



MERO

MASHANTUCKET EMPLOYMENT RIGHTS OFFICE

Final Claim Determination

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

Case Name: George Eleazer, Jr. v. Mashantucket Pequot Tribal Nation	Case Number: 2009-33002
Date of Claim Filing: July 10, 2009	Date of Determination: January 25, 2010

On December 30, 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:

George Eleazer, Jr. (“Mr. Eleazer”) alleges in his Claim that he was denied training beginning in about April, 2009, denied preference for an open first shift position in May, 2009 and terminated about June 26, 2009 by the Mashantucket Pequot Tribal Nation (“MPTN” or “Respondent”)¹ because he is a Tribal member. 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.”

I. Positions of the Parties

Mr. Eleazer alleges Respondent was not in compliance with the Preference Law when it failed to provide him with adequate training beginning in about April, 2009. Mr. Eleazer asserts that if he had been provided preference in training opportunities, he would not have been terminated for poor performance.² He also alleges that he was denied preference for an open first shift position in May, 2009.³

Respondent asserts that preference was afforded Mr. Eleazer in his hire and Mr. Eleazer was provided opportunities equal to, if not greater than, non-preference employees. Respondent further asserts that Mr.

¹ Although the Claim originally identified Foxwoods Resort Casino as Respondent, Respondent conceded that Mr. Eleazer’s employer and the respondent in this case is the Mashantucket Pequot Tribal Nation. (See, August 26 Response, pg. 1). 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.

² Mr. Eleazer also appears to allege a theory based on his asserted condition of attention deficit disorder. (See, Eleazer September 15 e-mail). The Preference Law does not, however, provide for a theory of liability based on medical or psychological condition or alleged disability.

³ All dates hereinafter are in Calendar Year 2009 unless otherwise indicated.

Final Claim Determination Case No. 2009-33002
January 25, 2010
MERO Form-33-1680
(07-09-01)

Eleazer was terminated during his probationary period due to gross performance deficiencies, which included policy violations as well as a failure to develop sufficient skills. With respect to the open first shift position, Respondent asserts that Mr. Eleazer did not meet the qualifications for the position given his performance deficiencies and probationary status.

II. Procedural History

Mr. Eleazer submitted a sworn affidavit, e-mail dated September 15 and e-mail dated October 8 in support of his claim. He also made himself available throughout the investigation to respond to additional questions. Respondent submitted a response dated August 26, which included a Position Statement, Answer to Mr. Eleazer's Affidavit, an affidavit from Timothy D. Bohr, Surveillance Director, dated August 25, and various documents. Respondent submitted responses dated September 24, to the MERO's subsequent requests for information dated September 10. Respondent's response included affidavits from Mr. Bohr dated September 24, and various documents. On the MERO's request, Respondent also provided access to Maria Tunstall, a surveillance officer for about three (3) years, for interview and Ms. Tunstall provided an affidavit taken by the MERO. In response to several MERO requests, Respondent submitted additional information via e-mail in October.

III. Findings of Fact

Respondent is the MPTN. (August 26 Response) Respondent admits that Mr. Eleazer is a Tribal member in good standing within the meaning of Title 33 M.P.T.L.. (August 26 Response Answer to Mr. Eleazer Affidavit, ¶ 1) At all relevant times, Mr. Eleazer was an employee of Respondent.

Mr. Eleazer was hired as a surveillance officer in the MPTN Surveillance Department on about March 17. (August 26 Response Answer to Eleazer Affidavit, ¶ 2; September 24 Bohr Affidavit, ¶ 4) Respondent contends that Mr. Eleazer's hire was pursuant to the Preference Law.⁴ (August 25 Bohr Affidavit, ¶ 5) Mr. Eleazer concedes that Respondent had knowledge of his status as a Tribal member at the time of hire. (Eleazer September 15 correspondence) Mr. Eleazer was terminated from employment June 26, for "overall unsatisfactory work performance." (August 26 Response Answer to Eleazer Affidavit, ¶ 5; September 24 Response, Exh. E, Termination Letter)

Newly hired surveillance officers are required to undergo six months of training, during which employment is considered probationary. (Eleazer Affidavit ¶ 3; September 24 Response, Exh. E, Surveillance Officer Job Description, and Exh. A, Employee Development Plan) Training is provided by various supervisors. (August 25 Bohr Affidavit, ¶ 7; Eleazer Affidavit, ¶ 6; September 24 Response, Exh.

