



**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> Scott Barton v. Mashantucket Pequot Tribal Nation	<b>Case Number:</b> 2012-33016
<b>Date of Claim Filing:</b> August 9, 2012	<b>Date of Determination:</b> January 30, 2013

On December 28, 2013, 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:

Scott Barton (“Claimant”) alleges in his Claim, filed on August 9, 2012, that he is a Tribal member who was delayed entry into the Fast Track program since about February, 2012, by the Mashantucket Pequot Tribal Nation (“MPTN” or “Respondent”) in retaliation for his prior efforts to pursue his rights under 33 M.P.T.L., the Mashantucket Pequot Tribal and Native American Preference Law (“Preference Law”). The above-referenced claim has been investigated pursuant to 31 M.P.T.L., the Mashantucket Employment Rights Law, and the Preference Law.<sup>1</sup>

**I. Positions of the Parties**

Claimant, a Mashantucket Pequot Tribal member, previously pursued a claim under the Preference Law in MERO Case No. 2011-33011. Shortly after settling the claim, Claimant sought to enter the Tribe’s Fast Track program, a program designed to assist in the professional development of Tribal members. Claimant asserts that his prior allegations against individuals within the Human Resources Department caused Human Resources employees to retaliate against him by delaying his admission to the Fast Track program and disciplining him to cause him to be considered ineligible for the program.

Respondent denies any violation of the Preference Law. Respondent asserts that the evidence does not support a conclusion that Claimant suffered retaliation for pursuing his rights under Tribal Law. Respondent contends that Claimant was not advanced in the Fast Track program for reasons unrelated to the prior claim, including the Claimant’s own failure to schedule Fast Track meetings and the disqualifying discipline assessed by Tribal Council, not Human Resources.

<sup>1</sup> Claimant additionally alleges violation of the MPTN Whistleblower Law. Claims under Title 37, M.P.T.L. are not within the MERO’s jurisdiction.

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## II. Procedural History

Claimant submitted a sworn affidavit dated August 9, 2012 with his Claim.<sup>2</sup> He provided additional information during the course of the investigation, including in person on October 15 and via e-mail on various dates. Claimant also advised the MERO of potential witnesses, including Tribal member Matt Hall.<sup>3</sup>

Respondent submitted a motion to dismiss dated August 21, alleging that Claimant failed to exhaust internal remedies before proceeding to MERO. The MERO denied the motion by order dated August 24. Respondent submitted a response dated September 19, which included a Position Statement, Answer to Claimant's Affidavit, Affidavit of Cynthia Torraca, Director of Government Human Resources/Native Preference, Affidavit of Joshua D. Carter, Manager of Native American Preference, and several documents. Respondent further submitted responses dated November 6 and 29 to MERO information requests and presented requested witnesses Detective Sergeant Katy Tougas of the Mashantucket Pequot Police Department, and Ms. Torraca.

## III. Findings of Fact

Respondent is the Mashantucket Pequot Tribal Nation. (September 19 Response)<sup>4</sup> Respondent admits that Claimant is a Tribal member in good standing within the meaning of Title 33. (September 19 Response, Answer to Claimant Affidavit, ¶ 1) Respondent further admits Claimant's prior pursuit of a Title 33 claim before the MERO that was withdrawn based on a settlement. (September 19 Response, Answer to Claimant Affidavit, ¶ 2) Both Ms. Torraca and Mr. Carter were aware of the prior claim. (September 19 Response, Carter Affidavit, ¶ 39, Torraca Affidavit, ¶ 18)

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<sup>2</sup> All dates hereinafter are in Calendar Year 2012 unless otherwise indicated.

<sup>3</sup> Several other potential corroborative witnesses were identified by Claimant. The MERO determined that these witnesses were not necessary to a determination because Claimant's account was credited or the facts to which the witnesses would testify were not in dispute.

<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. Ms. Torraca's Affidavit dated September 19 is referred to as "Torraca Affidavit" and her November 26 affidavit is referred to as "Torraca November 26 Affidavit." Claimant's affidavit is referred to herein as "Claimant Affidavit."



