



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

Table with 2 columns: Case Name, Case Number, Date of Claim Filing, Date of Determination.

On August 17, 2010, the MERO issued a Proposed Claim Determination in the above case. Both parties submitted Requests for Reconsideration.

On September 3, Respondent filed a timely Request for Reconsideration and request for extension of time to present additional evidence and argument in support of its request for reconsideration of several aspects of the decision. Respondent was granted an extension of time through the close of business on September 29. By letter dated September 22, Respondent requested withdrawal of its Request for Reconsideration, which is hereby granted.

Claimant submitted a Request for Reconsideration dated September 7. Claimant received the Proposed Claim Determination and accompanying Notice of Parties Rights to Request Reconsideration and/or Mediation ("Notice") on August 23. The Notice states that the Request for Reconsideration must be submitted to the MERO office within 14 days of Claimant's receipt of the Proposed Claim Determination. Claimant again received notice of the deadline for submission in an e-mail from the MERO on August 23, and in person by the MERO Director on August 30. The 14th day fell on a Tribal holiday when the MERO office was closed, therefore the Request for Reconsideration was required to be submitted no later than September 7. The MERO received Claimant's Request for Reconsideration on September 9. Accordingly, Claimant's Request for Reconsideration is denied, because it was not submitted timely.

1 All dates hereinafter are in Calendar Year 2010 unless specifically indicated otherwise.

2 The merits of Respondent's September 3 submission are therefore not addressed herein.

3 Both the Notice and cover letter address the deadline, including the following in the Notice, "Important Notice: A request for reconsideration and/or mediation must be received by the MERO no later than the 14th day after your receipt of the proposed claim determination." (emphasis in original)

4 The merits of Claimant's Request for Reconsideration are therefore not addressed herein.

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Having fully considered and addressed the parties' requests for reconsideration, the MERO Director issues the following Final Claim Determination:

John Anthony Colebut ("Claimant" or "Mr. Colebut") alleges in his Claim that in about August, 2009, the position opening of Director, Operations in the Food and Beverage Department of Respondent was not publicized in accordance with the Tribal and Native American Preference Law, hereinafter referred to as the "Preference Law," and the failure to properly publicize the position denied him the opportunity to apply for the position. He further alleges that he is a Tribal Member in good standing and met the minimum necessary qualifications for the position.

On about April 6, 2010, Mr. Colebut amended his Claim to also allege that on or about March 30, he was harassed and threatened with discipline or termination in retaliation for filing a claim with the MERO.

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 Preference Law.

I. Positions of the Parties

Mr. Colebut alleges that the position of Director, Operations in the Food and Beverage Department of Respondent⁵ was publicized only during the Tribe's 2009 Healing Break, which he observed, therefore denying Tribal members two days advance notice of the opening and the opportunity to apply for the position in violation of the Preference Law. He further alleges that he is a Tribal member who meets the minimum necessary qualifications of the position, therefore awarding the position to a non-preference eligible individual rather than Mr. Colebut violated the Preference Law. Mr. Colebut asserts that any internal complaint process was ineffective, therefore he was not required to exhaust internal remedies prior to proceeding with a claim at the MERO.

In his amended claim, Mr. Colebut contends that in an effort to avoid the consequences of her own misconduct, a subordinate employee made a complaint against Mr. Colebut. He further contends that Respondent used the subordinate employee's complaint as a pretext to retaliate against Mr. Colebut for filing a MERO claim by harassing and threatening him with discipline and discharge on about March 30, 2010, rather than supporting him as a manager with respect to the subordinate employee.

Respondent denies any violation of the Preference Law and asserts that the Director of Operations position arose as a result of the restructuring of the Food & Beverage Department. The successful candidate had previously been performing substantial duties of the position and filled the position by virtue of natural progression, thereby meeting the requirements of an exception to affording preference. Alternatively, Respondent argues that publicizing a position during Healing Break is not prohibited by

⁵ The Director, Operations Food & Beverage Department position is hereinafter referred to as Director of Operations.

the Preference Law, but in this case the position also was publicized for three (3) days beyond the Healing Break, therefore Mr. Colebut had sufficient time to apply for the position and failed to do so. Further, Respondent argues that even assuming Mr. Colebut had applied for the position, he did not meet the minimum necessary qualifications and therefore would not have been the successful candidate. Respondent notes that Mr. Colebut failed to exhaust his internal remedies, notwithstanding a well-established and longstanding complaint process, but does not allege Mr. Colebut's failure to utilize the process was unreasonable or should result in dismissal of his claim.

With respect to the amended claim, Respondent alleges it conducted a fair investigation based on a subordinate's complaint of harassment by Mr. Colebut. Respondent further contends that in its discipline of Mr. Colebut for "rude and discourteous behavior" it was ultimately lenient in part due to Mr. Colebut's MERO claim.

II. Procedural History

Mr. Colebut submitted a sworn affidavit dated February 2, 2010, with his Claim and a sworn affidavit dated April 6 in support of his Amended Claim. Mr. Colebut provided additional documents and information to the MERO, including during a conference on March 24, and from time to time thereafter. Mr. Colebut also identified several potential witnesses.⁶

Respondent submitted a response dated March 15, which included a Position Statement, Answer to Mr. Colebut's Affidavit, Affidavits of Dale Merrill, Director of Employment and Native American Preference, and Steve Heise, Vice President of Human Resources, and several documents. By correspondence dated April 29, Respondent submitted a response to the Amended Claim, including an Answer to Mr. Colebut's April 6 affidavit, affidavits from Ms. Merrill, Sam Agnello, Manager, Native American Preference and Indian Preference Officer, and George Papathanasiou, Employee Relations Specialist, and additional documents. By correspondence dated April 2, April 30, and May 21, Respondent submitted additional documentation in response to the MERO's March 22 and April 23 requests for information.