⁴ Although Respondent's assertion of compliance with the Preference Law at hire was provided under oath, there is no indication that the Preference Law was implicated. For example, no evidence was presented that other applicants for the opening filled by Mr. Eleazer were not Tribal members and were more qualified, or that Mr. Eleazer was not the most highly qualified candidate regardless of preference status. Given that an important function of the position is the ability to follow subjects in the casinos with surveillance cameras and Mr. Eleazer had following experience from a prior position, it is possible that Mr. Eleazer was the most qualified candidate for the position regardless of preference status.

B, Surveillance Supervisor position description) Supervisors' performance observations relative to the employee's development plan are recorded in a single document.⁵ (September 24 Bohr Affidavit) During his employment, Mr. Eleazer received direction and training from four (4) different supervisors (August 26 Response, Exh. B, Training Notes) The Training Notes for Mr. Eleazer generally include both positive and negative observations from all the supervisors. (August 26 Response, Exh. B, Training Notes)

One skill all surveillance officers are required to master is "following," which involves using multiple surveillance cameras located throughout the Foxwoods casinos to continuously follow a subject. (August 25 Bohr Affidavit, ¶ 8; August 26 Response Answer to Eleazer Affidavit, ¶ 4) From his prior employment in security at the Mashantucket Pequot Museum and Research Center, Mr. Eleazer had experience following subjects with cameras, but Mr. Eleazer found the following in his new position more challenging, because he was required to keep the cameras trained on the front of a subject, generally to be able to see the subject's hands. (Eleazer Affidavit, ¶ 4) Trainees are required to practice their following, including asking co-workers to take walks through the casinos, until the skill is mastered. (August 25 Bohr Affidavit, ¶ 8; September 30 Tunstall Affidavit) The Training Notes reflect almost 30 dates on which entries were made and approximately nine (9) times, beginning on April 3, when Mr. Eleazer was told to practice his following or observed not practicing. (August 26 Response, Exh. B, Training Notes) Each of Mr. Eleazer's supervisors recorded observations of his failure to sufficiently practice his following skills. (August 26 Response, Exh. B, Training Notes) Mr. Eleazer demonstrated inconsistent quality of following throughout his employment. (August 26 Response, Exh. B, Training Notes)

Similarly, another skill all surveillance officers are required to master is learning chip values. (August 25 Bohr Affidavit, ¶ 10) The Training Notes suggest that Mr. Eleazer had difficulty learning the chip values and tested inconsistently on his knowledge of chip values. (August 26 Response, Exh. B, Training Notes; see, also, August 25 Bohr Affidavit, ¶ 10) After two weeks, Mr. Eleazer had not mastered the chip values and tested inconsistently. (August 26 Response, Exh. B, Training Notes) Another trainee who did not successfully complete the probationary period appears to have learned and retained the chip values within less than a week. (See, September 24 Response, Exh. F, Employee No. 50654)

In addition to developing surveillance specific skills, Mr. Eleazer also was required to comply with Respondent's attendance policies, copies of which he received when he began employment. (September 24 Response, Exh. D, Acknowledgement of Receipt; See also, September 24 Response, Exh. A, Employee Development Plan) Respondent's "Hours of Work" policy states, in part, "Any employee who habitually reports to work late after the regular starting time shall be subject to disciplinary action as defined in disciplinary procedures." (August 26 Response, Hours of Work Policy dated 1999) Respondent's policy entitled, "Conduct of Employees," cites as examples of prohibited conduct "[t]aking more than specified times for meals, rest periods, or coffee breaks," and "...loafing, or sleeping on the job." (August 26 Response, Conduct of Employees Policy dated 1990)

⁵ The document for Mr. Eleazer is referred to herein as "Training Notes."

