



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**

| | |
|--|--|
| Case Name: Charlene Jones v. Mashantucket Pequot Tribal Nation | Case Number: 2011-33012 |
| Date of Claim Filing: July 7, 2011 | Date of Determination: March 2, 2012 |

On December 2, 2011, the MERO issued a Proposed Claim Determination in the above case.¹ By correspondence dated December 16, 2011, Claimant filed a timely Request for Reconsideration on the grounds that the MERO erred in the following respects: (1) finding insufficient evidence of a policy or law requiring hire of the most qualified applicant, (2) failing to find that the position posting did not reflect the requirements of the Director position and (3) failing to apply in its analysis the purported Tribal policy or law requiring hire of the most qualified applicant.

The MERO granted the request for reconsideration and afforded both parties ample and repeated opportunities to submit additional evidence and argument. The MERO issued Requests for Information to both Claimant and Respondent. Respondent produced a witness on January 10, 2012, and both parties provided additional submissions on January 13, 2012. Claimant submitted a sur-reply dated January 23, 2012. Thereafter, Claimant submitted a Motion to Consider Newly Discovered Evidence dated February 13, 2012.² Having considered all the information, evidence and argument before the MERO, and as more fully articulated below, the MERO Director issues this Final Claim Determination.

Charlene Jones (“Claimant”) alleges in her Claim, filed on July 7, 2011, that she is a qualified Tribal member who was denied consideration for hire and hire in about mid- March and early June, 2011, by the Mashantucket Pequot Tribal Nation (“MPTN” or “Respondent”) in violation of Title 33 M.P.T.L., the Tribal and Native American Preference Law (“Preference Law”).³

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

² Claimant’s Motion is hereby granted and consideration is given herein to Claimant’s submission dated February 13, 2012.

³ Claimant filed her Claim prior to the enactment of amendments to Title 33 M.P.T.L. on January 26, 2012. No retroactive amendments are implicated in this case. Accordingly, any references, citations or excerpts of Title 33, M.P.T.L. herein pre-date the January 26, 2012, amendments unless otherwise indicated.

Claimant alleges that the position of Director of Utilities⁴ was impermissibly awarded to a Tribal Member who does not meet the minimum necessary qualifications of the position or is less qualified than Claimant. Additionally, she alleges that the position of Assistant Director, Utilities (also referred to herein as “Assistant Director”) was impermissibly awarded to a non-native on about June 7. She further alleges that on about March 13, 2011, the Respondent failed to provide Tribal Members with advance notice of the Utilities Department position openings, and otherwise excluded qualified Tribal Members by establishing qualifications not necessary to the Director or Assistant Director positions. The above-referenced claim has been investigated pursuant to Title 31 M.P.T.L., the Mashantucket Employment Rights Law, and the Preference Law.

I. Positions of the Parties

Claimant, a member of the Mashantucket Pequot Tribe, alleges that after she submitted an application and was interviewed for the position of Director, Utility and Waste Water Management, on about April 15 she was informed that the position had been awarded to another Tribal member. Claimant argues that Respondent was required to hire the most qualified candidate, and her qualifications for the Director position exceeded those of the successful candidate. Alternatively, Claimant contests the determination that the successful Tribal member met the minimum necessary qualifications of the position and asserts that she is qualified for the position. Moreover, she alleges the minimum necessary qualifications on the revised position description included a “technical knowledge” requirement contrary to the direction of Tribal Council and were lowered with the purpose of favoring another Tribal member over Claimant.

With respect to the Assistant Director position, Claimant asserts she was qualified but not afforded an opportunity to interview for the position, which was impermissibly filled on about June 7 with an individual who is not a Tribal member.

With respect to both positions, Claimant contends that Respondent impermissibly excluded Tribal Member applicants by establishing qualifications that exceeded the qualifications required by other employers or necessary for the positions. She further contends the position opening for Director based on the revised job description and the position opening for the Assistant Director were never posted, thereby excluding Tribal member applicants. Finally, she alleges with respect to her candidacy for the positions that insufficient weight was afforded her experience as a member of Tribal Council and improper consideration was afforded her tardiness to her interview.

Claimant seeks an order that both the Director and Assistant Director positions be re-posted and awarded to the most qualified Tribal Member applicants who meet minimum necessary

⁴ Comparison of the position descriptions submitted by Claimant and Respondent reveals that the initial position was titled, Director, Utility-Water, and the subsequent position was titled, Director, Utility and Waste Water Management. (hereinafter, either position is also referred to as “Director”)

qualifications, or alternatively that she be awarded the Director position. She also seeks attorney's fees.

Respondent denies any violation of the Preference Law. Regarding the position postings, Respondent contends full compliance with the Preference Law posting obligations. With respect to filling the Director position, Respondent asserts that both Claimant and the successful candidate met the minimum necessary qualifications of the position of Director, Utility and Waste Water Management. Respondent asserts that the Preference Law does not require Respondent to select the more qualified candidate, although Respondent believes it selected the stronger of the two candidates. Regarding filling the Assistant Director position, Respondent denies the position was awarded on about June 7, explains that the notice of award was in error and asserts that the posting was rescinded due to an erroneous position description, therefore Claimant's claims are moot. Respondent urges dismissal of the claim in its entirety.