III. Findings of Fact

Respondent is the Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino. ("Respondent" or "Foxwoods") (March 15 Response to Claim)⁷ Respondent admits that Mr. Colebut is a Tribal member in good standing within the meaning of Title 33 M.P.T.L.. (March 15 Response to Claim, Answer to Claimant Affidavit, ¶ 1)

⁶ The investigation was extended beyond ninety (90) days after the filing of the Amended Claim to accommodate Claimant's requests that MERO speak with additional witnesses.

⁷ Submissions are generally identified by summary description and 2010 date of document. Although the Claim originally identified Foxwoods Resort Casino as the respondent, Respondent corrected the name of the employer, Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino. (See, March 15 Response to Claim, pg. 1).

A. Healing Break

In 1997, the Mashantucket Pequot Tribal Council introduced a two (2) week Cultural Family Healing and Unity Summer Break (hereinafter "Healing Break") for Tribal Members to address the hardship on Tribal families of the annual Child Development Center shutdown and to provide Tribal families with a more structured time for cultural activities and family healing. (TCR 061797-01 of 08) Beginning in 2000, the Healing Break was authorized by the Tribal Council annually for four (4) weeks. (TCR 030900-03 of 04) In 2009, however, in recognition of economic conditions and the impact of the Healing Break on customer service on the Reservation, the Mashantucket Pequot Healing Break was reduced to a two (2) week period, Friday, July 24 through Sunday, August 9, 2009. (TCR 040909-01 of 08)

Historically, some Tribal Members, including Mr. Colebut, have believed in a full focus during the Healing Break on spiritual healing and the family, and have not engaged in any work related activities. (Claimant February 2 Affidavit, ¶¶ 3, 4) Other Tribal Members have elected to continue all or part of their work related activities during the Healing Break. (March 15 Response to Claim, Answer to Claimant Affidavit, ¶ 3; March 15 Merrill Affidavit, ¶¶ 15, 16)

Respondent admits that at a tribal membership meeting in about September, 2009, Mr. Heise was questioned about the publication of openings during healing break. (March 15 Heise Affidavit, ¶ 6) Mr. Heise responded by inquiring "whether it was expected that employment operations would be suspended during Tribal healing breaks." (Id.)

B. Employment Opportunity Publication and Consideration

Publication of the Director of Operations position was limited to the Tribe and the employer's employees. (March 15 Merrill Affidavit, ¶ 8) Generally, Respondent publicizes employment opportunities to Tribal members for seven (7) calendar days. (April 30 Supplemental Response to Request for Information) After the first two (2) days, the opportunity is publicized to all employees for the remaining five (5) calendar days. (April 30 Supplemental Response to Request for Information) The length of any particular publication may vary depending on the circumstances. (April 2 Merrill Affidavit, ¶ 5)

At the time of the events herein, Respondent publicized employment opportunities to Tribal members by sending an announcement to the Tribe's Communications Manager for posting electronically on the Tribal member web site and in hard copy at various locations. (March 15 Response to Claim, Answer to Claimant Affidavit, ¶ 4; March 15 Merrill Affidavit, ¶¶ 9-10) Respondent also publicized the opportunities to Tribal members by sending the announcement directly to the home e-mail addresses of those Tribal members who voluntarily provided their e-mail addresses. (Id.) Mr. Colebut did not provide his home e-mail address to Respondent. (April 2 Response to Information Request, ¶¶ 3, 6) The publications include summary information about the opportunity, contact information to submit an application and the closing date for submission of applications. (See, e.g., March 15 Response to Claim, Exh. C)

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Respondent accepts applications from Tribal members after the closing date for any given employment opportunity. (April 2 Merrill Affidavit, ¶ 6) Tribal members were informed at various Tribal membership meetings in 2009 that Respondent would be “flexible” in considering applications after the close date of a given opportunity. (April 29 Merrill Affidavit, ¶¶ 3-5) Lists of employment opportunities, including those indicating past closed dates, were distributed at membership meetings. (Id.) Mr. Colebut denies knowledge of Respondent’s practice of accepting applications for employment opportunities after the close dates.

On August 4, 2009, Respondent publicized to Tribal Members the position of Director of Operations in the Food & Beverage Department. (March 15 Response to Claim, Answer to Claimant’s Affidavit, ¶ 4; March 15 Merrill Affidavit, ¶ 11; April 2 Response to Information Request, ¶ 6)⁸ An automated e-mail response from the Communications Manager indicated an alternative contact in his absence, and Respondent forwarded the posting accordingly. (March 15 Response to Claim, Answer to Claimant’s Affidavit, ¶ 6) No evidence was presented of the opportunity being posted to Tribal members through the Tribal member web site or in hard copy. (See, April 2 Response to Information Requests, ¶ 9) Thereafter, on August 6, 2009, Respondent published the Director of Operations and other postings to all employees, including Mr. Colebut, by way of their work e-mails. (March 15 Response to Claim, Answer to Claimant’s Affidavit, ¶ 4; April 2 Response to Information Requests, ¶ 9)⁹ A revised announcement was e-mailed to Foxwoods’ e-mail addresses on August 6, 2009, with a cover e-mail stating “REVISED PAY RATE FOR COOK,” but also extending the closing date from August 9 to August 12, 2009, for all positions within the posting, including Director of Operations. (April 2 Response to Information Requests, ¶ 6)

C. Filling the Position

The position description on the posting describes the Director of Operations position as planning, directing and coordinating “activities of the new food and beverage (Primary) (sic), Asian Operations (Secondary) and the Stewarding Department.” (April 2 Response to Information Requests, Exh. F) As explained by Ms. Merrill, the term “Primary” was used to express the top priority of developing new food and beverage outlets, including seeking and managing third party development relationships, and “Secondary” was used to express the lesser priority of developing and maintaining Asian outlets. (April 2 Merrill Affidavit, ¶ 9) According to Respondent, the Operations Manager position was eliminated and replaced with the Director of Operations position. (March 15 Merrill Affidavit, ¶ 5). Indeed, the position description for Director of Operations generally appears to consist of the position description for Operations Manager with the addition of oversight of the Stewarding Department. (March 15 Response to Claim, Compare Exhs. D and E). Specifically, the functions are described as planning,

