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: Shayna Sebastian v. Big Night Entertainment Group		**Case Number:** 2011-33010
Date of Claim Filing: February 16, 2011		**Date of Determination:** July 14, 2011

On June 6, 2011, 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:

Shayna Sebastian ("Claimant") alleges in her Claim that she is a member of a federally recognized Native American Tribe and was denied preference in hire on about January 28, 2011, by Big Night Entertainment Group.[1] 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 Tribal and Native American Preference Law, hereinafter referred to as the "Preference Law."

I. Positions of the Parties

Claimant alleges that she is a member of the federally recognized Mashantucket Pequot Tribal Nation who completed the application process for a cocktail server position with Big Night Entertainment Group ("BNEG" or "Respondent") on the Mashantucket Pequot Tribal Reservation ("Reservation") and was not hired in violation of the Tribe's Preference Law.

Respondent denies any violation of the Preference Law and asserts that Claimant was considered for hire but did not meet the minimum necessary qualifications of the cocktail server position. Specifically, Respondent alleges Claimant did not meet its experience requirement and did not pass either the written or mock exam portions of the application process.

II. Procedural History

Claimant submitted a sworn affidavit dated February 16 with her Claim and provided additional information at an April 8 meeting with the MERO Director. Respondent submitted an undated response received March 21, which included an Answer to Claimant's Affidavit and several documents. In response to the MERO's requests for information, Respondent submitted additional information by

[1] All dates hereinafter are in Calendar Year 2011 unless otherwise indicated.

Mashantucket Employment Rights Office, 2 Matt's Path / P.O. Box 3060, Mashantucket, CT 06338-3060
Phone: (860) 396-6508 Facsimile: (860) 396-6511 Email: uhaerter@mptn-nsn.gov Website: www.mptnlaw.org

e-mails dated April 8 and May 13, with attachments. Christine Roane, Director of Human Resources for BNEG, also provided information at a meeting with the MERO Director on April 28, 2011.

III. Findings of Fact

Respondent is the Big Night Entertainment Group, which operates Shrine Asian Kitchen, Lounge and Nightclub at MGM Grand Foxwoods Resort Casino, The Scorpion Bar Tequila Cantina at Foxwoods Resort Casino and High Rollers Luxury Lounge and Lanes at Foxwoods Resort Casino on the Mashantucket Pequot Tribal Reservation. (Claimant February 16 Affidavit, ¶ 1; March 21 Response, Answer to Claimant Affidavit, ¶ 1)[2] Respondent admits that Claimant is a member of the Mashantucket Pequot Tribe, a federally recognized Native American tribe. (March 21 Response, Answer to Claimant Affidavit, ¶ 1)

BNEG held a job fair at Shrine on January 19 during which approximately 77 applicants applied for bartender or cocktail server positions. (March 21 Response, Answer to Claimant Affidavit, ¶¶ 1 and 3; April 8 Response) Applicants first completed an employment application, then a written exam specific to the position sought. (April 28 Interview of Roane) A manager would conduct a preliminary review of the applicant's exam, and, if it appeared sufficient, would afford the applicant an opportunity to perform a mock service test. (April 28 Interview of Roane) Only about 10% of the applicants were permitted to take the mock service test. (April 8 Response, Answer to Information Request No. 5 and accompanying documents; April 28 Interview of Roane) An even smaller percentage of the job fair applicants were made offers of employment, including only two bartender applicants and no cocktail server applicants. (April 8 Response, Answer to Information Request No. 5 and accompanying documents; April 28 Interview of Roane)

At the job fair, Claimant completed an application form.[3] (March 21 Response, Answer to Claimant Affidavit, ¶ 4) Ms. Roane was familiar with Claimant and aware that she is a Tribal member as well as being friendly with the owners of BNEG. (April 28 Interview of Roane) In addition, Claimant indicated her preference status in response to a request for self-reporting that appeared on the application form. (March 21 Response, Claimant Application) Although her application indicates interest in both the bartender and cocktail server positions, Claimant subsequently indicated her preference for consideration for the cocktail server position. (Claimant February 16 Affidavit, ¶ 4) Of the applicants who applied for the cocktail server position, only four (4) were granted the opportunity to perform the mock service, one of whom was Claimant. (April 8 Response, Answer to Information Request No. 5)