II. Procedural History

Claimant submitted a sworn affidavit dated July 7 with her Claim. She provided additional information during the course of the investigation, including a substantial rebuttal dated September 19 to the Respondent's response. The Claimant's submissions included witness affidavits of Patrick Bernardo, former Director of Utilities; Robert J. Birmingham, whose most recent position with MPTN during a span of over 30 years was from 2008 to 2010 as Executive Director of Community Development and Property Management; Bruce Kirchner, who has held various positions over more than 35 years, including serving on Tribal Council from 1974-1989 and serving on the Utility Authority Board from 2001 to present; Rich Morse, a 17 year employee of the Tribe who has worked at the Water Treatment Plant since 1998; and Paula Jett, a manager at Pequot Health Care.

Respondent submitted a response dated August 24, which included a Position Statement, Answer to Claimant's Affidavit, Affidavit of Alice Munyan, Executive Director of Tribal Government Administration, Affidavit of Sam Agnello, Senior Recruiter, Human Resources Employment Division, Affidavit of Dale Merrill, Executive Director of Talent Management and Culture, Affidavit of Cynthia Torraca, Director of Native American Preference and Government Human Resources, and several documents. In response to the MERO's requests for information, Respondent submitted responses dated September 1 and 8. By correspondence dated October 5, Respondent submitted a sur-rebuttal, including an affidavit from Stan Harris, Director, Utility and Wastewater Management.

Final Claim Determination Case No. 2011-33012
March 2, 2012
MERO Form-33-1680
(07-09-01)

III. Findings of Fact

Respondent is the Mashantucket Pequot Tribal Nation. (August 24 Response)⁵ Respondent admits that Claimant is a Tribal member in good standing within the meaning of Title 33 M.P.T.L.. (August 24 Response, Answer to Claimant Affidavit, ¶ 1)

A. Hiring Policies

According to Claimant, “Tribal policy dictates that the most qualified candidate be selected for any open position.” (July 7 Claimant affidavit, ¶ 19(d)) Review of Tribal personnel policies and procedures disclosed no policy requiring the hiring of the most qualified candidate.

Respondent denies the existence of a policy or practice requiring the hiring of the most qualified candidate, whether formal or informal.⁶ (January 10, 2012 Merrill Affidavit, ¶ 2) According to Respondent, it seeks candidates who are the best fit, which does not necessarily equate to those who are the most qualified. (January 10, 2012 Merrill Affidavit, ¶ 2) “Factors that may be considered in determining the best fit for a leadership position include not only the individual’s skill sets and credentials, but also the individual’s understanding of the organization’s dynamics and culture and how well the individual’s personality will meld with existing employees.” (January 10, 2012 Merrill Affidavit, ¶ 2)

B. Director, Utility and Waste Water Management Position

On about November 19, 2010, the position of Director, Utility-Water was posted by MPTN to Tribal members. (August 24 Response, Answer to Claimant Affidavit, ¶ 5; Exh. B)⁷ Claimant

⁵ 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. Claimant’s affidavit is referred to herein as “July 7 Claimant Affidavit;” the documents submitted by Claimant with her claim are referred to herein as “Claimant’s documents;” Claimant’s rebuttal to Respondent’s response is referred to herein as “September 19 Rebuttal;” and Claimant’s additional submissions are referred to herein as “Claimant’s Submission” and identified by date. The parties’ witness affidavits are referenced by exhibit number, if applicable, surname of affiant and paragraph number, if applicable; except the 2012 affidavit of Dale Merrill is referred to as “January 10, 2012 Merrill Affidavit,” followed by applicable paragraph number.

⁶ Initially, Respondent did not specifically deny the existence of a policy in its answer. Generally, the MERO will consider the failure to specifically deny an allegation to constitute an admission. *Compliance and Claims Procedures Manual for the Mashantucket Pequot Tribal and Native American Preference Law*, § 3.3.1, pg. 3, Rev. 07-24-09. Here, however, Respondent offered an explanatory response to the allegation with a general denial and provided a specific denial in its October 5 sur-reply. After the MERO granted reconsideration, Respondent’s denial was also confirmed in Ms. Merrill’s affidavit.