According to the Training Notes, on at least 23 instances, Mr. Eleazer was either late for work or took breaks in excess of the time allotted.⁶ (August 26 Response, Exh. B, Training Notes) Mr. Eleazer concedes that “some” of his breaks “in the beginning were a little extensive,” but contends that in most cases he believed he was acting within the bounds of what he had been told by his supervisors. (Eleazer September 15 correspondence) Just about one week into Mr. Eleazer’s employment, a supervisor noted, “Must keep an eye on him as he tends to disappear for extended periods of time.” (August 26 Response, Exh. B, Training Notes, March 27 entry) By about his second week of employment, Mr. Eleazer was counseled for tardiness and unexplained extended breaks. (August 26 Response, Exh. B, Training Notes, April 3 entry) Within about a week of being counseled, Mr. Eleazer returned almost 20 minutes late from a break. (August 26 Response, Exh. B, Training Notes, April 9 entry) According to Mr. Eleazer, he was initially told that supervision was lenient about the length of break times, but when his supervisor spoke to him on April 9 about his late return from break, he was informed that Respondent would not be lenient, after which he was more careful. (Eleazer September 15 correspondence) The Training Notes reflect, however, that Mr. Eleazer’s attention to compliance with break periods lasted only about three (3) weeks. (August 26 Response, Exh. B, Training Notes)

Mr. Eleazer alleges that he was instructed to take walks to become familiar with the layout of the casinos and was subsequently cited for taking excessive breaks. (Eleazer September 15 correspondence) Maria Tunstall, a co-worker who Mr. Eleazer believes attempted to help him succeed, asserted that a supervisor should have been informed when Mr. Eleazer was taking a walk to familiarize himself with the facility and she recalled Mr. Eleazer regularly leaving the surveillance room inexplicably for periods of time, often immediately after arriving for his shift. (September 30 Tunstall Affidavit) Ms. Tunstall also recalled Mr. Eleazer taking extended breaks, specifically recalling occasions when Mr. Eleazer would leave for his breaks before her and return after she had returned. (September 30 Tunstall Affidavit) When confronted about his attendance or performance issues, Mr. Eleazer would become argumentative or claim he was being treated like a child. (September 30 Tunstall Affidavit)

The Training Notes reflect at least eight (8) instances when Mr. Eleazer was sleeping on the job. (August 26 Response, Exh. B, Training Notes; see also, September 30 Tunstall Affidavit) Mr. Eleazer admits nodding off in one instance (April 28) and contests another (June 15). (Eleazer Affidavit, ¶ 7) Mr. Eleazer also asserts that any drowsiness he experienced in June was attributable to medication he was taking for an injury he suffered at the beginning of the month. (Eleazer Affidavit, ¶¶ 7 and 8) Mr. Eleazer showed a supervisor, Mike Tetreault, the bottle of prescription medication that indicated that drowsiness was a side effect.⁷ (Eleazer Affidavit, ¶ 8) In his subsequent submission, Mr. Eleazer contends he never slept on the job, but “everyone” would become drowsy periodically and dozing does not equate to sleeping. (Eleazer September 15 correspondence) Ms. Tunstall confirmed that every once in a while a security officer would get drowsy, but recalled that unlike Mr. Eleazer, when others felt themselves nodding off, they would ask their fellow employees to keep them awake, walk around or

⁶ Mr. Eleazer’s time records reflect more work days of tardiness than noted in the Training Notes. (See, September 24 Response, Exh. I, Time Records).

