



**MERO**

**MASHANTUCKET EMPLOYMENT RIGHTS OFFICE**

**Final Claim Determination**

**For Claims under 33 M.P.T.L.,  
the Mashantucket Pequot Tribal and Native American Preference Law**

<b>Case Name:</b> Vincent Eleazer v. MGM Grand at Foxwoods Resort Casino	<b>Case Number:</b> 2009-33000
<b>Date of Claim Filing:</b> April 14, 2009	<b>Date of Determination:</b> August 25, 2009

On July 31, 2009, the MERO issued a Proposed Claim Determination in the above case. No timely Request for Reconsideration or Mediation was received from either party. Accordingly, the MERO Director issues the following Final Claim Determination:

Vincent Eleazer (“Claimant”) alleges that he and other Tribal members were denied the opportunity to apply for the position of assistant director of housekeeping at MGM Grand at Foxwoods Resort Casino (“MGM”) by Mashantucket Pequot Gaming Enterprise d/b/a MGM Grand at Foxwoods, (“Respondent”) because the position was not posted or otherwise advertised. The above-referenced claim has been investigated pursuant to Title 31 M.P.T.L., the Mashantucket Employment Rights Law and Title 33 M.P.T.L., the Mashantucket Pequot Tribal and Native American Preference Law, hereinafter referred to as the “Preference Law.”<sup>1</sup>

**I. Positions of the Parties**

Claimant alleges Respondent was not in compliance with the Preference Law when it filled the open position of assistant director of housekeeping without providing Claimant and other Tribal members and Native Americans an opportunity to receive notice of, and apply for, the open position. In his Claim, Claimant does not assert that he meets the minimum necessary qualifications of the position because of his lack of knowledge of those qualifications to be able to make an assessment. Upon review of the job description submitted by Respondent, Claimant concedes he does not meet the qualifications of the assistant director of housekeeping position set forth in the job description.

<sup>1</sup> Claimant filed this Claim prior to the amendments to Title 33 M.P.T.L. being enacted on June 29, 2009. The only provisions of the amended Title 33 M.P.T.L. applicable to this Claim are the rights associated with appeal from a MERO Director final determination. Accordingly, any references, citations or excerpts of Title 33 M.P.T.L. herein pre-date the June 29, 2009 amendments unless specifically indicated otherwise.

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Although Claimant advanced allegations of fact related to a promised training program and his application for an assistant manager position, neither of these issues are included in Claimant's Claim allegations as violations of the Preference Law and are therefore not decided herein.<sup>2</sup>

Respondent asserts that it was not required to post the position of assistant director of housekeeping under the circumstances presented. Specifically, Respondent contends that it was not required to post or otherwise advertise the open position, or accept applications for the position, because filling the assistant director of housekeeping position with an existing manager occurred pursuant to a restructuring plan approved by the Compensation Committee. According to Respondent, the approved plan specifically provided for filling the open position with one of the two existing managers, neither of whom fall within a preference category. Respondent further alleges that, even assuming it had a legal duty to consider Claimant for the position, Claimant did not possess the minimum necessary qualifications for the assistant director of housekeeping position.

Respondent's July 10, 2009, correspondence to the MERO also suggests that in the absence of any requirements imposed by the MERO Director pursuant to 33 M.P.T.L. ch. 1, § 5(c),<sup>3</sup> Respondent was under no obligation to post or otherwise advertise any open position.<sup>4</sup>

## II. Procedural History

Claimant submitted a sworn affidavit in support of his claim and made himself available throughout the investigation to respond to additional questions. Respondent submitted a response dated May 28, 2009,<sup>5</sup> which included a Position Statement, Answer to Claimant's Affidavit, an affidavit from Chris O'Connell, Director of Hotel Operations, MGM, dated May 27, an affidavit from Dale Merrill, Director of Employment and Diversity, dated May 26, and various documents.<sup>6</sup> Respondent submitted a response dated June 19, to the MERO's subsequent requests for information dated June 1. Respondent's response

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<sup>2</sup> Nothing herein precludes Claimant from filing additional claims alleging a failure to train, failure to promote or other theory of non-compliance, if those claims are filed within 180 days of the event Claimant believes was non-compliant with the Preference Law.