⁷ Claimant submitted substantial documentation in conjunction with her claim, including the position description for the Director position that was available November 24, 2010, which is consistent with the position posting submitted by Respondent. The position description associated with the Director position at that time was approved by Robert Birmingham on August 18, 2010. (See, Claimant’s documents) According to Mr. Birmingham,

was one of eight (8) Tribal Members who applied for the position. (August 24 Response, Answer to Claimant Affidavit, ¶ 5; Exh. C, Agnello Affidavit, ¶ 7) On December 20, 2010, Ms. Merrill requested an updated resume from Claimant that would demonstrate the ten (10) years of experience in utilities administration required by the position in the absence of a bachelor's degree. (August 24 Response, Answer to Claimant Affidavit, ¶ 5; Exh. D, Merrill Affidavit ¶¶ 9-10; Exh. E) Ms. Merrill did not provide a submission deadline. (Id.) Claimant responded on December 26, 2010, that she would submit an updated resume within the "next couple of days." (August 24 Response, Exh. E)) Not having received anything further from Claimant, Ms. Merrill followed up by e-mail on January 3. (August 24 Response, Exh. E) With no response from Claimant, Ms. Merrill followed up on January 4, indicating that Claimant would not be considered for the posting because she had not established that she met the minimum necessary qualifications. (August 24 Response, Answer to Claimant Affidavit, ¶ 5; Exh. D, Merrill Affidavit, ¶ 11; Exh. F) Three days later, Claimant requested reconsideration. (August 24 Response, Exh. F) Respondent denies Claimant's allegation that she believed she was invited to submit an updated resume. (August 24 Response, Answer to Claimant Affidavit, ¶ 5)

The Director of Utilities position was not filled as a result of the November 19, 2010 posting. (August 24 Response, Answer to Claimant Affidavit, ¶ 5; Exh. C, Agnello Affidavit, ¶ 8) None of the Tribal Member applicants met the minimum necessary qualifications of the position. (August 24 Response, Exh. A, Munyan Affidavit, ¶ 4; Exh. C, Agnello Affidavit, ¶ 8; Exh. D, Merrill Affidavit, ¶ 12) In about January, in accordance with its effort to make additional higher level positions available to Tribal Members, Tribal Council directed that changes be implemented to make the director position available to Tribal members. (Merrill January 10, 2012, Affidavit, ¶ 3; August 24 Response, Exh. A, Munyan Affidavit, ¶¶ 6-7; Exh. D, Merrill Affidavit ¶¶ 13-15; Exh. G) In response to Tribal Council's directive, a restructuring was developed that included revision of the Director position description and re-titling the position Director, Utility and Waste Water Management.⁸ (August 24 Response, Exh. A, Munyan Affidavit, ¶¶ 8 and 9) In February, Ms. Munyan and Ms. Merrill advanced via e-mail a proposal to Tribal Council to restructure the Utilities Department, which included as an attachment the revised Director position description. (August 24 Response, Exh. A, Munyan Affidavit, ¶¶ 6-7; Exh. D, Merrill Affidavit ¶¶ 13-15; Exh. G) The proposal states:

Amend the current role and responsibilities of the Director of Utilities and add an Assistant Director to manage Utilities Operations. The new Director will have general oversight of the Utilities department including Waste Water. The incumbent will focus on management and administration. The incumbent must have Utilities and Waste Water knowledge, but will not be required to hold the certifications. The change in

Claimant was "directly involved in staffing decisions and in the organization of the Utilities Department" and "was the final word on personnel matters" at the time. (September 19 Rebuttal, Exh. B, Birmingham Affidavit, ¶¶ 9-10)

⁸ Respondent's characterization of the proposal as a "restructuring" is accepted by the MERO for convenience and does not constitute a finding of a restructuring for purposes of Title 33, M.P.T.L..

responsibility and subsequently the job description will create an opportunity for a Tribal member. The position will be re-titled to Director, Utility and Waste Water Management. The added position, Assistant Director of Utility Operations, will report to the Director and will be required to have excellent technical expertise and experience as well as hold required licenses/certifications and handle the day to day operations. The Assistant Director, Waste Water Operations will have similar responsibilities and requirements for the Waste Water division.
(August 24 Response, Exh. G)

Thereafter, on March 2, Ms. Munyan and Ms. Merrill appeared before Tribal Council. (January 10, 2012 Merrill Affidavit, ¶ 7; Claimant's February 13, 2012 Submission, Excerpt for March 2, 2011 Special Tribal Council Meeting)⁹ Between February 10 and March 2, members of Tribal Council made no requests for changes to the Director position or position description. (January 10, 2012 Merrill Affidavit, ¶ 7) Due to the anticipated retirement of an employee from one of the positions, the excerpts of the March 2 meeting disclose some frustration among Tribal Council that the restructuring had not yet been completed. (Claimant's February 13, 2012 Submission, Excerpt for March 2, 2011 Special Tribal Council Meeting) Consistent with the sentiment to move forward, "Ms. Merrill asked if there were any apprehensions regarding the Proposed Restructure of Utilities and none were voiced. Ms. Merrill stated then she could post the positions – the two new ones –The Director and the new one (Assistant Director)" (Claimant's February 13, 2012 Submission, Excerpt for March 2, 2011 Special Tribal Council Meeting; January 10, 2012 Merrill Affidavit, ¶ 7) The resulting action items included Ms. Merrill posting the positions. (January 13, 2012 Response, Exh. 4; Claimant's February 13, 2012 Submission, Excerpt for March 2, 2011 Special Tribal Council Meeting)

