, and a state hearing officer found in her favor. However, the Division of Retirement reversed the hearing officer, and an appellate court affirmed the division's decision without issuing a written opinion. The Senate Special Master recommended against paying the claim, in part because he was convinced by other testimony indicating that the man had been in possession of his mental faculties when he made his election and indicating that the man had had several opportunities to change his choice of retirement options before it became irrevocable. Nevertheless, the Senate and House both passed the bill compensating the widow.

I accept the truth of Mr. McMullian's contention that the Florida Probation and Parole Commission did not properly effect a demotion of Mr. Miller (via either the letter demoting him involuntarily or the voluntary request for demotion). However, the commission's attorney, Mr. Camper, argues that Mr. Miller had several viable choices, one of which was to accept the voluntary demotion entailing a $19,000 annual salary then appeal to the Career Service Commission, one of which was to bargain for a salary higher than $19,000 but in turn to give up his right to complain to a body other than the internal grievance committee (a choice that he took but later reneged on), and one of which was to pursue the federal court suit to its conclusion in an effort to win amounts closer to those he has requested through the claim bill than the amount he settled for. (Moreover, though Mr. Camper did not so argue, Mr. Miller could have bargained to limit the effect of the release to the matters specifically pled in federal court.) Mr. Camper further argues that the doctrine of finality precludes, or should preclude, claimant from complaining of his dissatisfaction with the results of his settlements so many years after the last prior relevant proceeding (It was 13 years after the conclusion of the federal suit before claimant asked anyone to help him revisit the issue).

Although I disapprove of the commission's violating the clearly written personnel rule, I am even more uneasy with disregarding an agreement that Mr. Miller entered into with the assistance of an experienced attorney but the consequences of which he now decides he does not like. I conclude that a due respect for court-ordered resolutions and for the principle that a person ought to abide by his word (embodied here in the release signed by Mr. Miller) should move the Florida Senate to deny Mr. Miller's petition.

ATTORNEYS FEES: To my knowledge, no attorney's fees have been submitted with respect to this claim. The only legal representation Mr. Miller has had during this process was the appearance of Mr. Sidney Matthew at the Special Master's hearing.

RECOMMENDATIONS: Based upon the foregoing, I recommend that Senate Bill 68 be reported UNFAVORABLY.

Respectfully submitted,

Mary-Ellen Mockbee
Senate Special Master

cc: Senator Richard Mitchell
Faye Blanton, Secretary of the Senate
House Claims Committee