<sup>3</sup> 33 M.P.T.L. ch. 1, § 5(c) states, in part:  
Posting Requirements. Employers are required to comply with all job posting requirements which may be mandated in any rules, regulations and/or guidelines promulgated by the MERO Director. All Employers shall include and specify a Native American employment preference policy statement in all job announcements and advertisements and employer personnel policies affected by this Law. When the Tribe is the Employer it shall also include and specify a Tribal employment preference policy statement in all job announcements and advertisements and employer personnel policies affected by this Law.

<sup>4</sup> The analysis herein constitutes the MERO's response to Respondent's July 10, 2009, correspondence.

<sup>5</sup> All dates hereinafter are in Calendar Year 2009 unless otherwise indicated.

<sup>6</sup> Each of Respondent's submissions is generally referred to herein as "Response" and identified by date, with specific documents referenced where appropriate by date and summary description.

included affidavits from Mr. O'Connell, Ms. Merrill and Sam Agnello, Senior Employment Recruiter, dated June 19, and various documents. On the MERO's request, Respondent also presented Mr. O'Connell and Marie Fafard, Assistant Director of Housekeeping, for interview and Ms. Fafard provided an affidavit taken by the MERO.

### III. Findings of Fact

Respondent is a Tribal employer that employs over 1500 employees. (May 28 Response) Respondent admits that Claimant is a Tribal member in good standing within the meaning of Title 33 M.P.T.L.. (May 28 Response Answer to Claimant Affidavit, ¶ 2) At all relevant times, Claimant was an employee of Respondent. Claimant has held the position of housekeeping supervisor at MGM since his hire about November 24, 2008. (May 28 Response Exh. A) He had not held any positions in housekeeping previously. (Claimant Affidavit and May 28 Response Exh. A)

Respondent maintains a Native American Preference Policy that provides, in part, that "employment opportunities will be open to any candidate eligible for Native American Preference who meets the minimum necessary qualification of the position." (May 26 Merrill Affidavit) Per the policy, employment opportunities include hiring, transfer, promotion and training. (May 26 Merrill Affidavit)

The MGM assistant director of housekeeping, Shaheen Kahn, resigned his employment on about January 8, resulting in an open position. (May 27 O'Connell Affidavit; May 28 Response Answer to Claimant Affidavit ¶ 5; July 9 Fafard Affidavit) At that time, according to her resume, MGM Housekeeping Manager Marie Fafard had over twelve years of housekeeping supervisory and managerial experience. (June 19 Response Exh. I; July 9 Fafard Affidavit) About January 9, as the more senior of the two housekeeping managers, Ms. Fafard began performing the duties of the assistant director of housekeeping on an interim basis. (June 19 O'Connell Affidavit; July 9 Fafard Affidavit)

Around that same time, Director of Hotel Operations, MGM, Chris O'Connell was directed by senior management to reduce overhead costs. (May 27 and June 19 O'Connell Affidavits) These directives resulted in "several conversations" between Mr. O'Connell and Senior Vice President & General Manager of MGM Grand at Foxwoods Gillian Murphy "addressing cost cutting strategies in light of the existing economic circumstances." (June 19 O'Connell Affidavit)

In order to fill the assistant director of housekeeping position in light of the cost cutting directive, within about one month Mr. O'Connell developed a "reorganization plan," premised on the housekeeping department requiring "four (4) manager level employees."<sup>7</sup> (May 27 O'Connell Affidavit) Mr. O'Connell's reorganization plan called for "immediately add[ing] an Assistant Manager in Housekeeping and upon promotion of a qualified candidate (Housekeeping Manager) to the open position of Assistant

<sup>7</sup> Insufficient evidence was submitted to support Respondent's assertion that an analysis was conducted that concluded that four management level employees were required to operate the housekeeping department effectively. For purposes of assessing compliance with the Preference Law, however, the MERO accepts Respondent's decision to operate the housekeeping department with one assistant director, one manager and two assistant managers.