⁷ Respondent’s lack of specific denial to Claimant’s allegation constitutes an admission.

otherwise engage in actions that would assure their continued alertness. (September 30 Tunstall Affidavit) To the contrary, Mr. Eleazer would merely deny becoming drowsy or sleeping. (September 30 Tunstall Affidavit)

Mr. Eleazer alleges that two supervisors, Mike Tetreault and Jolene Bingham, conspired against him to deny him training opportunities and find fault with his conduct, resulting in discipline. (Eleazer September 15 correspondence) He contends that Ms. Bingham had reason to retaliate because Mr. Eleazer went to her supervisor twice to challenge her decisions, including Ms. Bingham's directive that Mr. Eleazer not use valet parking for his work shifts, which Mr. Eleazer contended was a privilege afforded Tribal members. (Eleazer September 15 correspondence; September 30 Tunstall Affidavit) According to Mr. Eleazer, Mr. Tetreault was Ms. Bingham's friend and predisposed to assert his authority in the workplace over Tribal members. (Eleazer September 15 correspondence) During the course of the investigation, Mr. Eleazer also inconsistently asserted repeatedly in communications to the MERO that his claims were not related to his status as a Tribal member. (See, e.g., Eleazer September 15 and October 8 correspondence)

Mr. Tetreault and Ms. Bingham were both promoted to supervisor in April, 2008. (September 24 Response, Exh. K) As a supervisor, Mr. Tetreault has been actively involved in training 14 surveillance employees, of whom 11 successfully completed their probationary periods and two (2) did not. (September 24 Response, Exh. K) Of those who successfully completed their probationary periods, four (4) were preference eligible and of those who were unsuccessful, one (1), Mr. Eleazer, was preference eligible.⁸ (September 24 Response, Exh. K) Similarly, Ms. Bingham was actively involved in training 15 surveillance employees, of whom 13 were successful and two (2) were not. (September 24 Response, Exh. K) Of those employees who successfully completed their probationary periods, five (5) were preference eligible and of those who were unsuccessful, one (1), Mr. Eleazer, was preference eligible. (September 24 Response, Exh. K) None of the preference eligible employees trained by Mr. Tetreault and Ms. Bingham, with the exception of Mr. Eleazer, were Tribal members. (See, September 24 Response, Exh. K) Ms. Tunstall, however, was unable to cite to any instances when Mr. Tetreault or Ms. Bingham treated Mr. Eleazer less favorably because of his Tribal status and does not believe either supervisor treated Mr. Eleazer less favorably than other employees. (September 30 Tunstall Affidavit)

Mr. Eleazer credits supervisor Hunter Harris and co-worker Maria Tunstall with training him and showing him aspects of the job beyond following.⁹ (Eleazer Affidavit ¶ 6; Eleazer September 15 correspondence) Notably, although Mr. Harris does not appear to have supervised Mr. Eleazer as often as some of the other supervisors, Mr. Harris's Training Notes reference comparable issues with Mr. Eleazer's performance as documented by the other supervisors. (August 26 Response, Exh. B, Training Notes) Mr. Harris noted

⁸ One employee who was preference eligible was laid off prior to the completion of his probation. (September 24 Response, Exh. K)

⁹ According to Ms. Tunstall, Mr. Harris is a Native American. (September 30 Tunstall Affidavit) Mr. Eleazer also cited supervisors Michael Mickens and Alfred DeSimone as having shown him aspects of the job beyond following, but both were transferred off the shift shortly after Mr. Eleazer's hire. (Eleazer September 15 correspondence)

issues with inattentiveness, failure to follow directions, being absent beyond break periods, sleeping, and failure to practice following in designated areas. (See entries dated April 24, April 30, May 1, and May 28-29 in August 26 Response, Exh. B, Training Notes; see also, August 26 Response, Exh. C, Progress Report)¹⁰ Ms. Tunstall corroborates not only attempts to assist Mr. Eleazer in his training, but also a number of performance issues identified by Mr. Eleazer's supervisors. (September 30 Tunstall Affidavit) Specifically, she witnessed Mr. Eleazer fall asleep more than once, fail to practice following, become distracted, take extended breaks and become argumentative in response to efforts to have him comply with policy. (September 30 Tunstall Affidavit) Mr. Eleazer alleges that Ms. Tunstall informed him that based on her own experience, as a Tribal member he would not receive the training he needed.¹¹ (Eleazer Affidavit, ¶ 6) Ms. Tunstall denied making any such statement to Mr. Eleazer, further indicating that she believed she was trained well and she successfully completed her training period within the three (3) month period allotted at the time. (September 30 Tunstall Affidavit)