The position of cocktail server at Shrine required "one year experience working in a high volume atmosphere in an establishment that has a full food and beverage menu." (April 8 Response, Position

---

[2] Each of Respondent's submissions is generally referred to herein as "Response" and identified by date of receipt, with specific documents referenced where appropriate by date and summary description.

[3] Pursuant to the job fair announcement, Claimant had sent an e-mail seeking a specific appointment time around the start of the job fair, but did not receive Ms. Roane's affirmative response until she was on the way to the job fair. (Claimant February 16 Affidavit, ¶ 2; March 21 Response, Answer to Claimant Affidavit, ¶ 3).

Mashantucket Employment Rights Office, 2 Matt's Path / P.O. Box 3060, Mashantucket, CT 06338-3060
Phone: (860) 396-6508 Facsimile: (860) 396-6511 Email: uhaerter@mptn-nsn.gov Website: www.mptnlaw.org

Description) Claimant's application reflected about 1.5 years experience at Taco Bell/Kentucky Fried Chicken. (March 21 Response, Claimant Application) She also worked as a waitress during one summer at a chowder house, Iggy's, and during a second summer at a seafood restaurant, Finbacks, for a combined total of about nine (9) months. (Claimant February 16 Affidavit, ¶ 4; April 8 Interview of Claimant) The completed applications of the three other cocktail server applicants who were granted a mock service exam reflected relevant experience levels of at least a year, ranging from about 14 months to almost six years. (April 8 Response, Applications of S. Love, N. Scelza and S. Peterson).

After submission of her application, Claimant took the cocktail server exam. Respondent asserts, "The minimum score required is 75%." (March 21 Response, Answer to Claimant Affidavit, ¶ 4) Generally, the exam results were not necessarily reviewed with "precision" to generate a score. (April 28 Interview of Roane) Ms. Roane explained that exam results may be subject to closer scrutiny if the applicant is under consideration for an offer of employment. (April 28 Interview of Roane) According to Respondent, Claimant "incorrectly answered 8 of the 20 questions asked giving her a score of 60%."[4] (March 21 Response, Answer to Claimant Affidavit, ¶ 4) An answer was considered incorrect if any subpart of a question was answered incorrectly. (April 28 Interview of Roane) The exam completed by Claimant, however, actually contains 16 questions, many of which are multi-part questions, with numbers 1-8 on the first page and numbers 14-21 on the second page. (See, March 21 Response, Claimant Cocktail Server exam) Two of the other applicants who were granted a mock service interview completed the same 16 question exam.[5] (April 8 Response, Cocktail Server exams of S. Love and N. Scelza).

Commonalities existed in the applicants' exam errors, with three or four of the applicants responding incorrectly to at least one aspect of the questions regarding champagne, garnishes, marking a table, the side(s) from which to serve and clear, and identifying liquor types based on brand names. (Compare, March 21 Response, Claimant Cocktail Server exam with April 8 Response, Cocktail Server exams of S. Love, N. Scelza and S. Peterson) Calculating Claimant's score based on a total of 16 questions yields a score of 50%. Applying the same response expectation standards utilized in grading Claimant's exam to the other exams yields scores of about 69% for each of the three other candidates who were granted mock service interviews.[6]

After completing the cocktail server exam, Claimant was interviewed by Jason Nichols, during which she confirmed the application information that she was currently employed on the Reservation and was

---

[4] The manager who interviewed Claimant graded her exam, but Ms. Roane subsequently added the score. (April 28 Interview of Roane)

[5] An incomplete cocktail server exam was submitted for the fourth applicant who was invited to perform a mock service. (April 8 Response, Cocktail Server exam of S. Peterson). Respondent agreed to provide the second page of the exam, but it was not received by the MERO.

