



**MERO**

**MASHANTUCKET EMPLOYMENT RIGHTS OFFICE**

**Final Claim Determination**

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

<b>Case Name:</b> Karen R. Colebut v. Mashantucket Pequot Tribal Nation	<b>Case Number:</b> 2012-33013
<b>Date of Claim Filing:</b> January 31, 2012	<b>Date of Determination:</b> July 26, 2012

On July 9, 2012, 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:

Karen Colebut (“Claimant”) alleges in her Claim, filed on January 31, 2012, that she is a qualified Tribal member spouse who was denied consideration for hire and hire for the position of Assistant Legal Counsel in about October, 2011, by the Mashantucket Pequot Tribal Nation (“MPTN” or “Respondent”) in violation of 33 M.P.T.L., the Mashantucket Pequot Tribal and Native American Preference Law (“Preference Law”).<sup>1</sup> She further alleges that in about November, 2011, Respondent attempted to exclude qualified preference eligible individuals by impermissibly re-designating the position a “key” position for purposes of the Preference Law.<sup>2</sup> The above-referenced claim has been investigated pursuant to 31 M.P.T.L., the Mashantucket Employment Rights Law, and the Preference Law.

**I. Positions of the Parties**

Claimant, a spouse of a Mashantucket Pequot Tribal member, submitted an application for the position of Assistant Legal Counsel, and was not awarded the position. She asserts that the

<sup>1</sup> The Preference Law was amended January 26, 2012, with amendments to Sections 2(d), 3(a) and 4(n) effective October 27, 2011 and the remainder effective as of the date of enactment. See, 33 M.P.T.L., Historical and Statutory Notes. The events implicated by Claimant’s allegations pre-date January 26, 2012.

<sup>2</sup> 33 M.P.T.L. ch. 1, § 5(h) provides:  
*Exclusion; Key Employees or Positions.* The preference in Employment Opportunities required by and set forth in this Law shall not be applicable to personnel actions regarding any key employees or positions. For the purposes of this Law, a "key employee" includes an individual holding a substantial ownership interest in the Employer or an individual with unique employer or industry knowledge that provides a significant competitive advantage to the Employer. For purposes of this Law, a "key position" includes a high-level managerial or critical function position such that the Employer would risk significant damage or loss if the position were not filled with the best qualified candidate regardless of preference or political appointee as defined by TCR121201-01 of 04. The Person claiming the exclusion bears the burden of proving the key employee or position by a preponderance of the evidence.

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employer established minimum necessary qualifications that were not consistent with the requirements of the position and if the required qualifications had been accurately represented, she would have been considered qualified for the position. Additionally, she alleges that Respondent excluded preference eligible individuals from consideration by changing the position to a “key” position. Claimant further alleges Respondent’s failure to post the position originally as a “key” position as an independent violation.

Respondent denies any violation of the Preference Law. Respondent asserts that Claimant was not advanced in the application process because she failed to demonstrate that she met the minimum necessary qualifications of the position, and designation of the position as a “key” position had no bearing on the outcome for Claimant. Respondent further asserts that the law does not require that positions be posted or advertised as “key” positions.

## **II. Procedural History**

Claimant submitted a sworn affidavit dated January 31, 2012 with her Claim.<sup>3</sup> She provided additional information during the course of the investigation, including via e-mail on May 14. Claimant was provided a deadline of June 1 for submission of any additional information for consideration, subsequently extended to June 8. Notwithstanding a MERO request for clarification of previously submitted information, Claimant submitted a statement on June 7 indicating that her position was clear and she would not be submitting any additional information.

Respondent submitted a response dated April 26, which included a Position Statement, Answer to Claimant’s Affidavit, Agnello Affidavit, Senior Recruiter, Human Resources Employment Division, Affidavit of Elizabeth Conway, Associate General Counsel, and several documents, as well as responses to the MERO’s requests for information.

## **III. Findings of Fact**

Respondent is the Mashantucket Pequot Tribal Nation. (April 26 Response)<sup>4</sup> Respondent admits that Claimant is a Tribal member spouse in good standing within the meaning of Title 33. (April 26 Response, Answer to Claimant Affidavit, ¶ 1)

In about August, 2011, as a result of the departures of two (2) attorneys in the Office of Legal Counsel, Tribal Council approved a restructuring of the Office of Legal Counsel, including the addition of a position of Assistant Legal Counsel. (April 26 Response, Conway Affidavit, ¶ 7)

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<sup>3</sup> All dates hereinafter are in Calendar Year 2012 unless otherwise indicated.

<sup>4</sup> Each of Respondent’s submissions is generally referred to herein as “Response” and identified by date, with specific documents referenced where appropriate by date and summary description and affidavits referenced by surname of affiant and paragraph number, if applicable. Claimant’s affidavit is referred to herein as “Claimant Affidavit;” and the documents submitted by Claimant with her claim are referred to herein as “Claimant’s documents.”