### ***A. The Fast Track Program***

“Essential to building and preserving a strong social and economic foundation for the advancement of the Mashantucket Pequot Tribal Nation is the development of its individual Tribal members.” (Tribal Government Fast Track program guidelines, Claimant Affidavit, Exhibit D). As explained by Joshua Carter, the Tribe’s Fast Track program “was developed, in part, to help Tribal members realize their potential by developing and preparing them for faster career progression, thereby increasing their advancement opportunities.” (September 19 Response, Carter Affidavit, ¶ 7). Prior to about May 7, the Fast Track program was available only to employees of the Mashantucket Pequot Gaming Enterprise. (September 19 Response, Carter Affidavit, ¶¶ 8 and 29). Thereafter, the Fast Track program was available to employees of the Tribal Government and other Tribal entities. (September 19 Response, Carter Affidavit, ¶ 29) According to Mr. Carter, the typical course of a Fast Track program application would take just over 90 days. (September 19 Response, Carter Affidavit, ¶¶ 16, 20-24) No Tribal member had successfully completed a Fast Track program as of mid-September.<sup>5</sup> (September 19 Response, Answer to Claimant Affidavit, ¶ 18)

Claimant initially inquired about entry to the Fast Track program in about January. (Claimant Affidavit, ¶ 4). Mr. Carter advised Claimant how to begin the process, specifically that Claimant was responsible for following up with MPTN Police Department Chief Dan Collins to schedule a meeting. (Claimant Affidavit, ¶ 4; September 19 Response, Carter Affidavit, ¶ 11). The Fast Track program guidelines provide that an “interested Tribal member must initiate the process by scheduling a meeting with their respective department head, supervisor or manager, Josh Carter and/or Tanisha Sebastian.” (Claimant Affidavit, Exhibit D). Claimant requested a meeting of Chief Collins, who indicated he would need several weeks to schedule the meeting. (Claimant Affidavit, ¶ 4).

In March, Claimant followed up with Chief Collins, who indicated that Mr. Carter told him that Claimant needed to follow-up with Honey Carter, who was now in charge of the program. (Claimant Affidavit, ¶ 5) When Claimant inquired of Mr. Carter at a Tribal member meeting, Mr. Carter denied having told Chief Collins to refer Claimant to Honey Carter and invited Claimant to follow-up with him via e-mail after the meeting. (Claimant Affidavit, ¶ 5) In the follow-up e-mail exchange on March 27 and 28, Mr. Carter states, in part, “Because the program stresses the importance of ‘commitment’ and as I specifically stated during our discussion, I need you to reach out to the Chief in order to initiate the process. Is there a reason you have not or will not ask him to set up the meeting?” (Claimant Affidavit, Exhibit A, pg. 2) Claimant responded with an explanation of his efforts to set up the meeting and confirmation that he would make another request of Chief Collins. (Claimant Affidavit, Exhibit A, pg. 1) Mr. Carter

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<sup>5</sup> Successful completion of the Fast Track program does not guarantee a new position, because positions are not created and existing employees are not displaced to accommodate Fast Track graduates. (Claimant Affidavit, ¶ 10 and Exhibit D, pg. 3)



responded, in part, by apologizing “for any confusion [he] may have caused.” (Claimant Affidavit, Exhibit A, pg. 1)

On March 28, Claimant made an e-mail request of Chief Collins to schedule a Fast Track meeting, resulting in a meeting scheduled for April 4 attended by Chief Collins, Claimant, Claimant’s Supervisor Paul Labrecque and Josh Carter. (September 19 Response, Answer to Claimant Affidavit, ¶ 10) During the meeting, Mr. Carter responded to questions about the program and distributed the Fast Track program guidelines. (September 19 Response, Answer to Claimant Affidavit, ¶ 10) Mr. Carter explained that “within the next 30 days, [Claimant’s] assessments would be conducted and then [they] would meet to discuss the customized training and development plan...” (September 19 Response, Answer to Claimant Affidavit, ¶ 10)

Nothing happened within the 30 day period after April 4. Mr. Carter expected that if Claimant wished to continue with the application process, Claimant would schedule another meeting within about a week of the April 4 meeting to discuss any additional issues and the assessment tools that would be utilized. (See, September 19 Response, Carter Affidavit, ¶¶ 19-25) Claimant expected that Mr. Carter would conduct the assessment within the 30 days after April 4 and schedule a meeting to discuss a training program. (See, Claimant Affidavit, ¶ 11)

Claimant’s expectation was more consistent with the prior conversation and the Fast Track program guidelines, which provide, in part:

After the initial meeting, the evaluation period beings which will be up to 90 days. This period is to assess in earnest the candidate’s readiness for the program in addition to ensuring the program can appropriately meet their needs.