Director of Housekeeping, eliminate[ing] the position of Housekeeping Manager.” (June 19 Response, Exh. D, Compensation Committee Request Form) The plan was projected to produce a savings of approximately \$51,000, and actual savings were about \$20,000 less. (May 28 Response; May 27 O’Connell Affidavit) Mr. O’Connell’s plan was submitted to the Compensation Committee at its meeting of February 16. (May 27 O’Connell Affidavit; June 19 Response, Exh. F, Compensation Committee Agenda)

According to Respondent’s submission, the Compensation Committee is charged with reviewing compensation and benefit matters that are new or fall outside the regular daily administration of established programs. (June 19 Response, Exh. G) The evidence does not support a finding that the charge of the Compensation Committee, or its exercise of authority, extends to determining whether an open position will be posted or advertised, assessing the qualifications of a particular individual for an open position or selecting a particular individual to fill a position. (See, June 19 Response, Exh. G) Moreover, Mr. O’Connell’s reorganization plan submission to the Compensation Committee presupposes that one or both housekeeping managers were qualified for the open position of assistant director and that the position would be filled with a housekeeping manager. (June 19 Response, Exh. D, Compensation Committee Request Form) The Compensation Committee approved the plan as submitted, effective March 1.<sup>8</sup> (May 27 O’Connell Affidavit; May 28 Response, Exh. D, Compensation Committee Approvals) As a result, Respondent contends the “customary posting requirement was inapplicable.” (See, June 19 Response, pg. 2)

Prior to implementation of the reorganization plan on March 1, Claimant, a Tribal member, inquired about the position of assistant director of housekeeping. (May 27 O’Connell Affidavit) During the meeting, also attended by Chris Mihailides, Manager of Organizational Development and Training, Mr. O’Connell represented that he would look into arranging a training program for Claimant. (June 19 O’Connell Affidavit; Answer to Claimant Affidavit, ¶ 7). Claimant suggested a two (2) year training program. (Claimant Affidavit) Mr. O’Connell and Mr. Mihailides anticipated getting back to Claimant with a training plan within a month. (June 19 Response, Exh. C) Prior to the filing of the Claim, no training plan had been presented to Claimant.

The open assistant director position was not posted or advertised otherwise. (May 28 Response Answer to Claimant Affidavit ¶ 8) Respondent asserts, “Pursuant to the approved reorganization plan, eligible candidates for the position were those holding the position of Housekeeping Manager.” (May 28 Response Answer to Claimant Affidavit ¶ 10). Neither housekeeping manager was preference eligible. (May 28 Response Answer to Claimant Affidavit ¶ 11). According to Mr. O’Connell, “the Assistant Director position was not posted pursuant to the Tribal and Native American Preference Law in that the law was not applicable to the filling of this position.” (May 27 O’Connell Affidavit) Mr. O’Connell assessed Ms. Fafard as well qualified for the position. (June 19 O’Connell Affidavit) He considered “her performance serving unofficially in the [interim assistant director] capacity” and “the qualifications set

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<sup>8</sup> According to the “Guide to: Salary Administration” submitted by the Tribal employer, implementation of a request approved by the Compensation Committee also requires approval of the President. (June 19 Response, Exh. G)

forth on her resume.” (June 19 O’Connell Affidavit) Ms. Fafard was therefore promoted into the position of assistant director of housekeeping. (July 9 Fafard Affidavit)