The original position posted in November, 2010, included the requirements of a bachelor's degree "and/or a minimum of 10 years of progressively responsible experience in utilities administration, management and operations."¹⁰ (August 24 Response, Exh. B and documents submitted by Claimant) The revised job description lowered these requirements, providing "Bachelor's degree...preferred; and/or a minimum of 5-7 years of progressively responsible experience in utilities administration, management and operations." (August 24 Response, Exh. R) The original position description included the following language that was omitted from the revised description: "State of Connecticut Class I Water Treatment Certification and Water Distribution Class I Certification required within one year of employment. State of Connecticut Class IV Water Treatment certification must be obtained within four years of date of hire. Other certifications commensurable with system requirements." (Compare, August 24 Response, Exhs.

⁹ The Claimant's attorney represented to the MERO that the excerpts are Claimant's notes because a transcript was not available to Claimant.

¹⁰ Claimant alleges that in February, a second and different position description was posted, which is denied by Respondent. (July 7 Claimant Affidavit, ¶ 6; August 24 Response, Answer to Claimant Affidavit, ¶ 6; Exh. C, Agnello Affidavit, ¶ 8) The record evidence does not support a finding of a February posting.

B and R) An aspect of the original position description that was retained was the requirement of “[T]echnical knowledge of utility operations.” (Compare, August 24 Response, Exhs. B and R)

Respondent posted the revised Director position opening in about March, 2011, with advance distribution to Tribal members. (August 24 Response, Answer to Claimant Affidavit, ¶ 7; Exhs. L, Q and R; Exh. A, Munyan Affidavit, ¶11; Exh. C, Agnello Affidavit, ¶8)¹¹ Mr. Agnello was instructed by e-mail dated March 2 to contact the Tribal Members who had applied for the prior Director, Utilities position and afford them the opportunity to be considered for the new Director, Utility and Waste Water Management position. (August 24 Response, Answer to Claimant Affidavit, Exhibit H; Exh. C, Agnello Affidavit, ¶ 11) It is undisputed that Mr. Agnello met with Claimant on March 4, at which time Claimant was advised of both Director and Assistant Director openings and indicated interest in both. (July 7 Claimant Affidavit, ¶ 7; August 24 Response, Answer to Claimant Affidavit, ¶ 7)

Three Tribal Members, including Claimant, applied for the Director, Utility and Waste Water Management position. (August 24 Response, Answer to Claimant Affidavit, ¶ 7, Exh. C, Agnello Affidavit, ¶ 16) Mr. Agnello found that all three “appeared to meet the minimum necessary qualifications of the Director position.” (August 24 Response, Exh. C, Agnello Affidavit, ¶ 17) Respondent did not articulate what it considered to be the minimum necessary qualifications of the position or what Mr. Agnello relied upon in making his qualification determinations. (See, August 24 Response, Answer to Claimant Affidavit and Exh. C, Agnello Affidavit).

The Tribal member applicants were scheduled for consecutive one hour interviews on April 14, with one half hour between each interview for applicant assessment. (August 24 Response, Munyan Affidavit, ¶ 13) Claimant was scheduled to be interviewed first. (August 24 Response, Munyan Affidavit, ¶ 15) The interview committee consisted of six (6) members, namely, Jackson King, General Counsel, Michael Whitty, Executive Director of Engineering/Projects, Keith Gove, currently Executive Director of Public Works, Community Planning and Property Management, Ed Marolda, Executive Director of Finance, Alice Munyan, Executive Director of Tribal Government Administration, and Steven Colebut, Executive Assistant to Tribal Council. (August 24 Response, Answer to Claimant Affidavit, ¶ 8; October 5 Response, fn. 1, pg. 3). Ms. Jones, who at that time held the position of Account Services Supervisor at Pequot Health Center, was approximately one half hour late due to a work meeting. (Claimant’s July 7 Affidavit, ¶ 9; Claimant’s September 19 rebuttal, Exh. E, Jett Affidavit; Exh. H) She attempted to reach Ms. Munyan in advance of the interview to report her lateness. (Id.; August 24 Response, Munyan Affidavit ¶¶ 15-16) Ms. Jones’s tardiness negatively affected the

¹¹ Respondent’s Exhibit R appears to be the same document as the position description submitted by Claimant as the one she received at her interview on April 14. (Compare August 24 Response, Exh. R with July 7 Claimant Affidavit, ¶ 6 and Claimant’s documents) Respondent denies Claimant’s assertion that Tribal members were not provided the posting associated with this job description. (August 24 Response, Answer to Claimant Affidavit, ¶ 19(a))

committee's assessment of her candidacy for the position. (August 24 Response, Munyan Affidavit ¶ 22)

After the three (3) interviews, the committee assessed Ms. Jones as a "close second" to their preferred Tribal member candidate, Mr. Stan Harris III, who was offered the position, which he accepted. (August 24 Response, Answer to Claimant Affidavit, ¶ 11; Munyan Affidavit ¶¶ 23 and 24) During the investigation, both parties submitted evidence of the qualifications of Claimant and Mr. Harris relative to the position.