The first segment of the evaluation period (up to 30 days) will concentrate on assessing the Tribal Member in order to utilize all relevant resources in building a customized training and development plan.

(Claimant Affidavit, Exhibit D, pg. 2)

Ms. Torraca was not aware of Claimant’s Fast Track program application until the issue was raised at Claimant’s May 7 disciplinary meeting at which Claimant received a Performance Improvement Notice (PIN). (September 19 Response, Torraca Affidavit, ¶ 28, Torraca November 26 Affidavit ¶ 11) According to Mr. Carter, Claimant was informed at that meeting that “by virtue of the issuance of the PIN he would no longer be considered eligible for the program at [that] time.” (September 19 Response, Carter Affidavit, ¶ 28) The message was not received by Claimant, who made subsequent inquiries with Tribal Council and HR Generalist Tanisha Sebastian to advance his application in the program. (See, Claimant Affidavit, Exhibits H and I) About that time, Ms. Sebastian began assuming responsibility for oversight of the Fast Track program, although Mr. Carter continued his involvement during the transition. (September

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19 Response, Carter Affidavit, ¶ 5) By e-mail on June 12, Mr. Carter stated that Claimant was discontinued from the application process for six (6) months as a result of the PIN. (See, Claimant Affidavit, Exhibit I)

The Fast Track guidelines do not directly address the implications of a PIN for the application process, but state with respect to participation in the program after admission, “If the Tribal Member receives a Performance Improvement Notice for performance, attendance or behavioral issues, while an active participant of the program, they may be asked to step down from their training.” “[A]pplicants’ and participants’ involvement in the Fast Track program is subject to suspension, the duration of which is determined on a case-by-case basis assessment, taking into consideration such factors as the conduct at issue, discipline imposed and mitigating factors presented.” (Respondent’s Supplemental Response to MERO Request for Information dated November 29) Respondent provided evidence of several Fast Track participants and an applicant who were suspended from the program for three (3) or six (6) months as a result of receipt of discipline for violation of attendance or departmental policies. (Respondent’s Response to MERO Request for Information dated November 6, and Supplemental Response to MERO Request for Information dated November 29)

Regarding an applicant with attendance issues, Mr. Carter explained, “We do not allow anyone in the Fast Track program if they have more than 3.5 attendance points or active discipline in their file (mirroring the Transfer Policy). The purpose is to protect the integrity of the program and make sure those who participate meet specific criteria.” (Respondent’s Response to MERO Request for Information dated November 6, 2012, May 31 e-mail to Mike Brovero) Ultimately, the applicant was assessed 3.5 attendance points and decided to voluntarily withdraw from the Fast Track program. (Respondent’s Response to MERO Request for Information dated November 6, 2012, July 2 Note to File; See also, Respondent’s November 29 Response to MERO Request for Information).

Claimant contested his PIN before Tribal Council on May 10. (Claimant Affidavit, ¶ 13) Claimant’s eligibility to continue the Fast Track program application process was restored on June 19 with the rescission of the PIN by Tribal Council. (Claimant’s Affidavit, Exhibit J) In the interim, a notice was issued announcing Chief Collins’s resignation. (May 31 Memo from Tribal Council) Thereafter, on June 21, Cyndi Torraca asked Josh Carter to contact Claimant regarding the Fast Track program. (Claimant Affidavit, Exhibit K) By e-mail on June 25, Mr. Carter asked Claimant to schedule a meeting with his supervisor, Tanisha Sebastian and Mr. Carter. (Id.) By notice dated July 12, the appointment of Interim Chief of Police William Dittman was announced. (July 12 Memo from Cynthia Torraca)

After June 25, both Claimant and Mr. Carter made efforts to schedule a meeting but as of Mr. Carter’s vacation July 20-27, no meeting was scheduled. (Id.; September 19 Response, Carter Affidavit, ¶ 34) Claimant attributes the delays to Mr. Carter having conflicts that did not appear on his electronic calendar and attempting to schedule during a period when Claimant’s

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supervisor was unavailable. (Claimant Affidavit, ¶ 17) Respondent attributes the delays to Claimant's "restrictive parameters" for scheduling, which included taking into account those periods when he or his supervisor would be dispatching alone and would therefore not have coverage to attend a meeting. (See, September 19 Response, Answer to Claimant Affidavit, ¶ 17; Claimant Affidavit, Exhibit K)