Respondent asserts that the assistant director of housekeeping position requires that the candidate have “eight (8) years progressive experience in a large Housekeeping operation, high occupancy or first class casino hotel [and] five (5) years experience operating a 4-Diamond or higher rated property.” (May 26 Merrill Affidavit) In addition, Respondent requires a “Bachelor’s degree in Business, Management or Hospitality preferred or combination of BS Degree and 10 years experience in combination above.” (May 26 Merrill Affidavit) According to the job description, however, the candidate is also required to have “five (5) years experience... at a Manager level or above,” and “at least (sic) one prior experience opening [a] 4-Diamond (or higher) Hotel.” (May 28 Response Exh. C) Ms. Fafard’s resume fails to confirm that she meets all the required criteria specified on the job description for the position of assistant director of housekeeping.<sup>9</sup> The Preference Law provides, however, that “[d]emonstrated ability to perform essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.” Ms. Fafard’s resume discloses extensive housekeeping experience at Tribal properties, including executive housekeeping experience. (June 19 Response, Exh. I; July 9 Fafard Affidavit)

The assistant housekeeping manager position was posted March 4, 2009 and Claimant applied for the position. (May 28 Response, pg. 3) Assistant Director of Housekeeping Marie Fafard and Housekeeping Manager Jo LaRoche interviewed Claimant for the open position. (July 9 Fafard Affidavit) According to Ms. Fafard’s memo to Mr. O’Connell, Ms. Fafard assessed Claimant as requiring additional time in his current position prior to advancing. (July 9 Fafard Affidavit; May 28 Response, Exh. E)

#### **IV. Analysis and Conclusions of Law**

Jurisdiction over the parties and with respect to the Claim is undisputed and asserted.

The Preference Law specifically provides that “employment opportunities” be provided by a Tribal employer first to Tribal Members, then to Tribal Member Spouses and third to Native Americans if the individuals afforded preference meet the minimum necessary qualifications of the position. 33 M.P.T.L. ch.1, § 5(a). “Employment opportunities” include hire and promotion. 33 M.P.T.L. ch.1, § 4(a). Employers are required to “include and specify a Tribal employment preference policy statement in all job announcements and advertisements and employer personnel policies affected by this Law.” 33 M.P.T.L. ch.1, § 5(c). In this case, it is undisputed that the position of assistant director of housekeeping was an open position after the departure of the incumbent in January, the open position was never posted or otherwise advertised to anyone, including Tribal members, and the open position was filled through the promotion of Ms. Fafard, who is not a preference eligible employee.

Respondent contends that the Compensation Committee, through its approval of Mr. O’Connell’s reorganization plan, required the promotion of a housekeeping manager who was not preference eligible

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<sup>9</sup> No information was provided by the Tribal employer in response to the MERO’s June 1 information request regarding the qualifications of the second manager who was deemed eligible for the position, Jo LaRoche.

into the position of assistant director of housekeeping. Based on Respondent's evidence, the Compensation Committee approved a reorganization plan that presumed placement of one of two housekeeping managers into the assistant director of housekeeping position. Respondent does not allege and did not present evidence that the Compensation Committee considered whether any preference eligible individuals were qualified for the position. Even assuming the Compensation Committee had the authority to determine who would be placed in an open position, the Preference Law provides no exception to the applicability of the law to Compensation Committee determinations. Accordingly, it would have been incumbent upon the Compensation Committee to determine if any preference eligible individuals were minimally qualified for the open position prior to approving the reorganization plan as proposed.

Furthermore, based on the documentation submitted by Respondent, it appears the Compensation Committee's authority does not include determining eligible candidates for open positions. Although permission from the Compensation Committee to fill the open position may have been contingent upon reduction of overhead, the reduction of overhead was achieved by eliminating a higher paid manager position and adding a lower paid assistant manager position, which was not dependent upon a particular individual filling the open position of assistant director of housekeeping. In accordance with the limits of the Compensation Committee's authority, the authorization granted by the Compensation Committee was to fill the open assistant director of housekeeping position, eliminate a housekeeping manager position and introduce an additional assistant housekeeping manager position for a total approximate projected annual savings of \$50,000.