⁸ The August 4, 2009, 11:40 a.m. e-mail included the posting for “F&B Administration-Operations Manager.” The title of the position was corrected to “F&B Administration-Director of Operations” and re-issued via e-mail at 3:19 p.m.. (Compare, March 15 Response to Claim, Exhibit C, with April 2 Response, Exhibit F-1)

⁹ Although Mr. Colebut was issued a company Blackberry, Respondent presented no evidence that any e-mails were opened during the period in question. (See, April 2 Response to Information Requests, ¶ 8)

directing and coordinating “activities of new oriental operations and the Stewarding department,” and the essential functions regarding stewarding are described as, “[o]versees and directs the operations of the Stewarding department.” (March 15 Response to Claim, Exh. C) Respondent asserts the purpose of the change was “to obtain cost savings from the consolidation of job responsibilities of Food & Beverage functions with Stewarding.” (April 2, 2010 Response, Answer to Information Request No. 10)

The Director of Operations position description included the following: “Bachelor’s degree in Hotel & Restaurant Management, or Business and five (5) to seven (7) years of related experience or an equivalent combination of education and experience.” (March 15 Response to Claim, Exh. D) Requiring a Bachelor’s degree is consistent with industry standard, but the basis for determining the required years of experience to assure “success” is not explained. (April 1 Petchark Affidavit, ¶¶ 10 and 11)

Oversight of the Stewarding Department was described as “not especially technically complex,” although “management and direction of the approximately 250 additional employees is significant.” (April 1 Petchark Affidavit, ¶ 6) The management and direction of employees, however, lies with the Executive Chief Steward, who “hires, trains, manages, evaluates, develops and directs the staffing of the Stewards Department.” (April 30 Supplement to Response to Request for Information, Executive Chief Steward Job Description dated 8/16/09) The role of the Director of Operations appears to consist of supervising the Executive Chief Steward (See, April 30 Responses)

The supervising position for the Executive Chief Steward has changed periodically. According to a 1999 job description, the Executive Chief Steward was supervised by the Assistant Director of Food Services, a position that was eliminated at an unspecified time. (April 30 Supplement to Response to Request for Information) The Executive Chief Steward’s performance evaluation for the period 2007-2008 was conducted by the Vice President of Food & Beverage.¹⁰ (Id.) The current job description for the Executive Chief Steward indicates that the position reports to the Assistant Executive Chef, but the body of the document references the position reporting to the Director of Operations.¹¹ (Id.) The Director of Operations reports to the Vice President of Food & Beverage. (March 15 Response to Claim, Exh. D)

Chye Chua was awarded the Director of Operations position on August 16, 2009. (April 2 Response to Information Request, ¶ 18) Mr. Chua is not a Tribal Member. (Claimant February 2 Affidavit, ¶ 7) Mr. Chua had previously held the position of Operations Manager since September, 2001. (March 15

¹⁰ Supervision or management of the Executive Chief Steward was not included in the job description for the Vice President of Food & Beverage at that time. (April 30 Supplement to Response to Request for Information) Neither the 2008-2009 Executive Chief Steward performance evaluation nor the identity of the author was submitted.

¹¹ No explanation is provided regarding the respective roles of the Assistant Executive Chef and the Director of Operations with respect to the Stewarding Department as reflected on the job description or the reporting relationship, if any, between the Assistant Executive Chef and the Director of Operations.

Response to Claim, Exh. F) Mr. Chua holds a Bachelor of Science degree in Hotel-Restaurant/Institutional Management and a Master of Business Administration degree in International Business, both from Johnson & Wales University.¹² (March 15 Response to Claim, Answer to Claimant's Affidavit, ¶ 7) Mr. Chua's employment history reflects above average performance, with no notable discipline. (*In camera* review of personnel records)

Since about February, 2009, Mr. Colebut has been employed by Respondent as a Restaurant Manager. (March 15 Response to Claim, Answer to Claimant Affidavit, ¶ 2) Between about 1998 and 2005, Mr. Colebut completed an extensive training program relating to Food & Beverage Director positions through the Tribe's Career Development Association.¹³ (Id.; April 2 Response) He subsequently held the position of Director of Off Site Catering until the department was eliminated. (Id.) According to Respondent, restaurant supervisory experience may constitute "related experience...but banquet and/or catering experience likely would not." (April 2 Response to Information Request, ¶ 12) Respondent does not articulate the required skill sets for the positions or provide a foundation for its conclusion. (See, generally, April 2 Response to Information Request) Mr. Colebut completed most of the course work toward an Associate's Degree at Johnson & Wales. (April 2 Response to Information Request, Exh. B-5)

The August 15, 2009, announcement entitled "Resort Operations Restructuring" includes Mr. Chua's position change, which states, "Chye started his career in the Food & Beverage Department in December 1995 and now has additional responsibilities of Stewarding and coordination across the food & beverage areas." (April 2 Response to Information Request, Exh. G) Two additional positions assumed by existing employees at the same time are addressed in the memo, which frames the changes as "staff members...taking on more responsibilities..." (Id.) No increase in compensation was associated with Mr. Chua's receipt of Director of Operations position. (March 15 Response to Claim, Exh. F) The Operations Manager position was eliminated after Mr. Chua assumed the Director of Operations position. (March 15 Response to Claim, Answer to Claimant's Affidavit, ¶ 7)

D. Events After the Position was Filled

After realizing the posting period had passed and/or that the position had been filled by an employee who is not preference eligible, Mr. Colebut did not make a complaint to the Tribal and Native American Preference Officer or otherwise until filing his Claim with the MERO on February 1, 2010. (See, Claimant's February 2 Affidavit ¶ 6) Respondent asserts a well established, long standing internal complaint process. (March 15 Response to Claim, Answer to Claimant's Affidavit ¶ 6) Mr. Colebut alleges no complaint process was made available by Respondent. (Claimant's February 2 Affidavit, ¶ 6)

¹² Mr. Chua's degrees were awarded in 1995 and 1997. (Degree certificates included in personnel file documents subject to MERO *in camera* inspection)

¹³ Although Mr. Colebut contends he held certain positions during this period which were not in a training capacity, the documents submitted by Respondent show no break in the training except for several months in 2002 when Mr. Colebut was terminated for unsatisfactory performance, then rehired.