Just prior to his vacation, Mr. Carter offered assistance in organizing the Fast Track meeting. (September 19 Response, Carter Affidavit, ¶ 35) The final communication appears to be Claimant's declination of the meeting due to his supervisor's schedule and request to be contacted if Mr. Carter could reschedule. (Id.; Claimant Affidavit, Exhibit K) Neither Claimant nor Mr. Carter made efforts to schedule a Fast Track meeting after Mr. Carter's return from vacation. (See, Claimant Affidavit ¶ 7 and September 19 Response, Answer to Claimant Affidavit, ¶ 7)

Tribal member Matt Hall, an employee of the Public Works, Community Planning and Building Management Department believed the Fast Track program was available only to Tribal members who worked for the gaming enterprise. (Hall Affidavit, ¶ 2) In about April, Mr. Hall was contacted by HR Generalist Tanisha Sebastian in her capacity as a career planning specialist. (Hall Affidavit, ¶ 3; Exhibit A) Ms. Sebastian reached out to Mr. Hall again on May 9. (Id.) Thereafter, a meeting was held between Ms. Sebastian, Mr. Hall and Mr. Hall's supervisor during which Ms. Sebastian provided information about the Fast Track program. (Hall Affidavit, ¶ 4; Exhibit A) A second Fast Track meeting was held before the end of May, attended by Ms. Sebastian, Mr. Hall, his supervisor and Mr. Carter. (Id.) By the beginning of June, Mr. Hall had completed and received the results of an on-line career assessment tool and he and his supervisor had received various Fast Track program documents from Mr. Carter. (Hall Affidavit, ¶¶ 6-8, Exhibits B and C) In mid-July another Fast Track meeting was held, attended by Mr. Hall, Mr. Carter and the executive director of Public Works, during which a career development plan was discussed. (Hall Affidavit, ¶ 9, Exhibit D) Shortly thereafter, Mr. Hall was informed by his executive director that Ms. Sebastian and Mr. Carter were no longer handling the program and he was trying to reach Cyndi Torraca, who was not handling it. (Hall Affidavit, ¶ 10) Mr. Hall heard nothing further about moving forward with the Fast Track program for at least three (3) months. (Hall Affidavit, ¶ 11) Mr. Hall was never told that he was responsible for coordinating or scheduling all the meetings associated with Fast Track. (Hall Affidavit, ¶ 11)

### ***B. Claimant's Alleged Misconduct***

At the March Tribal membership meeting, Claimant spoke individually with Councilor Crystal Whipple. (Complaint ¶ 6; Torraca Affidavit dated November 26, ¶ 2) Claimant shared concerns relating to the arrest of Morningstar Arroyo, who was employed at Public Safety, relating to an incident during which she released pepper spray. (Complaint ¶ 6; September 19 Response, Torraca Affidavit ¶ 4) Claimant stated, in part, that "someone may wish to look into the source of the pepper spray; that [he] had heard Morningstar state that she intended to ask Chief Collins

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for pepper spray.” (Complaint ¶ 6) He also expressed concern regarding the relationship between Chief Collins and Ms. Arroyo, indicating that Ms. Arroyo had been shown favoritism. (September 19 Response, Answer to Claimant’s Affidavit, ¶ 9; Torraca Affidavit ¶¶ 4 and 7)

Councilor Whipple reported her conversation with Claimant to Ms. Torraca. (September 19 Response, Torraca Affidavit, ¶ 4) The information relayed to Ms. Torraca by Councilor Whipple was that Claimant made a definitive statement that the pepper spray was given to Ms. Arroyo by Chief Collins from the MPTN Police Department supply. (September 19 Response, Answer to Claimant Affidavit, ¶¶ 6 and 9; Torraca Affidavit, ¶ 4) Ms. Torraca was told that Claimant stated definitively that Chief Collins and Ms. Arroyo were having a personal relationship. (September 19 Response, Answer to Claimant Affidavit, ¶ 9; Torraca Affidavit, ¶ 4)

Initially, Ms. Torraca had no intent of conducting an investigation. (Torraca November 26 Affidavit, ¶ 2) She contacted Chief Collins and inquired about the status of Ms. Arroyo. (Torraca November 26 Affidavit, ¶ 2) Without attribution, she informed Chief Collins that she had received a report that he was the source of Ms. Arroyo’s pepper spray, which he denied, indicating Ms. Arroyo said she bought it. (Torraca November 26 Affidavit, ¶ 2)