C. Assistant Director, Utilities

At the time of the initial posting of the Director position in November, 2010, the Assistant Director, Utilities position did not exist. (August 24 Response, Exh. A, Munyan Affidavit, ¶ 6; Exh. D, Merrill Affidavit, ¶ 14) The restructuring presented to Tribal Council in February included the following:

The added position, Assistant Director of Utility Operations, will report to the Director and will be required to have excellent technical expertise and experience as well as hold required licenses/certifications and handle the day to day operations.
(August 24 Response, Exhibit G)

Consistent with this description, at the March 2, meeting of Tribal Council Ms. Merrill explained that this additional assistant director position would be "primarily responsible for operations with higher level technical skills." (Claimant's February 13, 2012 Submission, Excerpt for March 2, 2011 Special Tribal Council Meeting) In March, the Assistant Director, Utilities position was posted with a position summary that did not reflect Tribal Council's directed restructuring. (August 24 Response, Exh. A, Munyan Affidavit, ¶ 10; Exh. D, Merrill Affidavit, ¶¶ 18-19) Claimant alleges that the position was not posted for Tribal members. (July 7 Claimant Affidavit, ¶ 19(f)) The position was posted on March 3 to Tribal members and on March 5 to non-Tribal members. (August 24 Response, Exh. A, Munyan Affidavit, ¶ 11; Exhs. L and Q)

Claimant applied for the Assistant Director, Utilities, position. (August 24 Response, Answer to Claimant's Affidavit, ¶ 15; Exh. C, Agnello Affidavit, ¶ 14) Claimant met the requirements of the position as reflected in the incorrect position description. (August 24 Response, Exh. C, Agnello Affidavit, ¶¶ 19-20; Exh. P, June 24 memo Torraca to Jones) Claimant was nevertheless informed that she did not meet the requirements of the Assistant Director, Utilities position and she was not considered for the position at that time. (August 24 Response, Answer to Claimant's Affidavit, ¶ 15; Exh. C, Agnello Affidavit, ¶ 18, 21) On about June 7, an announcement issued that Kenny Greenwood, who is not preference eligible, received the Assistant Director, Utilities position. (August 24 Response, Answer to Claimant Affidavit, ¶ 18; See also, documents submitted by Claimant in support of her Claim) The announcement was in error. (August 24 Response, Exh. A, Munyan Affidavit, ¶ 27; Exh. D, Merrill Affidavit, ¶ 21) The position was not filled at that time. (August 24 Response, Answer to Claimant's Affidavit, ¶

Final Claim Determination Case No. 2011-33012
March 2, 2012
MERO Form-33-1680
(07-09-01)

17) Respondent subsequently rescinded the posting, with the intent of revising the position description and re-posting the position with the correct requirements. (August 24 Response, Exh. A, Munyan Affidavit, ¶¶ 28-29; Exh. D, Merrill Affidavit, ¶¶ 19-20)

IV. Analysis and Conclusions of Law

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

A. The Director Position

When the Mashantucket Pequot Tribe is the employer, the Preference Law requires, with limited exception, that preference be provided in employment opportunities first to members of the Tribe who meet the minimum necessary qualifications. 33 M.P.T.L. § 5(a) Employment opportunities generally include consideration for hire and hire for open positions. 33 M.P.T.L. § 4(c) The Preference Law does not provide a cause of action based on one member of a preference category receiving an employment opportunity to the disadvantage of another member of the same preference category. *Sebastian v. MPGE*, MERO Case No. 2009-33003 (January 15, 2010), pg. 3; *See also* RPI-33-0904(2)(October 14, 2009) Correspondingly, when the Tribe is the employer, generally filling an open position with a Tribal member fulfills the objectives of the Law. *See* RPI-33-0904(2)(October 14, 2009).

1. Alleged Requirement to Hire of the Most Qualified Candidate

Claimant contends that when there are multiple preference applicants, the Preference Law requires an employer to afford first preference to the most qualified of those within the highest preference category who meet the minimum necessary qualifications. Claimant alleges Tribal policy or practice requires favoring the most qualified, which Respondent denies.

Not surprisingly, each party believes the other bears the burden of proving the existence or non-existence of a Tribal policy or practice. Generally, the party advancing a proposition bears the burden of proving it, but consideration is afforded the knowledge of each party relative to the facts, the availability of evidence to each party, public policy and the probability of the existence of the fact.