It is undisputed that on about March 30, Mr. Colebut was called to a meeting to discuss an issue involving a female subordinate. (Claimant April 6 Affidavit in Support of Amended Claim, ¶ 2; April 29 Response to Amended Claim, ¶ 2) The meeting was called by George Papathanasiou, an Employee Relations Specialist for about one and one half years. (April 29 Papathanasiou Affidavit ¶ 3) Mr. Colebut believed the purpose of the meeting was to discuss the subordinate's misconduct but Mr. Papathanasiou was investigating the subordinate's March 2 complaint against Mr. Colebut. (Id.; April 29 Response to Amended Claim, ¶ 3) Sam Agnello, Respondent's Indian Preference Officer, participated via telephone. (Claimant April 6 Affidavit in Support of Amended Claim, ¶ 2; April 29 Response, ¶ 2)

According to Mr. Papathanasiou, the complaint alleges, in part, that Mr. Colebut's "treatment of [the employee] was rude and discourteous," but no such characterization appears in the complaint advanced under Respondent's Sexual and Other Harassment Policy. (Compare April 29 Papathanasiou Affidavit, ¶ 5 with April 29 Response, Exhs. D and E) During the meeting, Mr. Colebut purportedly "admitted to the majority of the allegations," which are represented in the March 31 report by five (5) detailed bulleted entries.¹⁴ (April 29 Response, ¶ 2, Exh. C; April 29 Papathanasiou Affidavit ¶ 7; April 30 Agnello Affidavit, ¶ 6) The report, however, reflects that Mr. Colebut made the following limited admissions: asking the subordinate to submit a physician's note, asking other management and subordinate employees to check on the subordinate in the bathroom, but not to tell her to hurry up or that she was taking too long; and speaking to the subordinate several times about performance issues. (April 29 Response, Exh. C)

Both Respondent's answer to the claim and Mr. Agnello's affidavit indicate the purpose of the meeting was limited to the female subordinate's March complaint. (April 29 Response, ¶ 3; April 30 Agnello Affidavit, ¶ 5) Nonetheless, during the meeting Mr. Colebut was questioned about an incident involving a male subordinate based on a complaint that had been submitted almost three (3) months earlier, on about January 7. (April 29 Papathanasiou Affidavit, ¶ 9; April 30 Agnello Affidavit, ¶ 7; April 29 Response, Exh. C) Respondent's submission does not address who initiated the inquiry or who questioned Mr. Colebut regarding the earlier incident.

Mr. Colebut asserts that Mr. Papathanasiou indicated Mr. Colebut would be disciplined and suggested he resign. (Claimant April 6 Affidavit in Support of Amended Claim, ¶ 2) Mr. Papathanasiou's denies these allegations. (April 29 Papathanasiou Affidavit, ¶ 10) Mr. Agnello's affidavit provides no account specifically addressing the claim. (See, April 30 Agnello Affidavit)

It is undisputed that the March 30 meeting included discussion of Mr. Colebut's prior discipline. (April 29 Papathanasiou Affidavit, ¶ 10; April 30 Agnello Affidavit, ¶ 8; April 29 Response, Exh. C) Respondent did not answer Mr. Colebut's allegation that Mr. Papathanasiou referenced a 2008

¹⁴ The allegations as represented in the report extend beyond the allegations in the written complaint without any explanation as to the basis for the expanded claims. (Compare, April 29 Response, Exhs. C and D)

disciplinary action that Mr. Colebut asserted should have been removed from his file. (Claimant April 6 Affidavit in Support of Amended Claim, ¶ 2) In his report, however, Mr. Papathanasiou references the rescission of a 2008 disciplinary action “due to the dates in question do not match up correctly.” (April 29 Response, Exh. C) Mr. Colebut was presented with prior discipline that he had not previously seen, specifically a May, 2009, warning for “rude and discourteous behavior.”¹⁵ (Claimant April 6 Affidavit in Support of Amended Claim, ¶ 2)

During the meeting, the fact of Mr. Colebut’s pending MERO claim was discussed. (April 30 Agnello Affidavit, ¶ 11) The discussion occurred as the meeting was “concluding.” (April 29 Papathanasiou Affidavit, ¶ 13) Mr. Agnello knew about the pending MERO claim at the time of the meeting. (April 30 Agnello Affidavit, ¶ 10) Mr. Colebut asserts that Mr. Agnello denied knowledge of the claim when confronted in the meeting. (Claimant April 6 Affidavit in Support of Amended Claim, ¶ 4) By Mr. Agnello’s account, when asked during the meeting if he knew about Mr. Colebut’s MERO claim, Mr. Agnello responded to the effect, “To the extent you filed a claim, I am not involved in responding to it....” (April 30 Agnello Affidavit, ¶ 11) Mr. Papathanasiou’s affidavit contains no account of the exchange. (April 29 Papathanasiou Affidavit)

After the meeting, Mr. Colebut contacted Ms. Merrill and asked her to become involved. (Claimant’s Affidavit in Support of Amended Claim, ¶ 4) Ms. Merrill agreed and reviewed the investigation. (Merrill April 29 Affidavit, ¶¶ 5 & 6) Although suspension was recommended, Ms. Merrill reduced the discipline to a second written warning. (April 29 Merrill Affidavit, ¶ 7) The reduction was “based, in part, on the fact of Mr. Colebut’s pending MERO claim so as not to cloud the issues raised thereby.”¹⁶ (April 29 Merrill Affidavit, ¶ 8) The report concludes that the Food & Beverage Department wished to assess a second written warning to Mr. Colebut for “rude and discourteous behavior.” (April 29 Response, Exh. C)

Neither the report nor any of the other documents submitted by Respondent specify Mr. Colebut’s conduct that was determined to be “rude and discourteous” or find the conduct in violation of the non-harassment policy under which the claim was advanced. (See, Respondent’s April 29 Response) The documents also do not indicate what policy or policies were purportedly violated by Mr. Colebut or the substance of the Development Plan. (Id.) Furthermore, although Mr. Agnello and Ms. Merrill were to make certain Mr. Colebut was treated “fairly and in accordance with policy,” there is no indication as to the standards of fairness applied or any applicable employer policy. (See, April 30 Agnello Affidavit, ¶ 5; April 29 Merrill Affidavit, ¶ 6)

IV. Analysis and Conclusions of Law

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

¹⁵ Respondent failed to offer a specific response to Mr. Colebut’s allegation. (See, April 29 Response and Exhibits) Failure to respond constitutes an admission.