The notes from Mr. Eleazer's last month of employment reflect three different supervisors commenting on Mr. Eleazer's lack of effort. For example, Mr. Harris noted, "George was informed many times to turn around a[nd] face his monitors and to continue practicing in his zone. George has also been spoken to about pulling up camera[s] in zones that he has not yet learned." (August 26 Response, Exh. B, Training Notes, May 28-29 entry) Mr. Tetreault noted, "George was observed not following...was reminded that he had to be constantly practicing while in the monitor room." (August 26 Response, Exh. B, Training Notes, June 3 entry) On a subsequent shift, Mr. Tetreault noted, "Even after talking to him about practicing, George simply did not put forth the effort that he should have." (August 26 Response, Exh. B, Training Notes, June 9 entry) According to Mr. Tetreault's notes, when confronted about sleeping and asked if he wanted to take a walk, George "said that he was bored and that he would take a walk if I wanted him to. I advised him that I would rather that he practiced his following and that if he was too tired or bored to do his job, that I would send him home. George did not seem happy and only put forth a minimal effort for the rest of the day." (August 26 Response, Exh. B, Training Notes, June 9 entry) Two weeks after Mr. Harris noted that Mr. Eleazer had been counseled to practice in his assigned zone, Ms. Bingham observed, "He had to be prompted to request follows and to keep focused on his practice. He followed a couple of patrons I earlier told him to drop in a casino he is not working on." (August 26 Response, Exh. B, Training Notes, June 16 entry) Within about a week thereafter, Ms. Bingham observed that two hours into his shift, Mr. Eleazer "had not practiced his following, I reminded him to practice. I had to initiate a follow for George and then wait until he was ready..." (August 26 Response, Exh. B, Training Notes, June 24 entry)

The termination letter provided Mr. Eleazer states the basis for termination as, "overall unsatisfactory work performance." (September 24 Response, Exh. E) Respondent asserts, "Claimant was terminated because of well-documented performance issues, which include ongoing attendance problems, repeated

¹⁰ Prior to his transfer, Mr. DeSimone noted that Mr. Eleazer not only had difficulty staying awake, but also was absent for extended periods beyond his break periods. (August 26 Response, Exh. B, Training Notes)

¹¹ Ms. Tunstall is not an enrolled member of the Mashantucket Pequot Tribe, but her father is a Tribal member. (September 30 Tunstall Affidavit)

failure to return from breaks in a timely fashion, failure to grasp certain skills necessary to succeed in his position and a demonstrated lack of concerted effort to master those skills.” (August 26 Response Answer to Eleazer Affidavit, ¶ 11) Respondent cites two (2) other employees who were not preference eligible and who were terminated during their probationary period within about a year of Mr. Eleazer’s termination. (August 26 Response Answer to Eleazer Affidavit, ¶ 9; August 25 Bohr Affidavit, ¶ 16) In both cases, the employees received termination letters substantively comparable to the one received by Mr. Eleazer. (September 24 Response, Exh. F) Employee No. 14870 was terminated in about four (4) months for poor performance, while Employee No. 50654 was terminated in just over two (2) months for poor performance and sleeping on the job. (August 25 Bohr Affidavit, ¶ 16) Progress notes for Employee No. 14870 include multiple references to a good attitude and inconsistency in following skills over time. (September 24 Response, Exh. F) The progress notes for Employee No. 50654 include references to four instances of calling out or leaving early within the first eight (8) weeks of employment, initially strong following skills that declined to inconsistency, mastery of chip values within a week, one instance of falling asleep, which appeared intentional, and one notation of poor attitude. (September 24 Response, Exh. F) Other employees have received counseling or discipline for single instances of sleeping on the job. (September 30 Tunstall Affidavit; August 25 Bohr Affidavit, ¶ 16) Mr. Eleazer alleges that a co-worker named Steve regularly slept on the job in view of his supervisors and was not disciplined. (Eleazer Affidavit, ¶ 9) Respondent denies the allegation and denies permitting employees to sleep on the job.¹² (August 26 Response Answer to Eleazer Affidavit, ¶ 9)