[6] The fourth applicant also completed the server exam, which contained the same or similar questions, allowing for comparison with the others for marking purposes. (April 8 Response, Cocktail Server and Server exams of S. Peterson).

Mashantucket Employment Rights Office, 2 Matt's Path / P.O. Box 3060, Mashantucket, CT 06338-3060
Phone: (860) 396-6508 Facsimile: (860) 396-6511 Email: uhaerter@mptn-nsn.gov Website: www.mptnlaw.org

considering the BNEG employment opportunity in addition to her existing position.[7] (Claimant February 16 Affidavit, ¶ 4). During the interview, Claimant informed Mr. Nichols that she had completed bartending school. (Claimant February 16 Affidavit, ¶ 4). She also recalled discussing relevant restaurant experience that did not appear on her application. (Claimant February 16 Affidavit, ¶ 4) Specifically, Claimant indicated that she worked from about April, 2000 to about September, 2000 at Finbacks and from about April 2001 to about August 2001 at Iggy's. (April 8 Interview of Claimant) Respondent contends it had no knowledge of any relevant experience not reflected on the application. (March 21 Response, Answer to Claimant Affidavit, ¶ 4)

Claimant was scheduled to perform a mock service on Friday, January 21. (March 21 Response, Answer to Claimant Affidavit, ¶ 4) Claimant alleges she was informed that the mock service was for purposes of determining the amount of training she would require. (Claimant February 16 Affidavit, ¶ 4) Respondent contends the mock service was for purposes of determining employment eligibility, specifically to assess "level of experience and knowledge and to observe guest interaction." (March 21 Response, Answer to Claimant Affidavit, ¶ 4) Applicants were evaluated with respect to "correctly taking and ordering a customers (sic) order, performing steps of service, ability to carry a tray of drinks, [and] drink knowledge." (March 21 Response, Answer to Claimant Affidavit, ¶ 6)

After each mock service, the managers discussed the applicant's performance and decided whether to make an employment offer. (April 8 Response, Answer to Information Request No. 3) The managers who acted as guests for Claimant's mock service, Jason Nichols, Director of Operations, Frank Pontoriero, Director of Nightlife for Shrine and Scorpion, Michael Gannon, High Rollers Manager, and Tim Macy, Manager for Shrine and High Rollers, observed six (6) errors by Claimant. (March 21 Response, Answer to Claimant Affidavit, ¶ 6; April 8 Response, Answer to Information Request No. 3) Specifically, the managers recalled that Claimant did not ask necessary questions when taking drink orders, did not call drinks correctly to the bartender, spilled drinks on the tray during delivery, failed to provide guests with beverage napkins, placed the drink tray on the table and did not acknowledge a new guest when he joined the table. (April 8 Response, Answer to Information Request No. 3) Claimant concedes only one error, placing the tray on the table, and denies the remainder. (April 8 Interview of Claimant)

According to Respondent, at the culmination of her mock service, Claimant was told that she would be contacted if she was being offered a position. (March 21 Response, Answer to Claimant Affidavit, ¶ 6) Claimant contends there was no condition placed on the representation that she would be contacted. (Claimant February 16 Affidavit, ¶ 6) Not having heard anything from Respondent, Claimant e-mailed Ms. Roane on Friday, January 28, thanking her for the consideration and inquiring about call backs. (Claimant February 16 Affidavit, ¶ 7) After the weekend, she sent another follow-up e-mail. Claimant February 16 Affidavit, ¶ 8) In both instances, Ms. Roane, who was on vacation at the time, opened the

---

[7] At BNEG's request, Claimant's supervisor subsequently confirmed that Claimant was not restricted from securing secondary employment on the Reservation. (March 21 Response, Answer to Claimant Affidavit, ¶ 4; January 19 e-mail from Craig Francis to Jason Nichols submitted with Claim)