¹⁶ The other reason(s) for the reduction in discipline are not provided.

A. Filling the Director of Operations Position

a. Preference Exception

In this case, the position of Director of Operations was newly created as part of certain changes in resort operations and the position of Operations Manager was eliminated after Mr. Chua vacated the position. Respondent asserts that introduction of the Director of Operations position constitutes a “restructuring,” combining the responsibilities of the Operations Manager and oversight of the Stewarding Department, while eliminating the position of Operations Manager.

The Preference Law provides an exception to affording preference in promotional opportunities in the context of a “restructuring or reorganization.” Title 33, M.P.T.L. ch. 1, § 5(c). This preference exception in promotion is limited by definition, requiring all of the following elements:

- (1) a restructuring or reorganization;
- (2) an opening that would not have existed but for the restructuring or reorganization;
- (3) the opening being filled through the natural progression of an existing employee; and
- (4) the employee filling the opening having performed substantial duties of the position previously.

See, Title 33, ch. 1, M.P.T.L. § 5(c).

Respondent persuasively argues that a restructuring need not necessarily involve large scale changes to the structure of a business. Conversely, the law’s provision of preference in promotions would have little meaning if every addition of responsibilities or provision of a higher level title equated to a restructuring that would permit an employer to invoke the exception to affording preference. For purposes of this analysis, a redesign of one or more aspects of an employer’s operations for the purpose of deriving a benefit for the employer’s business could constitute a restructuring. Nevertheless, even under such an expansive definition, Respondent has failed to demonstrate that a restructuring occurred in this case.

According to the Director of Operations position description, the position melds the Operations Manager position with oversight of the Stewarding Department. Respondent’s submissions indicate that oversight of the Stewarding Department consists of supervising the Executive Chief Steward. Respondent appears unable to identify the position charged with supervision of the Executive Chief Steward just prior to the Director of Operations assuming oversight. Both the Vice President of Food & Beverage and the Assistant Director of Food Services were identified as prior supervising positions. Respondent argues that this history suggests that oversight of the Stewarding Department “was not well established” until it was vested in the Director of Operations position.¹⁷

¹⁷ Respondent’s defense relies on position descriptions and other documents, as well as affidavits from select personnel, but no employees of the food and beverage department, including Mr. Chua or the Executive Chief Steward, were presented as witnesses.

Contrary to Respondent's assertion, the evidence does not support a finding that oversight of the stewarding function became clearly established under the Director of Operations. The Director of Operations position description details the operations manager functions but provides no details of the parameters of the stewarding oversight function. The position description dated August 16, 2009, for Executive Chief Steward includes the position reporting to the Assistant Executive Chef. The same job description also places the Executive Chief Steward under the supervision of the Director of Operations. Taken together, the two position descriptions are far from clear in establishing the role of the Director of Operations with respect to stewarding.

Respondent's argument that the oversight of the Stewarding Department had not been settled previously also is not consistent with its factually unsupported reason for the purported restructuring, namely, cost savings associated with consolidation of job responsibilities. Previously, the Executive Chief Steward was supervised by the Assistant Executive Chef or the Vice President of Food & Beverage. The proposition that cost savings would result from moving the supervisory responsibility to a newly created director level position has not been established.¹⁸

Finally, although Respondent asserted an exception to providing preference that would have obviated the need to publicize the opening, it nevertheless chose to publicize the opening. Respondent's actions are more consistent with a belief that it was required to comply with the Preference Law publication and selection requirements than a belief that it was permitted to invoke an exception under the law.

Taken as a whole, the evidence submitted is insufficient to support a conclusion that the changes in the Food & Beverage Department at issue herein constituted a restructuring or reorganization.¹⁹ Accordingly, analysis of Respondent's compliance with the Preference Law publication and hire requirements in filling the position is considered.

b. Publication Requirements

Mr. Colebut alleges the publication of the position failed to meet the Preference Law requirements because the posting purportedly occurred only during the Healing Break. The excerpt of Mr. Heise's conversation at a Tribal member meeting discloses confusion as to the implications of an observance such as the Tribal Healing Break with respect to filling employment opportunities.

The Preference Law does not require an employer to publicize a position for any specific period of time, but it does require a Tribal employer to provide two days advance notice of the employment opportunity to Tribal members and their spouses. (33 M.P.T.L. ch. 1, § 5(d)) Respondent generally publicizes positions to Tribal members for seven (7) days, and after the first two days opens the

¹⁸ Although Mr. Chua did not receive a wage increase associated with the higher level title immediately, by classifying the new position at the higher director level, Respondent replaced a lower pay range position with a higher pay range position.

¹⁹ The failure to establish the first element of the test obviates the need to analyze the remaining elements.

publication to the general public for the remaining five (5) days, but in this case, Respondent initially publicized the open position to Tribal members on August 4, 2009, with a closing date of August 9, 2009, just five (5) days later.²⁰ Two days after initial publication to Tribal Members, Respondent publicized the open position to all employees and also extended the closing date to August 12, 2009.