Mr. Eleazer also contends he was denied preference for a first shift position in about May. Respondent contends the position was for a fully trained surveillance officer, for which probationary employees were not eligible. (August 25 Bohr Affidavit, ¶ 17; September 24 Bohr Affidavit, ¶ 9) The position was awarded to a fully trained surveillance officer who is the spouse of a Tribal member. (Eleazer Affidavit, ¶ 10; August 25 Bohr Affidavit, ¶ 17; September 24 Bohr Affidavit, ¶ 9) In another instance predating Mr. Eleazer’s hire by several months, an opening in a first shift probationary surveillance officer position provided an opportunity for a preference eligible probationary employee to transfer from third shift to first shift. (Respondent’s October 22 e-mail)

Upon termination, Mr. Eleazer was informed that he would not be eligible for rehire for one (1) year. (Eleazer Affidavit, ¶ 12) According to Respondent, eligibility for re-hire would be expedited if Claimant works with the Career Assessment and Planning (CAP) program. (August 26 Response Answer to Eleazer Affidavit, ¶ 12)

IV. Analysis and Conclusions of Law

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

¹² Mr. Eleazer asserts that Steve was captured on video tape sleeping. (Mr. Eleazer’s October 8 e-mail) In response to the MERO’s request for the video footage, Respondent indicated that the footage is routinely overwritten and does not exist. (Respondent’s October 9 e-mails)

Mr. Eleazer asserts two theories of violation of the Preference Law, the first relating to his employment termination. The Preference Law generally does not protect preference eligible individuals subject to disciplinary terminations. Specifically, Title 33, M.P.T.L. § 4(c) defines employment opportunities as including “non-disciplinary retention.” The Preference Law also provides, however, that eligible employees receive preference in training opportunities. See, Title 33, M.P.T.L., § 4(c) and § 5(a). It is possible, therefore, for a claimant to advance a theory of violation, as Mr. Eleazer has in this case, that if Respondent had not denied him training opportunities required by the Preference Law, he would not have suffered a disciplinary termination.

The second asserted theory of violation is that Mr. Eleazer was denied preference for transfer from the third shift to an opening on the first shift. The Preference Law requires that preference be afforded in shift assignments. See, Title 33, M.P.T.L., § 4(c) and § 5(a).

A. Alleged Denial of Training Opportunities Resulting in Termination

It is undisputed that Mr. Eleazer is a Tribal member in good standing who was hired as a surveillance officer and assigned to the third shift. Also undisputed is that all surveillance officers are required to successfully complete a six (6) month probationary period during which they receive training and their skills and development are regularly evaluated.

Mr. Eleazer was terminated during his probationary period. Respondent alleges that Mr. Eleazer’s termination was due to his performance deficiencies, including his failure to develop substantive skills and comply with Respondent’s policies. Mr. Eleazer asserts that he would not have been disciplined and ultimately terminated if he had been provided preference in training and if two of his supervisors had not denied him training opportunities and targeted him for adverse action.¹³

The Preference Law is intended, in part, to “further the Tribe’s goal to provide opportunities for professional growth and economic empowerment.” Title 33, M.P.T.L. § 2 (c). In support of this goal, eligible individuals who meet the minimum necessary qualifications of a position are required to be provided hiring preference over more qualified individuals. The Preference Law also requires Tribal employers to provide preference in training opportunities to eligible employees. Accordingly, a Tribal employer is required to provide selection preference for existing training opportunities. In this case, regardless of whether the Preference Law was implicated, it is undisputed that Mr. Eleazer was hired for the surveillance officer training opportunity.