Mashantucket Employment Rights Office, 2 Matt's Path / P.O. Box 3060, Mashantucket, CT 06338-3060
Phone: (860) 396-6508 Facsimile: (860) 396-6511 Email: uhaerter@mptn-nsn.gov Website: www.mptnlaw.org

e-mails but did not respond. (Claimant February 16 Affidavit, ¶¶ 7 and 8; March 21 Response, Answer to Claimant Affidavit, ¶¶ 7 and 8)

Respondent did not hire any of the four (4) cocktail server applicants who applied during the job fair and were granted mock service interviews.[8] (April 8 Response, Answer to Information Request No. 5)

IV. Analysis and Conclusions of Law

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

Claimant is a member of the federally recognized Mashantucket Pequot Tribal Nation. At the time of the events at issue herein, she was employed on the Reservation, therefore Claimant is found to live on or near the Mashantucket Pequot Tribal Reservation. Claimant submitted an application for an open position of cocktail server with Respondent, a non-Tribal employer operating several establishments on the Reservation.

When the employer is not the Tribe, the Preference Law requires that preference be provided in employment opportunities on the Reservation to members of federally recognized Tribes who live on or near a Reservation and meet the minimum necessary qualifications. 33 M.P.T.L. § 5(a) Employment opportunities generally include consideration for hire and hire for an open position. 33 M.P.T.L. § 4(c)

There is insufficient evidence from which to conclude that BNEG's consideration of Claimant for employment was not in compliance with the Preference Law. To the contrary, BNEG's advertisements for positions on the Reservation provide that preference is afforded Native Americans and its employment application affords applicants the opportunity to self-report Native American status. Respondent maintained an application process in which only about 10% of the applicants were afforded the opportunity to perform a mock service test. Notwithstanding Claimant's understanding otherwise, Respondent's records demonstrate that the mock service test was a component of the applicant evaluation process, with employment offers extended only to a fraction of those provided the opportunity to perform a mock service. Claimant, who was known to Respondent not only as a Tribal member, but also as being friendly with the owners, was one of only four cocktail server applicants given the opportunity to fully complete the application process, including the mock service.

While Respondent would have been seeking the best qualified candidates from among the three other applicants who performed the mock service, its obligation with respect to Claimant was to hire her if she met the minimum necessary qualifications of the cocktail server position. Respondent contends that Claimant did not meet any of the three criteria comprising the minimum necessary qualifications for a

---

[8] Claimant asserts that another preference eligible applicant, a Tribal Spouse, interviewed during the job fair and was hired as a bartender notwithstanding limited experience. (February 16 Affidavit, ¶ 9; April 8 Interview of Claimant) The account was not corroborated. Although a Tribal Spouse applied for a bartending position, she was not awarded the position. (See, April 8 Response, Answer to Information Request Nos. 4 and 5 and Application of S. McKeon). According to Ms. Roane, resumes or applications of prior applicants are not revisited, noting that she receives 50-100 unsolicited resumes a week. (April 28 Interview of Roane)

Mashantucket Employment Rights Office, 2 Matt's Path / P.O. Box 3060, Mashantucket, CT 06338-3060
Phone: (860) 396-6508 Facsimile: (860) 396-6511 Email: uhaerter@mptn-nsn.gov Website: www.mptnlaw.org

cocktail server position, namely she did not have at least one year of prior experience in a high volume food and beverage establishment, she did not receive a score of at least 75% on the written cocktail server exam, and she did not successfully complete the mock service test.

With respect to the first criteria, Claimant was unable to demonstrate the prior work experience sought by Respondent. Respondent required one year of prior work experience in a "high volume atmosphere in an establishment that has a full food and beverage menu." Neither Taco Bell nor Kentucky Fried Chicken, which were listed on Claimant's application as prior work experience, has a full food and beverage menu. Resolution of the parties differing accounts with respect to Respondent's knowledge of Claimant's work experience at Iggy's and Finback's is unnecessary. Even assuming, without finding, that working in each of these establishments met Respondent's standards of a "high volume atmosphere [with] a full food and beverage menu," the cumulative total of Claimant's experience at these establishments was less than the one year minimum experience required. In contrast, the other three applicants who were granted the opportunity to complete the mock service test all met the minimum type and degree of prior experience Respondent required.