Healing Break appears to have been introduced, in part, to afford Tribal members and their families a designated period to reconnect with the Mashantucket Pequot culture. It is distinguishable from other types of leave periods, such as vacations or sick leave, in that it has a fundamental basis in Tribal culture. The parameters of Healing Break have been revised periodically by Tribal Council, reflecting an effort to balance the objectives of strengthening cultural connections with the realities of the Tribe's economic well-being. For example, in 2009, Tribal Council reduced the Healing Break period from four (4) to two (2) weeks.

Tribal employers are required to provide cultural opportunities if they do not result in hardship on the employer. Generally, accommodation of a cultural opportunity leave does not require an employer to adjust its regular process of publicizing open positions. The 2009 Healing Break, however, provided a single designated leave period for all Tribal members. Respondent concedes that some Tribal members observed Healing Break. Under these circumstances, a cultural opportunity may include the opportunity for Tribal members to strictly observe the designated Healing Break, without being required to sacrifice employment opportunities that would be made available to them otherwise. The position opening in this case was not the result of the departure of an employee or unanticipated circumstances, but rather the result of a planned decision to make certain departmental changes, therefore it was foreseeable. No evidence was presented to support a conclusion that Respondent did not have control over the timing of the publication, required an expedited process or otherwise experienced circumstances that might implicate a hardship defense. Accordingly, Respondent was not barred from publicizing the opportunity during the Healing Break, but to the extent it chose to do so, it was required to provide Tribal members with two (2) days advance notice prior to the start of the Healing Break.

Respondent's assertions that it nevertheless met its obligations under the Preference Law because the position opening was extended beyond the Healing Break and applications were accepted from Tribal members after the close of the position posting are unpersuasive.²¹ The law requires advance notice to Tribal Members. Moreover, even assuming Respondent were able to demonstrate that publication after the Healing Break met the requirements of the Law, Respondent provided inadequate notice to Tribal

²⁰ Respondent's advance publication to Tribal members occurred both through direct e-mail communication with those Tribal members who voluntarily provided their home e-mail addresses and through provision of the postings to the Tribe's Communications Manager for further distribution, with re-provision to an alternative tribal government office based on the Tribal Communications Manager's automated e-mail response. The publication efforts undertaken by Respondent to notify Tribal members satisfy the requirements of the Preference Law if the publication were otherwise in compliance with the law.

²¹ The Preference Law does not require Respondent to continue to accept applications from preference eligible individuals after it closes the acceptance of applications generally.

members of the additional opportunities to be considered for the open position after the Healing Break. Specifically, although the posting deadline was extended to include three (3) days after the end of Healing Break, the notice that included the extension was prominently labeled “REVISED PAY RATE FOR COOK,” providing no indication that the deadline for submitting applications for any of the open positions had been extended. Additionally, informing Tribal members that Respondent would be “flexible” in the acceptance of their applications does not provide sufficient specificity and conveying the information at various membership meetings that may or may not have been attended by any given Tribal members does not constitute effective conveyance of the message.

c. Minimum Necessary Qualifications

Mr. Colebut would have applied if the Director of Operations position had been publicized consistent with Preference Law requirements.²² The MERO is not aware of any other preference eligible individuals who assert that they were not afforded the opportunity to apply and would have applied for the position if the opportunity had been afforded.

The parameters of the Director of Operations position are not clear and the evidence submitted by Respondent is internally inconsistent. On one hand, the job posting provides that the primary duties of the position would be the planning, directing and coordinating of new food and beverage outlets. The duties include seeking and managing third party development relationships. On the other hand, the position description addresses only “new oriental operations,” terminology taken directly from the former Operations Manager description and which, at most, addresses what the posting claimed to be the secondary focus of the position. The position description does not address what the posting characterizes as the primary functions of the position. Considering the inconsistencies between the postings and position descriptions, including with respect to the oversight of the Stewarding department, addressed above, Respondent’s submissions lead to the conclusion that the Director of Operations position description is unreliable and does not accurately reflect the responsibilities of the position. The accuracy of the underlying Operations Manager position description is similarly drawn into question. No evidence was presented of the actual work performed by Mr. Chua in either capacity.

Absent an accurate description of the Director of Operations position and/or articulation of the skills necessary to perform the position, it is not possible to determine the minimum necessary qualifications of the Director of Operations position. Even assuming, however, the accuracy of the education and experience requirements as set forth on the position description, Respondent failed to substantiate its claim the Mr. Colebut did not have the “equivalent combination of education and experience required.” Although Mr. Colebut did not possess a Bachelor’s degree, he successfully completed extensive training through the Tribe’s educational programs that could be considered to enhance his formal education and experiential credentials. The training was designed to prepare Mr. Colebut to hold a director level position in food and beverage. He has subsequently spent years working for Respondent,

²² Although Mr. Colebut’s assertion that he would have applied for the position is questionable given that he waited over five (5) months to make any complaint, Respondent’s failure to publicize the opportunity in accordance with the Preference Law results in an adverse inference against Respondent that Claimant would have applied if given the opportunity.

including in a Director capacity. Respondent's assertions that Mr. Colebut lacked relevant experience are unsubstantiated. Considering the evidence in its entirety, Respondent has failed to establish the minimum necessary qualifications of the position or that Mr. Colebut did not possess the minimum necessary qualifications for the Director of Operations position.

B. Retaliation Claim

The Preference Law does not contain an express provision prohibiting retaliation against an individual for availing himself of the protections of the law. Nevertheless, Tribal Council explicitly set forth its intent in enacting the law "[t]o further the Tribe's goal to provide opportunities for professional growth and economic empowerment of its Tribal Members and Native Americans,...to provide...guidance on these issues, the administrative structure to regulate this area, and a forum to address any issues that may arise concerning compliance with this Law." 33 M.P.T.L. § 2(c) Considering the law in its entirety and in the context of the laws of the Mashantucket Pequot Tribal Nation overall, Tribal Council's intent to establish broad preference protections for Tribal Members and Native Americans on the Reservation, whether employed by the Tribe or non-Tribal employers, is undeniable. To construe Tribal Council's silence in the law as denying a cause of action for retaliation would not be consistent with the explicit and implicit protections afforded by the law or fully effectuate the purposes of the law. In a similar context, the U.S. Supreme Court has inferred anti-retaliation provisions in laws providing broad bans on discrimination. (See, *Gomez-Perez v. Potter*, No. 06-1321, 553 U.S. __ (May 27, 2008) and *CBOCS West, Inc. v. Humphries*, No. 06-1431, 553 U.S. __ (May 27, 2008), and cases cited therein) Accordingly, the Preference Law is read to include an anti-retaliation component.