At a regularly scheduled appearance before Tribal Council on March 29, Ms. Torraca was directed to conduct an investigation of Claimant’s purported statement that the pepper spray used by Ms. Arroyo in the incident that resulted in her arrest was MPTN Police Department property given to her by Chief Dan Collins. (September 19 Response, Torraca Affidavit, ¶ 5; November 26 Affidavit, ¶ 3) Councilor Whipple was present and did not disavow the characterization of the assertion attributed to Claimant. (Torraca November 26 Affidavit, ¶ 5) Ms. Torraca conducted an investigation that included receipt of information from Claimant, Paul LaBrecque, Wayne Glaude, Law Enforcement Radio Communications Specialist, Chief Collins and Morningstar Arroyo, as well as collection of various documents. (Investigative File,<sup>6</sup> Torraca November 26 Affidavit, ¶¶ 6-9) Claimant suggested Ms. Torraca check the Tribal police department stock to determine if the pepper spray was the same as that used by Ms. Arroyo. (Claimant Affidavit, ¶ 9) Chief Collins provided Ms. Torraca with a photo of police grade capsicum used by the MPTN Police Department and the pepper spray container that had been confiscated from Ms. Arroyo. (Investigative File; September 19 Response, Torraca Affidavit, ¶ 8; Torraca November 26 Affidavit, ¶ 2) After the incident, Ms. Arroyo told others, including the arresting police department, that she had obtained the pepper spray she used from the MPTN police department. (Claimant Affidavit, ¶ 11) When she spoke with Ms. Torraca, however, Ms. Arroyo stated that she had obtained the pepper spray from Auto Zone in Norwich.<sup>7</sup> (Torraca November 26 Affidavit, ¶ 9)

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<sup>6</sup> Ms. Torraca’s investigative file was produced for *in camera* review only. MERO’s acceptance of *in camera* review of the investigative file is not an admission that disclosure of the investigative file could not be compelled or a waiver of any right MERO may have to compel submission.

<sup>7</sup> The Norwich Auto Zone confirmed that it sells pepper spray.



Ms. Torraca determined that the pepper spray used by Ms. Arroyo in the incident was not the type used by the MPTN Police Department. (September 19 Response, Torraca Affidavit, ¶ 8) She further determined that Chief Collins was not the source of the pepper spray used by Ms. Arroyo. (September 19 Response, Torraca Affidavit, ¶ 8) Claimant independently learned from Ms. Arroyo's mother-in-law that the pepper spray used in the incident was not police grade. (Claimant Affidavit, ¶ 12) Ms. Torraca concluded that Claimant was in violation of Tribal policy by advancing unsubstantiated, false information; specifically, that the pepper spray was MPTN property and had been given to Ms. Arroyo by Chief Collins.<sup>8</sup> (September 19 Response, Torraca Affidavit, ¶ 9; Torraca November 26 Affidavit, ¶ 10)

Ms. Torraca recommended that Claimant should receive the first level of progressive discipline, a written warning, for the violations of policy she found. (September 19 Response, Torraca Affidavit, ¶ 9; See also, Claimant Affidavit, Exhibit G) She submitted a report to Tribal Council that included the scope of her investigation, her findings, conclusions and recommendations. (Investigative File) Tribal Council had the opportunity to review the report and ask questions via e-mail or in person before voting on the matter. (Investigative File)

Ms. Torraca had been asked previously by Tribal Council to conduct investigations. (Torraca November 26 Affidavit, ¶ 13) In this case, a departmental investigation would not have been appropriate due to the allegations implicating the head of the police department. (September 19 Response, Torraca Affidavit, ¶ 16) Detective Sergeant Tougis, who typically conducts internal affairs investigations for the MPTN Police Department, indicated that the only other investigation implicating her superiors also was conducted by Ms. Torraca. (MERO Memo dated November 7 of Tougis interview)

Tribal Council has not accepted Ms. Torraca's recommendations in all instances, but in this case, it did. (Torraca November 26 Affidavit, ¶ 13; September 19 Response, Torraca Affidavit, ¶¶ 9 and 10) On May 7, Ms. Torraca delivered the Performance Improvement Notice (PIN) to Claimant in the presence of his supervisor, Paul Lebreque, and Native American Preference Office representative Josh Carter. (September 19 Response, Torraca Affidavit, ¶ 11) Claimant lost about ten (10) hours of work time after receipt of the PIN. (Claimant Affidavit, ¶ 20)