Claimant also did not score well on the written exam, but neither did the other three cocktail server candidates who were granted mock service opportunities. All four applicants appeared to perform at a level below the 75% Respondent asserts constituted a minimum score, with Claimant's performance lower than the other three applicants who were permitted to continue in the process. Respondent's process consists of managers conducting a cursory review of an exam in assessing whether an applicant receives the mock service opportunity, with closer examination occurring only if the applicant meets or exceeds the other hiring criteria and an employment offer is considered. Respondent did not articulate the reasons for its decisions not to hire each of the four applicants who were afforded mock service opportunities, so the strictness of its adherence to the 75% minimum score is unclear; however, even assuming a less than stringent adherence, notably Claimant's exam score was well below 75% and lower than the other three candidates.

According to Respondent, Claimant also performed poorly on the mock service. The four managers who evaluated Claimant's mock service found multiple errors. Claimant, however, asserts she made only one error, placing the drink tray on the table. The evidence does not disclose any discrimination or ill will by any of the four managers toward Claimant or Native Americans, therefore their judgment regarding Claimant's performance is deserving of some deference. Moreover, even by Claimant's account, her mock service was not error free; therefore, her performance on the mock service admittedly could not have been so stellar that it may have compensated for her lack of relevant work experience and low score on the written exam.

Under the circumstance of this case, the evidence is insufficient to demonstrate that Claimant met the minimum necessary qualifications for the cocktail server position as of her application in January, 2011. Claimant's prior experience did not meet the requirement set forth in the position description and her performance on both the written and mock service exams was below Respondent's standards.

Mashantucket Employment Rights Office, 2 Matt's Path / P.O. Box 3060, Mashantucket, CT 06338-3060
Phone: (860) 396-6508 Facsimile: (860) 396-6511 Email: uhaerter@mptn-nsn.gov Website: www.mptnlaw.org

In further support of her claim, Claimant points to several communication issues, specifically, Ms. Roane's failure to respond to Claimant's request for a scheduled application time until she was on the way to the job fair, Respondent's failure to contact her after the mock service as she believed one of the manager's had represented, and Ms. Roane's failure to respond to Claimant's follow-up e-mails after the mock service exam. There is no indication that any of these communication issues affected Respondent's consideration of Claimant for hire or its determination with respect to Claimant's application. Any failure on the part of Respondent to have communicated as alleged by Claimant, in and of itself, does not constitute a violation of the Tribal and Native American Preference Law.

V. Disposition

Respondent did not violate the Preference Law in considering Claimant for employment and declining to hire Claimant for the open position of cocktail server on about January 28, 2011, or in any failure to communicate with Claimant as alleged. Accordingly, 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 14th day of July, 2011

Ursula L. Haerter
MERO Director

Mashantucket Employment Rights Office, 2 Matt's Path / P.O. Box 3060, Mashantucket, CT 06338-3060
Phone: (860) 396-6508 Facsimile: (860) 396-6511 Email: uhaerter@mptn-nsn.gov Website: www.mptnlaw.org

MERO

MASHANTUCKET EMPLOYMENT RIGHTS OFFICE

Notice of Parties' Appeal Rights

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

Case Name:
Shayna Sebastian v. Big Night Entertainment Group

Case Number:
2011-33010

Date of Mailing of Final Claim Determination:
July 14, 2011

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

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

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

Notice to the MERO: A copy of any appeal filed in Tribal Court must be forwarded to the MERO Director.

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

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

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

Mashantucket Employment Rights Office, 2 Matt's Path / P.O. Box 3060, Mashantucket, CT 06338-3060
Phone: (860) 396-6508 Facsimile: (860) 396-6511 Email: uhaerter@mptn-nsn.gov