In response to the MERO's specific request for any additional evidence supporting Claimant's assertion of a "most qualified" selection policy, Claimant submitted only the general explanation that her assertion was founded on "her own practices as a past member of the Tribal Council and as a person who has hired for the Tribe."¹² (January 13, 2012, Response to Request for More

¹² Claimant asserts, "We have shown that the Claimant, when she hired employees, applied tribal policy as she understood it and hired the most qualified applicant." (Claimant's January 23, 2012 submission, pg. 3) Although review of the record reveals no such demonstration, even assuming the MERO had received such evidence, Claimant's individual experience, standing alone, does not prove a Tribal Nation personnel policy or practice.

Information, first unnumbered page) Claimant contends that the purported policy should be considered by the MERO as a customary practice that constitutes Tribal law.¹³ Respondent denies the existence of such a policy or practice and Claimant has failed to offer any additional evidence that would provide a basis from which to disbelieve Respondent's denial or believe that a "most qualified" selection policy or practice exists. The MERO will not conduct a fishing expedition. Based on the record, the MERO finds no policy or practice requiring Respondent to hire the most qualified applicant, much less the type of widely applied repetition of a practice that could possibly comprise a custom that may be recognized as a law by a Tribal agency or court.

Alternatively, Claimant contends that the Preference Law must include an affirmative obligation on employers to select the most qualified of those minimally qualified within the highest preference category. Claimant reasons that the "[s]uccess of the Tribe and Enterprise is hinged upon the performance of tribal members who are hired. The good of the Tribe depends upon the success of its employees." (July 7 Claimant Affidavit, ¶ 19(d)) While it is undisputed that the Law is silent with respect to selection between two minimally qualified applicants of the same preference priority, in support of her argument, Claimant points to the MERO's determination that the Preference Law permits a cause of action for retaliation notwithstanding the lack of an explicit provision in the law. *See Colebut v. Mashantucket Pequot Gaming Enterprise*, MERO Case No. 2010-33005, pg. 14 of 18 (October 6, 2010)

The Preference Law does not include a selection hierarchy and the MERO finds no basis from which to conclude that Tribal Council intended to require an employer to afford priority to the most qualified preference eligible individuals within a preference category.¹⁴ Inferring in the law an anti-retaliation component is distinguishable in that it gives effect to the broad protections intended by Tribal Council. *See Colebut v. Mashantucket Pequot Gaming Enterprise*, MERO Case No. 2010-33005, pg. 14 of 18 (October 6, 2010) Declining to infer protections against retaliation would not be consistent with the law's explicit and implicit terms. *Id.*¹⁵ In contrast,

¹³ Claimant's singular example of existing Tribal "customary law" is banishment of Tribal members by the Elders Council, the authority for which Claimant asserts is not found in Tribal statutes. (January 13, 2012, Response to Request for More Information, third unnumbered page) Claimant's banishment analogy is misplaced, because the banishment authority of the Elder's Council is specifically set forth in the Tribe's Constitution. *See* M.P.T.N. Constitution, Article XII.

¹⁴ To the contrary, when Tribal Council subsequently clarified its intent in its declaratory amendments to the Preference Law, Tribal Council provided for employer determination of the best, not the most qualified, candidate between two eligible individuals within the same preference category. 33 M.P.T.L., ch. 1, § 5, amended January 26, 2012 ("An Employment Opportunity shall be awarded to the best candidate, as determined by the Employer, from among two (2) or more candidates of the same preference category who meet the Minimum Necessary Qualifications of the position.")(emphasis added)

¹⁵ Tribal Council's subsequent amendments explicitly include a non-retaliation provision. 33 M.P.T.L., ch. 1, § 13, amended January 26, 2012.

reading a requirement into the Preference Law that favors the most qualified preference eligible individual does not advance the broad objectives of the law to increase opportunities on the Reservation for preference eligible individuals.¹⁶ The MERO is permitted to enforce only those rights and responsibilities determined by Tribal Council. Accordingly, even assuming, without finding, that Claimant was more qualified for the Director position than Mr. Harris, if Mr. Harris met the minimum necessary qualifications of the position, the MERO's inquiry goes no further.¹⁷

2. Minimum Necessary Qualifications of the Director Position¹⁸

By establishing the minimum necessary qualification threshold, the Law balances the preference objective to afford opportunities with an employer's business need to employ properly qualified individuals. For example, an employer is not required to hire a preference eligible individual who is not qualified to perform the basic responsibilities of the position. By the same token, an employer is not permitted to exclude preference eligible individuals by imposing qualification standards beyond those necessary to perform the basic responsibilities of a position.

Claimant challenges the minimum necessary qualifications established for the Director position. First, she alleges the actual requirements of the position were not consistent with the position description. She contends that (1) the position description did not accurately reflect the envisioned restructuring and (2) the position description included requirements that are not imposed by other employers with comparable positions. Second, Claimant alleges that the requirements of the position were lowered to favor a Tribal member other than Claimant.