Thereafter, at Claimant's request, on about May 10, Claimant appeared before Tribal Council to dispute his receipt of the PIN. (Claimant Affidavit, ¶ 13) The PIN was subsequently rescinded by notice dated June 19. (September 19 Response, Torraca Affidavit, ¶ 15) The rescission notice states, in part:

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<sup>8</sup> On a subsequent date, after the Chief's departure, various containers of non-MPTN Police Department issue pepper spray were found in his office. (MERO Memo of Tougis interview)



...Although the accusation was found to be false, it was important for us to investigate and know the truth of the matter. Therefore, we do appreciate the fact that you brought this to our attention; thank you.

However, please bear in mind that disciplinary action will be issued in the future to an employee, if there is a history of unsubstantiated or false claims made that cause disruption to the department or the workplace to the normal work process.

With that being said, we wish you the best of luck in the tribal member Fast Track program.

(Claimant's Affidavit, Exhibit J)

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

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

MERO is an agency of limited jurisdiction and its inquiry is circumscribed accordingly. The issue before the MERO is limited to a determination as to whether Claimant was retaliated against due to his activities pursuing his rights under Title 33, the Preference Law. 33 M.P.T.L. ch. 1 § 13(a) provides,

a. No Employer shall retaliate against any Person with respect to Employment Opportunities or terms or conditions of employment because such Person has filed a claim or instituted or caused to be instituted any proceeding under or related to this Law or has testified or is about to testify in any such proceeding or because of the exercise by such Person on behalf of himself or others of any right afforded by this Law.

The elements of a retaliation claim were set forth in *John Anthony Colebut v. Mashantucket Pequot Gaming Enterprise, d/b/a Foxwoods Resort Casino*, MERO Case No. 2010-33005 (October 6, 2010):

In order to prevail in a claim of retaliation, the evidence must show that (1) the claimant engaged in some known protected activity, (2) the claimant suffered an adverse employment action and (3) a causal connection exists between the protected activity and the adverse action. Respondent can nevertheless defeat the claim if it demonstrates that the adverse action would have been taken notwithstanding any retaliation.

In this case, there is no dispute that Claimant meets the first element of having engaged in protected activity by filing and pursuing a MERO claim previously. The second element of the test requires an adverse employment action of sufficient significance that it would likely deter a reasonable person from pursuing his or her rights under the Preference Law.

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Employment opportunities generally include training and promotional opportunities. 33 M.P.T.L. ch. 1, § 4(c) The Fast Track program is a career development training program exclusively available to Tribal members to help them advance and increase their rate of advancement.<sup>9</sup> The exclusivity of the program in and of itself provides a preference in opportunities solely for the highest preference category under the law, Tribal members. Barriers to pursuit of the Fast Track program could be sufficiently significant to constitute an adverse employment action. The Fast Track program guidelines envision an application process of just over three (3) months. Claimant's experience of a four (4) month period, followed by a disciplinary suspension from the program and no further advancement of the application after the suspension was lifted six (6) weeks later, is sufficiently beyond the program parameters to constitute an adverse employment action.

In addition, Claimant alleges loss of about ten (10) hours of work time as a result of the disciplinary action he was assessed. Even assuming the lost work time could otherwise be considered an employment action, it is not sufficiently significant to be considered an adverse employment action. Similarly, the fact that Claimant was the subject of a workplace investigation does not, in and of itself, constitute an adverse employment action.

The evidence also must establish the third element of a nexus between the protected activity and the adverse employment action. It is undisputed that both Ms. Torraca and Mr. Carter had knowledge of Claimant's prior MERO Board claim. There is, however, no direct evidence of retaliation or a retaliatory motive. Several factors could support a finding of a nexus between Claimant's prior preference claim and the barriers to advancement he experienced: (1) the close timing of the alleged retaliation relative to the protected activity, (2) if similarly situated individuals received more favorable treatment in the Fast Track program, or (3) if the investigation conducted by Ms. Torraca was unreasonable.