Respondent argues that it was compelled to promote a housekeeping manager to avoid having to terminate one of the two housekeeping managers as a result of eliminating a housekeeping manager position. Respondent's argument is not persuasive. Given the elimination of only one position (manager) and filling of two positions (assistant director and assistant manager), Respondent's conclusion that both managers would not have been able to maintain employment with Respondent is unfounded. Moreover, even assuming the provision of preference to an eligible individual had resulted in a manager being terminated, Respondent's argument fails. There is no basis for Respondent's contention that the Preference Law does not envision the possibility of adverse employment action against an employee as a result of compliance with the law's requirements.<sup>10</sup>

Any contention that Respondent had no obligation to post or otherwise advertise the open position because of the absence of noticed posting requirements from the MERO pursuant to 33 M.P.T.L. ch. 1, § 5(c) is without merit.<sup>11</sup> There is no question that the Preference Law envisions posting or other advertising of employment opportunities. The Preference Law explicitly provides that job announcements and advertisements include preference policy statements. Without foreclosing the

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<sup>10</sup> The possibility of adverse action as a result of a reorganization also appears to be envisioned by the Compensation Committee, which included in its Guide to Salary Administration subsection on reorganization the possibility of reassignment to a different position and cross references the demotion guidelines.

<sup>11</sup> The law is permissive rather than directive with respect to the MERO's imposition of posting requirements.

possibility that there may be circumstances under which posting or other advertising of a position may not be required, the circumstances presented here is not such a case. The assistant director of housekeeping position was an open position for which Respondent was required to provide preference to eligible candidates. While a limitation on a pool of potential candidates for an employment opportunity may be permissible under the Preference Law, limiting the pool to two employees who are not preference eligible does not comply with the requirements of the law.

Respondent offers no explanation of how it is able to comply with the Preference Law and its own policies requiring preference in employment opportunities without making employment opportunities known through posting or advertising to individuals who may be eligible for preference.<sup>12</sup> To the contrary, Respondent concedes a “customary posting requirement.” Moreover, Respondent’s understanding of the requirements of the law appear to be accurately reflected in its policy of providing that “employment opportunities will be open to any candidate eligible for Native American Preference who meets the minimum necessary qualification of the position.” In this case, however, rather than being open to any eligible preference candidate, the employment opportunity was open to no candidates other than two managers, neither of whom are preference eligible. Although Claimant inquired about the open position when it came to his attention, the onus is not on preference eligible individuals to speculate and inquire about the existence of employment opportunities. The burden is on the employer to make employment opportunities broadly enough known that they will reach preference eligible individuals. Respondent posted the other open position resulting from the restructuring, the assistant manager of housekeeping position, supporting a conclusion that Respondent understood the expectation in the law that employment opportunities be posted or otherwise advertised. Respondent’s failure to post or otherwise advertise the open position of assistant director of housekeeping at MGM violated the requirements of the Preference Law.

Notwithstanding Respondent’s failure to post the open position, there is no evidence currently before the MERO to indicate that a member of the preference eligible population who meets the minimum qualifications of the position would have applied for the position of assistant director of housekeeping if the open position had been posted or otherwise advertised. The extent of Claimant’s experience in housekeeping at the time consisted of about three (3) months tenure as a housekeeping supervisor, a position three levels below the open position of assistant director of housekeeping. Based on Claimant’s concession that he did not meet the criteria of the job description, and all the information presented, the MERO finds that Claimant did not meet the minimum necessary qualifications of the position, therefore Respondent did not violate the Preference Law by declining to offer the assistant director of housekeeping position to Claimant.<sup>13</sup>

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<sup>12</sup> Respondent is no stranger to expectations regarding preference. In originally enacting the Preference Law, the Tribal Council noted the existing preference policy of Tribal employers and the need for an enforcement mechanism to ensure compliance. 33 M.P.T.L. ch. 1, § 2(a).