An employer’s training obligation under the Preference Law may not be limited to affording preference in admission to an existing training program. Preference eligible individuals, especially those who do not exceed the minimum necessary qualifications for hire or a training program, may require additional

¹³ To the extent Mr. Eleazer alleges that his supervisors discriminatorily targeted him for discipline and discharge because he is a Native American, he does not have a cause of action under Title 33. Mr. Eleazer’s claims with respect to discipline and termination are considered herein only as they relate to the claimed denial of training opportunities.

assistance to be fully successful in a position. In no event may an employer provide preference eligible employees lesser training than non-preference eligible employees, and in many cases, additional training may not be required for the success of the preference eligible employees. Nevertheless, in some cases, an employer is required to provide preference eligible employees more training opportunities than those afforded non-preference eligible employees. For example, when a preference eligible employee is not succeeding and an objective assessment would reasonably conclude that enhanced training may appreciably benefit the employee's ability to achieve the core competencies of the position, the provision of additional training opportunities is generally required. The requirement to provide training opportunities, however, is not limitless; for example, the requirement is not intended to relinquish preference eligible individuals from personal responsibility. An employer also is not required to continue to make training efforts where an employee has demonstrated a lack of capacity for success or additional training would otherwise be futile. Moreover, the Preference Law does not require an employer to abandon enforcing reasonable, non-discriminatory workplace rules and policies. To find otherwise would fail to give meaning to the Preference Law's limitation on protection for terminations to non-disciplinary retention. See, Title 33, M.P.T.L. § 4 (c).

In this case, Mr. Eleazer does not allege that non-preference eligible employees received more training than he received, but that the Preference Law required Respondent to provide him additional training opportunities. Nevertheless, an objective assessment does not lead to a reasonable conclusion that Mr. Eleazer's mastery of the core competencies of the position would have benefited appreciably from additional training. To the contrary, Mr. Eleazer's performance deficiencies involved his failure to fulfill the basic requirements of any employment position. He was required to arrive at work on time, comply with Respondent's break periods, and stay awake on the job, all of which are fundamental to employment. The job specific requirements of mastering following and learning chip values required that Mr. Eleazer practice. The evidence discloses that he was repeatedly encouraged to practice, afforded the time to practice, and offered assistance with practicing, but he nevertheless failed to practice.

Mr. Eleazer's explanations for his non-compliance with Respondent's policies do not affect the analysis. Assuming, without finding, that Mr. Eleazer's need to become acclimated to a third shift schedule excused his tardiness and sleeping on the job initially, it would not account for the multiple instances of tardiness and additional instances of sleeping on the job thereafter. Even assuming, without finding, that falling asleep on the job in June should have been excused due to the drowsy effects of prescription medication, the prescription medication does not account for his lack of effort in June or the performance issues that pre-date his injury. If Mr. Eleazer was told that he had leeway in his break periods, by his own account, his supervisor corrected his understanding as of April 9. The evidence discloses multiple additional extended breaks thereafter.

Mr. Eleazer's assertion that he was denied training opportunities by two of his supervisors, Mike Tetreault and Jolene Bingham, is equally unavailing. To the contrary, the Training Notes reflect that Mr. Tetreault and Ms. Bingham recorded the same types of performance issues with Mr. Eleazer as other supervisors. Mr. Tetreault and Ms. Bingham were both responsible for participating in successfully training multiple surveillance officers, including preference eligible officers. Although none of the successful preference eligible trainees were Tribal members, no evidence was presented of animus toward Tribal members. In