#### ***A. Timing of Alleged Retaliation Relative to Protected Activity***

Claimant alleges that he initially attempted to pursue the Fast Track program in January, shortly after he settled his MERO claim, and he was unsuccessful at making any substantial progress with the application. The temporal proximity of events may support a claim of misconduct, however, in this case, the Fast Track program was not made available to Tribal members employed by the Tribal government until May, several months after Claimant made his initial request to apply for the program. Mr. Carter could easily have deferred action on Claimant's request until May, but instead, he began assisting Claimant with the application process, which weighs against a finding of retaliation, rather than in favor of it.

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<sup>9</sup> Whether the Fast Track program, as structured, complied with the Preference Law is not before the MERO and not addressed herein.



### ***B. Treatment of Other Fast Track Program Applicants Relative to Claimant***

Claimant asserted his belief that other Tribal members had completed the Fast Track program in less time than it took him to complete the application process for the program. By its terms, the Fast Track program appears to have a scheduled approach to the application process that would have an applicant admission determination within approximately three (3) to four (4) months. Claimant had been attempting to initiate his application process for over three (3) months when he received a disciplinary suspension from the program.

Claimant specifically pointed to Tribal member Matt Hall, a Public Works employee, as a comparator. In some respects Mr. Hall's experience with the Fast Track program stands in stark contrast to Claimant's experience. Mr. Hall was solicited for the program by Ms. Sebastian and began the application process shortly after; program information was provided expeditiously; evaluation tools were implemented quickly; and meetings were initially scheduled and held with little delay. In addition, although Mr. Hall was expected to schedule the first meeting, there did not appear to be an expectation beyond the first meeting that he would be exclusively responsible for advancing his program application as there was for Claimant.

The evidence supports a finding that the initial three (3) to four (4) months of Claimant's application process were not as accomplished as Mr. Hall's first two (2) months. Nevertheless, Claimant's first three months occurred before the program was even made available to Tribal government employees, therefore, the delay placed him in no worse position than if he had been expected to wait for the roll out of the program to governmental employees.

Both Mr. Hall and Claimant appeared to receive support within their supervisory and managerial structures, but unlike the Police Department, Public Works did not experience turnover in any positions involved in the Fast Track program. Notwithstanding the lack of turnover in Public Works and the initial expeditious handling of Mr. Hall's application, he experienced the same cessation of application activity in the summer as experienced by Claimant. In Mr. Hall's case, he was told that administration of the program was being transitioned to another person, and as of his MERO interview, more than two (2) months had passed with no activity. In Claimant's case, efforts to advance the application appeared to cease when Mr. Carter went on vacation. As of the investigation of this case, Mr. Hall had not been admitted to the Fast Track program, much less completed it. No Tribal members had completed a Fast Track program.

Claimant also points to the program guidelines in support of his contention that disciplinary action does not suspend applicants from the program. The program guidelines are silent regarding the implications of discipline for applicants, but provide that program participants who receive a PIN may be subject to program suspension or discontinuation. Two other applicants were suspended from the application process due to disciplinary action. In one case, the individual was 2.5 months into his assessment when disciplinary action forced him out of the program. In the second case, the employee received a six (6) month program suspension,

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comparable to that received by Claimant prior to Tribal Council's rescission of the disciplinary action. In addition, Mr. Carter confirmed in correspondence relating to another applicant that discipline could be a disqualifier in order to maintain program integrity.

There is no doubt that Claimant's Fast Track program application would have benefitted greatly from clearer program guidelines, and better communication and support from Mr. Carter. Transitions in the Fast Track program personnel and within the department's leadership added to the lack of continuity in the process. In the end, however, the application processes for Mr. Hall and Claimant were not materially different and ultimately, neither application was processed to completion, much less within the time period provided for in the guidelines. Additionally, the evidence reflects other program suspensions resulting from disciplinary action. Overall, the evidence does not support a finding that Claimant suffered disparate treatment in the Fast Track program application process.

### ***C. The Reasonableness of the Investigation***

Claimant takes issue with virtually every aspect of Ms. Torraca's investigation and its results. In the first instance, it is notable that by his own account, Claimant sought an investigation, specifically suggesting to Councilor Whipple that an investigation may be warranted of the source of the pepper spray used by fellow employee and Tribal member Morningstar Arroyo in an incident resulting in her arrest. While Claimant believed he was speaking as a Tribal member concerned about the implications for the reputation of the Tribe if the information he offered was correct, the information directly implicated a fellow employee and the head of his department in potential workplace misconduct.