Mr. Colebut asserts that his interview by Employee Relations on March 30, 2010, included harassment and threat of discipline or discharge in retaliation for his filing a MERO claim. Respondent asserts that the interview was proper, fair, non-retaliatory, and in accordance with Respondent's policies as assessed by both Mr. Agnello and Ms. Merrill. In order to prevail in a claim of retaliation, the evidence must show that (1) the claimant engaged in some known protected activity, (2) the claimant suffered an adverse employment action and (3) a causal connection exists between the protected activity and the adverse action. Respondent can nevertheless defeat the claim if it demonstrates that the adverse action would have been taken notwithstanding any retaliation.

As of the investigative meeting, Mr. Colebut had a claim pending at MERO for about two months, so there is no doubt that Respondent knew of the claim. Respondent conceded that prior to the meeting Mr. Agnello and Ms. Merrill had knowledge of Mr. Colebut's claim.²³ The investigatory interview related to the female subordinate's claim, however, was initiated by Mr. Papathanasiou. The investigation of a subordinate's recently submitted claim of harassment in and of itself does not constitute retaliation. Furthermore, until such time during the meeting that Mr. Papathanasiou gained knowledge of the pending MERO claim, his independent actions could not have constituted retaliation.

²³ When Mr. Colebut suspected his MERO claim was related to the investigatory interview and inquired of Mr. Agnello about his knowledge of the claim, Mr. Agnello provided such an unusually qualified response that it comes as no surprise Mr. Colebut believed that Mr. Agnello was denying knowledge of his MERO claim when he was actually aware of the claim.

At the start of the meeting Mr. Colebut and Mr. Papathanasiou held different views of what would be addressed regarding a female subordinate of Mr. Colebut. Mr. Colebut believed he was receiving assistance in dealing with the subordinate's misconduct while Mr. Papathanasiou was investigating a claim of harassment made by the female subordinate against Mr. Colebut earlier in the month. What was clearly understood by all present was that the subject matter related to the female subordinate.

The conduct of the investigation was far from the fair and proper approach Respondent asserts, but the evidence does not support a finding that all aspects were retaliatory. Mr. Colebut was told that the investigation would result in discipline and resignation was suggested as an option. Although Mr. Papathanasiou denied making such statements, his version is not corroborated by Mr. Agnello and Mr. Colebut's account is credited. The threat of adverse action was compounded by the presentation of inflated disciplinary records. Specifically, review of Mr. Colebut's personnel records included presentation of a disciplinary action that should have been removed from his file.²⁴ In addition, Mr. Colebut's file included another disciplinary action for "rude and discourteous" behavior he had never previously seen. Nevertheless, no nexus is found between the past inflated disciplinary record or the threat of discipline and the pending MERO claim.

Other aspects of the investigatory interview, however, go beyond unfairness. Although the reason for the investigatory interview was the complaint of the female subordinate, a significant aspect of the interview consisted of Mr. Colebut being questioned about the incident three months earlier involving a male subordinate. The earlier incident occurred prior to Mr. Colebut filing his MERO claim, but Respondent failed to investigate the incident until after Mr. Colebut filed a claim with MERO.²⁵ Ultimately, almost one half of the investigative report that purportedly supported the disciplinary action was devoted to a factual recitation of the untimely investigation of the claim of the subordinate male employee, without any specific findings, conclusions, or explanation as to the implications for discipline. The last minute injection of this second stale claim into the investigation and the significance attributed to it is not consistent with waiting three months to investigate the matter, absent another motive, namely retaliation for Mr. Colebut pursuing a MERO claim.

The summary report of Mr. Papathanasiou's investigation, written after Mr. Papathanasiou had knowledge of Mr. Colebut's pending MERO claim, does not adequately support the proposed disciplinary action against Mr. Colebut. The report does not, as Respondent asserts, reflect that the female subordinate's allegations were "largely admitted" by Mr. Colebut. Rather, the report reflects three admissions that, in isolation and as characterized in the report, would not necessarily result in a finding of wrongdoing. To the extent Mr. Papathanasiou based some or all of his conclusions on credibility resolutions against Mr. Colebut, such credibility resolutions are not reflected in the report.

²⁴ The fact that the disciplinary action was subsequently removed from Mr. Colebut's file did not ameliorate Respondent's threat of discipline, especially given the lack of evidence that Mr. Colebut was informed that the disciplinary action had been removed.

²⁵ Even assuming inquiry into the earlier claim occurred prior to Mr. Papathanasiou's knowledge of the pending MERO claim, the evidence does not support a finding that it was initiated independently by Mr. Papathanasiou.

To the extent the allegations differ from Mr. Colebut's account, the report gives no indication of any additional witness interviews or document review to corroborate either account. To the contrary, the report was issued just one day after the interview of Mr. Colebut. The report concludes that Mr. Colebut engaged in misconduct without (1) drawing conclusions of fact in support of the misconduct, (2) identifying the purported misconduct, (3) citing employer policies violated or (4) identifying the basis for the level of discipline assessed. Some of the report's deficiencies may not have constituted retaliation. A number of factors, however, point to retaliation, including the issuance of the report one day after Mr. Colebut's interview and Mr. Papathanasiou learning of the MERO claim, without additional investigation, and the report's reliance on the earlier claim by the male subordinate to support the disciplinary action.

For reasons that were not articulated, suspension of Mr. Colebut as a result of the investigation was originally contemplated. After the meeting, Mr. Colebut immediately contacted Ms. Merrill and asked her to get involved. Upon Ms. Merrill's review of the investigation and conclusions, a recommendation was made to reduce the suspension to a second written warning, in part because of Mr. Colebut's MERO claim. The reduction of the discipline because of Mr. Colebut's MERO claim suggests a concern that the investigation and resulting discipline were, indeed, related to the MERO claim.