In the first instance, it is within an employer's purview to determine its business needs and establish the positions necessary to fulfill those needs. In this case, in November, 2010, Respondent posted the Director position with the description that had previously been approved by Mr. Birmingham.¹⁹ Claimant was specifically solicited by Ms. Merrill to provide additional

¹⁶ Arguably, the reverse could be true, as those individuals with greater qualifications are more likely to qualify for a broader range of employment opportunities; therefore, awarding the positions to the least qualified of the minimally qualified applicants would provide opportunities to those with the lowest likelihood of qualifying for other positions.

¹⁷ Similarly, given that Claimant was considered to have met the minimum necessary qualifications, the weight afforded Claimant's service on Tribal Council or consideration of her late appearance at the interview are not relevant to the analysis. The comparative evaluation of Claimant and Mr. Harris is also obviated; therefore, Claimant's objection to Respondent's *in camera* submission of certain documents, which was pursuant to the MERO's request, is denied as moot. See, Claimant's January 23, 2012, Submission, pgs. 2-3.

¹⁸ In the interest of fully addressing the Claim allegations, Claimant's challenges to the minimum necessary qualifications are analyzed notwithstanding the MERO's conclusions in Sections IV, A, 1 and 3.

¹⁹ To the extent Claimant maintained an active oversight role, as described by Mr. Birmingham, at the time the position description was approved, presumably Claimant was in accord with the requirements of the position at that time.

information to demonstrate that she met the qualifications, but Claimant did not follow-up prior to Respondent closing its consideration of applicants. None of the eight (8) Tribal member applicants, including Claimant, established they were able to meet the minimum necessary qualifications of the position. Rather than moving on to consider non-Tribal members for the position, the requirements of the Director position were revised to open this higher level employment opportunity to Tribal members.

Claimant argues that the position description's requirement calling for "technical knowledge of utility operations" is "directly contrary" to the restructuring, "fail[ing] to distinguish between the more technical requirements of the Assistant Director position and the administrative nature of the Director position." (September 19 Rebuttal, pg. 2) Claimant overlooks the specific requirement presented to Tribal Council that the Director must "have Utilities and Waste Water knowledge, but...not be required to hold the certifications." (August 24 Response, Exh. G) Comparing the original Director position description with the post-restructuring position description reflects, consistent with the directive of Tribal Council, the lessening of the technical requirements. Although Tribal Council had ample opportunity to request conceptual or specific changes after being provided a summary of the restructuring and the revised Director position description, it chose not to do so. Claimant is correct that the restructuring was not implemented in a manner consistent with Tribal Council's directive, but the inconsistency occurred not with the Director position, but with the Assistant Director position. The evidence does not support a finding that any errors with respect to implementation of Tribal Council's directive regarding the Assistant Director position had any bearing on filling the Director position. In this regard, the restructuring concept and Director position were consistent from the time Tribal Council directed the restructuring to the time the position was posted; therefore, the evidence refutes Claimant's argument.²⁰

Moreover, comparing the requirements of a position on the Reservation to similar positions with other employers, as Claimant urges, may be helpful in certain cases where, for example, it is alleged that the qualifications of the position on the Reservation effectively excluded preference eligible individuals. Here, however, the requirements of the position were fashioned to open the position to Tribal members. Therefore, even assuming Claimant is correct that the requirements for the Tribe's Director position are higher than those imposed by other employers, the Preference Law does not require an employer to decrease its qualification standards where, as here, the qualifications were established at a level that made the position accessible to members of the highest preference category.

Claimant's allegation that the qualifications for the Director position were specifically reduced to favor another Tribal member is not supported by the evidence. Respondent would have had no

²⁰ Resolution of any contention by Claimant that Tribal Council's means of approving the restructuring was not proper is outside the MERO's jurisdiction and not necessary to a determination under the Preference Law. The MERO has considered the proceedings before Tribal Council only to the extent they relate to Claimant's assertion that the position description did not accurately reflect the intended restructure.

reason to solicit Claimant to provide additional qualifying information when she applied for the Director position in 2010 if its objective was to favor another Tribal member. The subsequent changes to the position description were substantial, but select, and do not appear to be specifically tailored to the successful candidate's credentials.²¹ Not one, but three (3) Tribal member applicants, including Claimant, were considered to have met the minimum necessary qualifications of the new Director position. These three (3) Tribal members were interviewed during the course of several hours by a team of six (6) that included three executive directors and the general counsel. Respondent's devotion of significant resources to the application process is not consistent with a pre-determined outcome.

Furthermore, even assuming Claimant was correct that the qualifications of the position were specific to a particular Tribal member, there is nothing in the Preference Law that precludes an employer from tailoring an opportunity to an individual of the highest preference category. No violation was found where a change in the requirements of a position after the position was posted effectively excluded a Tribal member from consideration under circumstances where another Tribal member qualified for and was awarded the position. *Sebastian v. Mashantucket Pequot Gaming Enterprise*, MERO Case No. 2009-33003 (January 15, 2010). A position may be filled with a highest preference individual without posting or advertising the position, because retaining a member of the highest preference category fulfills the objectives of the Law. See RPI-33-0904(2)(October 14, 2009).