Claimant contends that to the extent there was a workplace issue, the investigation should not have been performed by Ms. Torraca. Detective Sergeant Tougis, who is designated to conduct internal affairs investigations, confirmed that she has not conducted any internal affairs investigations involving alleged misconduct by any of her superiors. Furthermore, the only investigation about which she was aware that involved alleged misconduct by a superior was conducted by Ms. Torraca, therefore Ms. Torraca's investigation of this matter is consistent.

According to Claimant, Ms. Torraca took advantage of an opportunity to pursue an investigation that would result in Claimant being disciplined and excluded from the Fast Track program. Several factors support a contrary view. First, Ms. Torraca did not initiate an investigation until so instructed by Tribal Council. Second, Ms. Torraca was not aware of Claimant's application in the Fast Track program until the disciplinary meeting. Third, Tribal Council, not Ms. Torraca, determined the scope of the investigation and made the ultimate disciplinary determination.

Claimant further asserts that Ms. Torraca should have conducted a more extensive investigation and suggests some additional evidence that could have been considered or collected. None of the additional suggested inquiries, however, would have changed the factual outcome of the

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investigation. Ms. Arroyo told Claimant well prior to the incident that she intended to ask the Chief for pepper spray. After the incident, Ms. Arroyo told others, including the arresting police department, that she had obtained the pepper spray she used from the MPTN police department. The pepper spray used by Ms. Arroyo, however, was not a police grade pepper spray like that used by the MPTN police department. Shortly after being separated from employment, Ms. Arroyo told Ms. Torraca that she obtained the pepper spray from the Norwich Auto Zone, a viable source. The Chief also denied providing Ms. Arroyo with pepper spray. Based on the available evidence, Ms. Torraca made reasonable conclusions that the pepper spray used in the incident was not MPTN property provided to Ms. Arroyo by the Chief. Additional investigation at that time was not likely to yield a different result.<sup>10</sup>

While Claimant also challenges the conclusion drawn from the investigation and the policy violations found, simply put Ms. Torraca's conclusions and interpretation of the policies were not outside the realm of reasonableness.<sup>11</sup> Moreover, importantly, Ms. Torraca presented a full written report to Tribal Council, which is not alleged to have retaliated against Claimant. Tribal Council had ample opportunity to consider Ms. Torraca's report before making its decision, and made the ultimate determination to discipline Claimant under its policies.

The evidence reveals that Ms. Torraca was simply performing her human resource duties as directed by Tribal Council. The evidence does not support a finding that Ms. Torraca attempted to perfect her responsibilities in an unreasonable or otherwise retaliatory manner.

## **V. Disposition**

Taken as a whole, the evidence fails to demonstrate a causal connection between Claimant's protected activities and the delays he experienced in his Fast Track program application or the discipline he was assessed. The evidence does not support a conclusion that Mr. Carter or Ms. Torraca retaliated against Claimant due to his protected activities under the Preference Law. Accordingly, Respondent did not violate the Preference Law and the Claim is dismissed.

## **VI. Notice of Publication**

This Final Claim Determination is available to the public through the MERO and subject to formal revision and publication by the MERO. Readers are encouraged to advise the MERO of any typographical or other formal errors so that corrections can be included in the published opinion.

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<sup>10</sup> The Chief's office collection of pepper spray that was not police grade could not have been considered, because it was not discovered until well after the close of the investigation.

<sup>11</sup> Ms. Torraca's investigation did not uncover any favoritism shown to Ms. Arroyo. Ms. Torraca could easily have incorporated this finding into the adverse determination against Claimant, as she might have if she had a retaliatory motivation, but she did not.



## 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 30<sup>th</sup> day of January, 2013.



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Ursula L. Haerter  
MERO Director

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MERO

## MASHANTUCKET EMPLOYMENT RIGHTS OFFICE

### Notice of Parties' Appeal Rights

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

**Case Name:**

Scott Barton v. Mashantucket Pequot Tribal Nation

**Case Number:**

2012-33016

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

January 30, 2013

Pursuant to 33 M.P.T.L., the Mashantucket Pequot Tribal and Native American Preference Law, as amended, 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. The parties may not introduce evidence in court 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.

**Representation in Court:** If a party wishes to be represented in Tribal Court by an attorney, it is that party's responsibility to find and retain an attorney at that party's cost. The MERO represents the MERO's decision in court and does not represent any employer or claimant.

**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  
(10-01-12)