Final Claim Determination Case No. 2009-33002
January 25, 2010
MERO Form-33-1680
(07-09-01)

addition, the one witness who Mr. Eleazer cited as a Tribal member and surveillance officer under the same supervision reported that she did not witness any lesser treatment of Mr. Eleazer and did not believe he was treated unfavorably due to his Tribal membership. Moreover, the notes submitted by Respondent regarding two other probationary employees who were unable to successfully complete the probationary period reflect common training issues between supervisors and trainees.¹⁴

The claim alleges that the Respondent was required to provide training opportunities beyond those afforded Mr. Eleazer to meet the requirements of the Preference Law, but under the circumstances, there is no objective basis from which to find that Respondent should have had a reasonable belief that additional training would have appreciably helped Mr. Eleazer achieve the core competencies of the position. In this regard, the supervisors' observations during Mr. Eleazer's last month of employment are particularly notable, because they reflect a consistent lack of concentrated effort and commitment by Mr. Eleazer to his training and employment. Under these circumstances where Mr. Eleazer failed to make reasonable efforts to succeed in the existing training opportunities, it does not advance the objectives of the Preference Law to expect Respondent to have provided even more training opportunities. Respondent is found to have complied with the Preference Law in the training opportunities afforded Mr. Eleazer.¹⁵

B. Denial of First Shift Position

Shortly prior to Mr. Eleazer's hire, a first shift probationary surveillance officer position became open and was filled by the transfer of a probationary employee from the third shift. In contrast, in about May, a first shift surveillance officer position became open as a result of the departure of a fully trained officer. Respondent sought a fully trained surveillance officer to fill the position, which was awarded to a Tribal spouse who is a fully trained surveillance officer. Respondent was required to afford preference to Tribal members above other preference categories, including Tribal spouses, but no evidence was presented to support a finding that a qualified Tribal member was denied the position.

Respondent is not required to reclassify a position to afford a shift preference opportunity to a preference eligible employee. As a probationary employee who had completed only about one third of his training period, Mr. Eleazer was not qualified for the open position and Respondent was not required to afford preference to Mr. Eleazer for the first shift position available in May.¹⁶

¹⁴ The notes suggest that the Tribal employer provided Mr. Eleazer more opportunities to comply with its standards of conduct and performance than the non-preference eligible trainees.

¹⁵ Based on the conclusion that additional training was not required, the MERO does not reach the question of the relationship between any additional training and the termination. Had the MERO found that the Tribal employer violated the Preference Law by failing to provide additional training, the MERO would have considered whether the Claimant would have continued in employment but for the lack of additional training.

¹⁶ Given Mr. Eleazer's lack of qualifications by virtue of his short tenure in the probationary position, the MERO declines to address Respondent's claim that Mr. Eleazer also was ineligible by virtue of his performance deficiencies.

C. Re-employment

It is undisputed that pursuant to Respondent's policies, employees such as Mr. Eleazer who are terminated for poor performance during their probationary period are not eligible for re-hire for one year. Respondent noted that Mr. Eleazer may be eligible for reinstatement immediately if he participates in a Career Assessment and Planning (CAP) program.¹⁷ Until such time that Mr. Eleazer applies for employment with Respondent, any issue relating to re-employment is not ripe for a claim before the MERO.¹⁸

V. Disposition

Respondent did not violate the Preference Law by its training or termination of Claimant, or its failure to transfer Claimant to a first shift position in about May, therefore the Claim is dismissed.

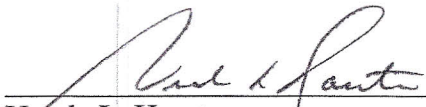
VI. Notice of Publication

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 January, 2010



Ursula L. Haerter
MERO Director

¹⁷ No evidence was presented regarding the structure, function or eligibility criteria of the CAP program.

¹⁸ Accordingly, whether or not Respondent's re-hire policy complies with the Preference Law is beyond the scope of this investigation. Nothing herein precludes Mr. Eleazer from filing a timely claim with the MERO if he is denied consideration for hire or hire.