Considering the totality of the evidence, aspects of Respondent's investigative interview and the contemplated discipline constitute retaliatory harassment against Mr. Colebut for his filing and pursuit of a claim against Respondent at MERO. Respondent may still establish a defense, however, if the evidence demonstrates that the disciplinary action would have been taken notwithstanding the retaliation. For this reason, consideration must be given to Respondent's legitimate concern about Mr. Colebut's handling of personnel matters. Mr. Colebut has handled certain personnel matters in a manner that is not consistent with best practices or with protecting the employer's interests. Considering his many years of training and experience, as well as his current managerial position, Mr. Colebut would be expected to exhibit stronger personnel skills. Ms. Merrill's reduction of the proposed discipline from a suspension to a written warning effectively and appropriately reflects Respondent's legitimate business need to hold its managers accountable for failing to exercise appropriate judgment in personnel matters. Accordingly, Respondent violated the Preference Law in its retaliatory handling of the investigation, but did not violate the law in assessing Mr. Colebut a written warning.

In addition, Mr. Colebut's mishandling of personnel matters supports the need for additional managerial training. If the male subordinate's claim had been addressed timely and properly with Mr. Colebut, perhaps Mr. Colebut would have sought appropriate assistance from the human resource department to better address personnel issues thereafter. As a manager, Mr. Colebut must understand and accept that the human resource department is a resource to assist him with personnel issues to minimize potential legal liability exposure for the employer and understand when human resources should be invited to assist him with personnel issues.

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The Preference Law has previously been found to require an employer to provide additional training to preference eligible individuals in order to permit them to become fully successful in their positions. (See, RPI-33-1001, February 19, 2010) If Mr. Colebut does not master the handling of personnel matters in a manner that minimizes potential liability for the employer, at a minimum his professional development will be limited. If Mr. Colebut repeatedly mishandles personnel issues, his employment may be in jeopardy. For these reasons, and in the absence of evidence of training initiatives to address Mr. Colebut's handling of personnel issues that post-date the events herein, additional managerial training for Mr. Colebut is warranted.

C. Exhaustion of Internal Remedies

It is undisputed that Mr. Colebut did not file any internal claims relating to his allegations of non-compliance with the Preference Law prior to filing a claim with the MERO. The Preference Law specifically provides for claimants to file an internal complaint prior to proceeding at the MERO. Title 33, ch. 1, M.P.T.L. § 9(a). The law further provides that the Tribe maintain the position of Tribal and Native American (IP) Officer. A claimant's unreasonable failure to utilize an effective internal complaint process may be asserted as a defense to a claim.

Although Mr. Colebut asserted that Respondent did not offer a complaint process, when he believed he had suffered retaliation, he immediately called Ms. Merrill and asked her to intervene. Ms. Merrill's intervention was effective, resulting in Mr. Colebut's discipline being reduced. Mr. Colebut therefore demonstrated familiarity with the internal complaint mechanism.

Respondent has not asserted that Mr. Colebut's failure to utilize the complaint process rises to the level of an unreasonable failure warranting dismissal of the Claim. Under the circumstances of this case, the MERO finds it would not effectuate the purposes of the Preference Law to dismiss Mr. Colebut's Claim based on his failure to pursue an internal complaint prior to proceeding to the MERO. Nevertheless, Mr. Colebut's failure to avail himself of Respondent's complaint process denied Respondent the opportunity to resolve the issue prior to the position being filled or Mr. Colebut filing a MERO claim. Mr. Colebut's failure to utilize the available complaint process has been considered in determining an appropriate remedy in this case.

V. Disposition

Respondent was not in compliance with Title 33, M.P.T.L., the Mashantucket Pequot Tribal and Native American Preference Law in the following respects:

- By failing to properly publicize the open position of Director of Operations to permit preference eligible individuals, including Mr. Colebut, the opportunity to apply;
- By failing to appropriately consider whether Mr. Colebut met the minimum necessary qualifications for the position of Director of Operations;
- By harassing Mr. Colebut in retaliation for his filing and pursuit of a claim with MERO in the manner in which it conducted the investigation of subordinates' complaints.

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Mr. Colebut was not in compliance with the Preference Law when he failed to make an internal complaint about Respondent's selection for the Director of Operations position before proceeding to MERO. As a result, Respondent was not afforded the opportunity to timely address and attempt to resolve any issues. In the future, failure to make an internal complaint prior to proceeding at the MERO may result in dismissal of the claim.

Respondent is ordered to cease and desist from non-compliance with the Preference Law and to post or otherwise publicize open employment positions in a manner consistent with the requirements of the law. Respondent is ordered to pay Mr. Colebut the differential between the rate of pay for the Director of Operations and Mr. Colebut's rate of pay for a one (1) year period from the filling of the position in August, 2009. Furthermore, until such time as Mr. Colebut is awarded a director level position, if any food and beverage director or equivalent positions become available for which Mr. Colebut applies and meets the minimum necessary qualifications, he must be afforded preference over all other candidates, including other Tribal Members. Finally, Respondent is ordered to provide Mr. Colebut with additional managerial training within six (6) months of this order, at Respondent's cost, with particular focus on addressing personnel issues, and submit to MERO evidence of the training provided Mr. Colebut.²⁶

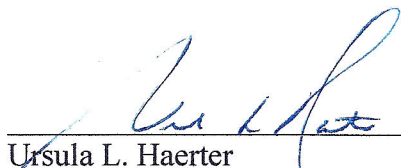
VI. Notice of Publication

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 6th day of October, 2010



Ursula L. Haerter
MERO Director

²⁶ To the extent additional training has been provided Mr. Colebut subsequent to the events at issue but prior to the issuance of this order, MERO will consider whether such training meets the requirements of MERO's order should Respondent submit proof of the training.