The Tribal Council designated all attorney positions within the Office of Legal Counsel as “Key Positions.” (April 26 Response, Answer to Claimant Affidavit, ¶ 4; Conway Affidavit, ¶ 8)

The open position of Assistant Legal Counsel in the Office of Legal Counsel was originally posted on October 19, 2011, with a closing date of October 24, 2011. (Claimant’s documents; April 26 Response, Agnello Affidavit, ¶ 5) The position description provides, in part, that applicants must possess a Juris Doctorate from an ABA accredited or approved law school, and must be admitted to practice law in a state or federal jurisdiction at the time of appointment to the position. (Assistant Legal Counsel Posting with closing date of October 14, 2011, Claimant’s documents) The description also states, in part, “One (1) to five (5) years of experience practicing law in a government, private or corporate setting, with some experience or exposure to the field of federal Indian law.” (Id.) Per the position description, the successful candidate must secure admission to the Connecticut and Mashantucket Pequot Tribal Court bars within one year of appointment. (Id.)

The position description includes the requirements of “[d]emonstrated excellent ability to research and analyze...legal issues...[and] [e]xcellent ability to communicate legal concepts and analysis to MPTN (including its elected officials, officers, employees and representatives), to patrons, vendors or any other person necessary to resolve a matter ...” (Id.) The role involves “performing research, writing and analysis on a variety of complex legal issues, and drafting new tribal laws as well as reviewing existing tribal laws and drafting amendments.” (April 26 Response, Conway Affidavit, ¶ 10) According to Associate General Counsel Conway, the attorney’s work would typically not be “subject to redundant research” and improper performance could potentially have significant financial or political ramifications for the Tribe. (April 26 Response, Conway Affidavit, ¶ 11)

Sam Agnello, Senior Recruiter in the Human Resources Department, received no applications from Tribal members for the Assistant Legal Counsel position, and a single application from a Tribal member spouse, namely Claimant. (April 26 Response, Agnello Affidavit, ¶ 8) “In his initial e-mail to Claimant, Mr. Agnello indicated that Claimant had met the requirements of holding a Juris Doctorate and having 1-5 years of experience.” (April 26 Response, Answer to Claimant Affidavit ¶ 3; E-mail exchange Exh. B; Agnello Affidavit, ¶ 10) According to Mr. Agnello, his assessment that the work of a law clerk would be considered sufficient to meet the 1-5 years of experience requirement was in error. (April 26 Response, Agnello Affidavit, ¶ 9) As explained by Attorney Conway, an attorney must necessarily be licensed or admitted to practice law in order to engage in the practice of law within a given jurisdiction. (April 26 Response, Conway Affidavit, ¶ 15)

Mr. Agnello’s response e-mail to Claimant requested an updated resume and confirmation of a state license to practice law. (April 26 Response, E-mail exchange Exh. B; Agnello Affidavit, ¶ 10) Mr. Agnello requested confirmation that Claimant holds a state admission to practice law on two additional occasions, for a total of three requests in the course of five (5) days to which he received no response. (April 26 Response; E-mail exchange Exh. B; Agnello Affidavit, ¶¶ 10, 12, and 13)

It is undisputed that Claimant holds a Juris Doctorate degree from the University of Pittsburgh, an ABA accredited law school, which was awarded in about May, 1991. (April 26 Response, Answer to Claimant Affidavit, ¶ 2 and Claimant's Resume, Exh. A) Her resume reflects several years of law clerk experience, with the most recent employment as a law clerk in 1994. (April 26 Response, Claimant's Resume, Exh. A) The record contains no evidence of Claimant's admission to any legal bar to practice as an attorney at any time.

The Assistant Legal Counsel position was reposted on about November 3, 2011, with the following notation, "Please note that we have designated this position as a "key" position pursuant to the Tribal and Native American Preference Law. Therefore, while you will not be given preference in this employment opportunity, your application will be considered along with all others." (Assistant Legal Counsel Posting with closing date of November 10, 2011, Claimant's documents; April 26 Response; Agnello Affidavit, ¶ 15) The successful candidate was extended an offer of employment January 17, which she accepted, and began employment January 25. (February 1 e-mail from Marietta Anderson, Legal Counsel)

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

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

When the Mashantucket Pequot Tribe is the employer, the Preference Law requires, with limited exception, that preference be provided in employment opportunities first to Tribal members and second to Tribal member spouses who meet the minimum necessary qualifications. 33 M.P.T.L. ch. 1, § 5(a) Employment opportunities generally include consideration for hire and hire for open positions. 33 M.P.T.L. ch. 1, § 4(c)

Respondent concedes that Claimant is a preference eligible Tribal member spouse and the only preference eligible individual who applied for the Assistant Legal Counsel position, but asserts that Claimant did not meet the minimum necessary qualifications of the position. Claimant alleges that if the position description requirements had not exceeded the necessary minimum qualifications for the position, she would have been considered qualified. Specifically, Claimant alleges the requirement that applicants be admitted to practice in a jurisdiction at the time of hire excludes preference eligible individuals and is unnecessary, especially given the requirement that the individual pass the Tribal bar within one year of appointment.<sup>5</sup> (Claimant Affidavit, ¶ 5)