<sup>13</sup> Given the determination that the Claimant was not minimally qualified, the MERO finds it unnecessary to determine whether the Preference Law is violated when, as was the case here, the employer considers an employee’s job performance in an interim capacity in the selection decision but affords only an employee who is not a preference eligible employee the exclusive opportunity to serve in the interim capacity.

## V. Disposition

Respondent did not violate Title 33, M.P.T.L., the Mashantucket Pequot Tribal and Native American Preference Law, by declining to offer the assistant director of housekeeping position to Claimant. Respondent was not in compliance with the Preference Law when it failed to post or otherwise advertise the open position of assistant director of housekeeping at MGM. The Tribal employer is ordered to cease and desist from non-compliance with the Preference Law and to post or otherwise advertise open employment positions in a manner consistent with the requirements of the law.

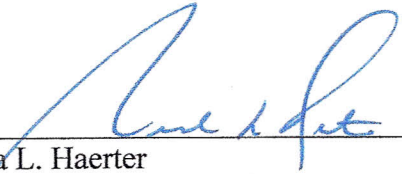
## VI. Notice of Publication

This Final Claim Determination is available to the public through the MERO and subject to publication by the MERO.

## VII. Appeal Rights

The parties are directed to the enclosed Notice of Appeal Rights. If no timely appeal is filed with the Tribal Court, this Final Claim Determination is final and binding upon the parties.

Dated this 25th day of August, 2009

  
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Ursula L. Haerter  
MERO Director

Final Claim Determination Case No. 2009-33000  
August 25, 2009  
MERO Form-33-1680  
(08-09-01)





**MERO**

**MASHANTUCKET EMPLOYMENT RIGHTS OFFICE**

**Notice of Parties' Appeal Rights**

**For Claims under 33 M.P.T.L.,  
the Mashantucket Pequot Tribal and Native American Preference Law**

**Case Name:**

Vincent Eleazer v. MGM Grand at Foxwoods Resort Casino

**Case Number:**

2009-33000

**Date of Mailing of Final Claim Determination:**

August 25, 2009

Pursuant to Title 33 M.P.T.L., the Mashantucket Pequot Tribal and Native American Preference Law, as amended June 29, 2009, and the Compliance and Claims Procedures Manual for the Mashantucket Pequot Tribal and Native American Preference Law, the MERO has investigated the above-referenced claim and issued a Final Claim Determination. A party adversely affected by a Final Claim Determination of the MERO may appeal the determination to the Mashantucket Pequot Tribal Court as follows:

**Form of Appeal:** An appeal must be in writing on a form available from the Tribal Court clerk. A copy of the Final Claim Determination from which an appeal is being taken must be submitted to the Tribal Court with the completed appeal form.

**Deadline for Filing Appeal:** To be timely filed, an appeal must be filed with the Tribal Court within thirty (30) days of the above Date of Mailing of Final Claim Determination.

**Appeal Hearings:** Appeal hearings in Tribal Court are conducted in accordance with the rules of the court. Both parties have the opportunity to present full evidence and argument to the Tribal Court, provided that the parties may not introduce evidence that was not submitted to the MERO during the investigation of the claim unless the evidence is newly discovered or was not available to the party during the investigation notwithstanding the party's best efforts to secure the evidence.

**Contacting the Tribal Court:** Mashantucket Pequot Tribal Court, Office of the Tribal Court Clerk, P.O. Box 3126 Mashantucket, CT 06338-3126. Telephone Number: (860) 396-6115.

**Please contact the Mashantucket Pequot Tribal Court clerk for Appeal Forms.  
Any questions about Tribal Court appeal or other processes should be directed to the court.**

MERO Form-33-1690  
(08-09-01)