3. Filling the Director Position

Rather than tailoring the position for a particular Tribal member, Respondent posted the position for all to apply and Tribal members were given first consideration for the opportunity. Tribal members received the two (2) day advance notice required by the Law and Claimant's allegations to the contrary are unsupported and without merit.

Under the Preference Law, only those applicants who met the minimum necessary qualifications of the posted position were permitted to be afforded preference. Claimant challenges the determination that Mr. Harris was minimally qualified.²² Although a third Tribal member applicant was considered minimally qualified, given that Respondent termed Claimant a "close second" to Mr. Harris, there is no doubt that Claimant would have been awarded the position if Mr. Harris had not met the minimum necessary qualifications.

²¹ Claimant alleges she is better qualified for the position, suggesting she agrees that the position was not tailored to the successful candidate.

²² Although Claimant alleges that Mr. Harris did not meet the minimum necessary qualifications of the position, her primary argument appears to be that Mr. Harris's strengths are more suited to the Assistant Director position while her strengths are more suited to the Director position. (See, September 19 Rebuttal)

It is axiomatic that agencies and courts afford a certain degree of deference to an employer's decision making regarding personnel matters.²³ The degree of deference afforded may depend, in part, on the particular facts of a case and the implications of the nature of the decision for the protections afforded by law. For example, in the Preference Law context, less deference is appropriate where employer determinations may impermissibly exclude preference individuals from consideration for hire, because such barriers to opportunities are contrary to the law's objective to promote preference opportunities.

The issue here is the extent of the MERO's review of an employer's determination that a member of the highest preference category meets the minimum necessary qualifications of a position where the record evidence is devoid of preference bars. Here, Tribal Council's directed restructuring reduced the previously established minimum necessary qualifications for the purpose of opening the higher level position to preference eligible individuals. All the highest category preference applicants who applied for the position were deemed minimally qualified and afforded full opportunity to demonstrate their credentials. Respondent selected the candidate it believed to be best for the position, with Claimant a close second. In the context of this case where there were no barriers to full consideration of those preference eligible individuals who applied for the position, subjecting the determinations of which preference eligible individuals were minimally qualified does not advance the objectives of the law and the MERO defers to the employer's minimum necessary qualification determinations.²⁴ Accordingly, Respondent satisfied the Preference Law's requirements by considering for hire and hiring a qualified member of the highest preference category, Tribal members, to fill the position.²⁵

B. The Assistant Director Position

The position of Assistant Director was posted at the same time as the position of Director, therefore Claimant's allegation of a failure to timely post the position is similarly without merit. Respondent admits that the posting in March was incorrect in that the position description did

²³ Even in circumstances where constitutional protections are implicated, deference is afforded a sovereign when acting as an employer. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 675 (1994) ("The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer.")

²⁴ The MERO's decision is consistent with Tribal Council's recent clarifying amendments, which afford broader deference, providing "A preference eligible individual awarded an employment opportunity is conclusively presumed minimally qualified for the position, provided that the individual is a member of the highest preference category to which the employer is required to afford preference." 33 M.P.T.L. § 9 (g).

²⁵ Even assuming Claimant had prevailed in her claim, the Claimant's requested remedy of re-posting the Director position that had already been filled is not available under the Preference Law. *See* 33 M.P.T.L. § 11. Moreover, the Preference Law does not provide for attorney's fees where, as here, the evidence does not support a finding of an intentional violation of the law or gross negligence. *See* 33 M.P.T.L. § 11(c).

not accurately reflect the qualifications necessary for the position. It further admits that Claimant was incorrectly informed that she did not meet the minimum necessary qualifications for the Assistant Director position as it was posted at that time. Finally, Respondent admits the position was incorrectly announced in June as having been filled. Upon discovering the posting error, the position as posted in March was rescinded with the intent of re-posting with a correct position description.

It is undisputed that Respondent committed a series of errors in initially implementing the Assistant Director position and declining to consider Claimant for the position. Nevertheless, because the incorrect posting was withdrawn and the process was re-initiated to correct the errors, alleged Preference Law violations associated with the March posting were rendered moot.²⁶

V. Disposition

Respondent did not violate the Preference Law in its posting of the Director, Utility and Waste Water Management and Assistant Director, Utilities positions in March. The Assistant Director position was not filled at that time and the posting was rescinded, rendering any remaining allegations with respect to that position moot. Respondent did not violate the Preference Law when it selected another minimally qualified Tribal member over Claimant for the position of Director, Utility and Waste Water Management. 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 2nd day of March, 2012.



Ursula L. Haerter
MERO Director

²⁶ Respondent's course of action was consistent with the remedy sought by Claimant that the Assistant Director position be re-posted. Any claims related to the re-posted position are beyond the scope of this investigation.



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:

Charlene Jones v. Mashantucket Pequot Tribal Nation

Case Number:

2011-33012

Date of Mailing of Final Claim Determination:

March 2, 2012

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.**

MERO Form-33-1690
(04-06-11)