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<sup>5</sup> During the investigation, Claimant additionally asserted that the "there are several practicing attorneys here in MPTN and Foxwoods who do not meet the necessary minimum requirements... which by default means that the rules...are enforced arbitrarily." (Claimant's May 14 e-mail to the MERO) Notwithstanding the MERO's requests, Claimant provided no evidence in support of her contention that the qualifications of existing employees would demonstrate that the job description was overreaching. (See, MERO Director correspondence to Claimant of May 14 and June 7) Notably, however, she referenced the employees as "practicing attorneys," therefore those employees are admitted to practice law and any alleged failure to meet minimum necessary qualifications would presumably relate to other issues.

“The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.” Model Rules of Prof'l Conduct R. 5.5 cmt. (2010) Law school graduates are not authorized to practice law until admitted to the jurisdiction of practice. *See, e.g.*, Mashantucket Pequot Rules of Legal Counsel Conduct, § 1; Connecticut Rules of Prof'l Conduct, R. 5.5 (2007). Prior to admission, a law school graduate may work as a law clerk, but the work and work product must be overseen by a practicing attorney. *See*, Model Rules of Prof'l Conduct R. 5.5 cmt. (2010) (“This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.”)

While it may not be unusual for an employer seeking an entry level attorney to hire a law school graduate contingent upon passage of a bar examination and admission to a jurisdiction, an employer seeking an experienced attorney would expect the attorney to be a practicing attorney admitted in one or more jurisdictions, depending on the nature of the position being filled. In this case, the Tribal employer sought candidates with at least one (1) year of practice experience. The successful candidate would be responsible for legal research and analysis, and rendering legal advice, with limited redundancies. Respondent's expectation that candidates be admitted to a jurisdiction and have practiced law is consistent with the level of experience sought.

The fact that the job description also placed candidates on notice that a successful candidate would be required to become admitted to the Connecticut and Tribal Court Bars does not obviate the requirement of current admission. Rather, the additional required admissions reflect the scope of the practice necessary for the position, but do not negate the necessity of the successful candidate being a practicing attorney in the first instance.

An employer is not required to reduce the level of an available position to accommodate a preference eligible individual. In this case, the employer sought an admitted attorney with some practice experience. Ms. Colebut's law clerk experience does not equate to practicing law. Only those who meet the admission requirements of any given jurisdiction may practice law in that jurisdiction. Ms. Colebut did not demonstrate that she was admitted to practice law in any jurisdiction at any time. She did not, therefore, satisfy the minimum necessary admission or practice experience requirements of the open position.

### ***“Key” Position Designation***

Claimant asserts that Respondent's designation of the position as a “key” position after the original posting was designed to exclude Claimant and other preference eligible individuals from the process. Tribal Council's designation of the position as a “key” position occurred in August,

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well before the position was posted.<sup>6</sup> Given that the decision to designate the position as “key” was made prior to the original open position announcement, no nefarious motive can be attributed to the change in the position designation to “key” after the original posting. Furthermore, the record includes no evidence that any preference eligible individuals who met the minimum necessary qualifications of the position were excluded from consideration for the position.

Claimant nevertheless asserts that Respondent is in violation of the Preference Law by its failure to designate the position as a “key” position in the first posting. She alleges the re-designation of the position as an independent violation of the Preference Law. There is no doubt that much confusion and litigation could be avoided if employers were careful and accurate in their position descriptions and advertisements for open positions. Currently, however, there is no requirement that employers post “key” positions with the “key” designation.

#### **V. Disposition**

Respondent did not violate the Preference Law in its posting and filling of the Assistant Legal Counsel position in about January, 2012. Respondent did not violate the Preference Law by initially posting the Assistant Legal Counsel position without a “key position” designation. Accordingly, the Claim is dismissed.

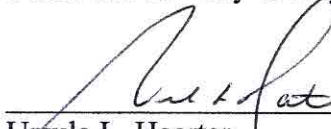
#### **VI. Notice of Publication**

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 26<sup>th</sup> day of July, 2012.



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Ursula L. Haerter  
MERO Director

<sup>6</sup> The question of whether the designation as a “key” position was appropriate is not reached herein, because resolution of the issue is not necessary to a determination of the allegations. The MERO notes, however, that Respondent’s assertion that no such inquiry would be warranted because the “key” designation was attributed by Tribal Council is not persuasive. (See, April 26 Response, Position Statement pg. 3) No evidence was introduced that at the time it designated attorney positions within the Office of Legal Counsel to be “key,” Tribal Council, which fulfills many roles as a governing body, made its determination within the framework of the Preference Law.



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**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:**

Karen R. Colebut v. Mashantucket Pequot Tribal Nation

**Case Number:**

2012-33013

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

July 26, 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.**

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