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: ReGina J. Zuni v. Mashantucket Pequot Tribal Nation		**Case Number:** 2013-33019
Date of Claim Filing: February 21, 2013		**Date of Determination:** August 26, 2013

On August 5, 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:

ReGina J. Zuni ("Claimant") alleges in her Claim, filed on February 21, 2013, that she is a Native American who was denied consideration for employment 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"). 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

When Claimant, a member of the Pueblo of Isleta, attempted to apply for the position of Senior Staff Consultant, Healthcare Systems at PRxN, she was informed that she had a "no hire" designation due to her prior termination from employment with Respondent's Management Information Systems department. She alleges that the "no hire" designation was unjustified, because her termination was in retaliation for the workplace complaints she pursued; therefore, barring her from employment denies her preference in employment as provided in Title 33.

Respondent denies any violation of the Preference Law. Respondent asserts that Claimant was previously terminated for misconduct, including sexual harassment, and therefore ineligible for rehire under Respondent's policies. Furthermore, Respondent asserts that even assuming Claimant was eligible for hire, she does not meet the minimum necessary qualifications of the position for which she applied.

II. Procedural History

Claimant submitted a Claim dated February 13, 2013 and a sworn affidavit dated February 19, 2013, in support of her Claim.[1] She also provided documentation she had submitted in

[1] All dates hereinafter are in Calendar Year 2013 unless otherwise indicated.

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conjunction with her claim pursuant to 33 M.P.T.L. ch. 1 § 9(a) before Respondent's Native American Preference Office.

In accordance with the MERO's interim order dated February 21, Respondent confirmed that the position of Senior Staff Consultant, Healthcare Systems at PRxN would not be filled until the earlier of an alternative MERO Order or the expiration of 90 days.[2] Case processing was held in abeyance for a reasonable period pending Claimant's pursuit of a claim through Respondent's internal complaint process. The processing stay was lifted April 29.

Respondent submitted a response to the Claim dated June 7, which included a Position Statement, Answer to Claimant's Affidavit and several documents. By telephone on June 19, Claimant requested a period of 30 days to respond to Respondent's submission to the MERO. On about June 28, MERO forwarded correspondence to Claimant and Respondent, including the MERO's grant of Claimant's request for at least 30 days to submit a response to the Respondent's answer, a deadline of July 29 for both parties to submit all final evidence and argument, and a Request for Information directed to each party. Respondent submitted a response to the Request for Information directed to it on July 29. Claimant did not submit a response to the Request for Information directed to her or any evidence or argument in response to Respondent's Answer.[3]

III. Findings of Fact

Respondent is the Mashantucket Pequot Tribal Nation. (June 7 Response)[4] Respondent admits that Claimant is a Native American. (June 7 Response, Answer to Claimant Affidavit, ¶ 1)

A. Claimant's Employment Separation

Claimant was previously employed by the Mashantucket Pequot Tribal Nation in the position of Senior Government System Staff Consultant in the MIS Department. (June 7 Response, Answer to Claimant Affidavit, ¶ 8) She was hired about November, 2007, suspended September 26, 2008, pending completion of an investigation of alleged misconduct, and terminated about November 21, 2008. *Id.* During the investigation of the allegations against Claimant, Claimant filed a complaint that included allegations of sexual, racial and religious discrimination, fraud

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2 The MERO's interim order authority is set forth in 33 M.P.T.L. ch. 1 § 9(f).

3 The failure to respond to the MERO Request for Information results in an adverse inference against Claimant with respect to the requested information.

4 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."

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and workplace violence, against her co-workers and direct supervisor. (Foxwoods Resort Casino Formal Complaint dated September 29, 2008) Claimant's allegations were referred to the Tribal Police and the Office of the Inspector General for investigation. (June 7 Response, Exhibit 5)

Claimant's termination resulted from the investigation of allegations that she had engaged in "threatening, rude and discourteous behavior," including conduct in violation of Respondent's Standards of Conduct Policy and the Sexual and Other Harassment Policy. (June 7 Response, Exhibit 5; Answer to Claimant Affidavit, ¶ 8) Claimant believes her complaint against her co-workers and supervisor was the real reason for her termination. (Claimant Affidavit, ¶ 9)

Claimant was in New Mexico due to a death in her family when she received word of her termination on November 21, 2008. (Claimant Affidavit, ¶ 8) She initially availed herself of the opportunity to appeal the termination decision through Respondent's Board of Review ("BOR") process by submitting a request dated December 8, 2008.[5] (June 7 Response, Exhibit 7) In February, 2009, she was notified that the Board of Review hearing had been scheduled for March 25, 2009. (July 29 Respondent Response to Request for Information, Tab 2) Shortly thereafter, Claimant sent an e-mail indicating that she would get back to Respondent regarding her availability. (June 7 Response, Exhibit 6) On March 6, 2009, not having heard from Claimant, Employee Relations representative Gina Williams responded via e-mail, confirming the hearing date and indicating that absent a request for an alternative date from Claimant by March 9, 2009, the hearing would go forward as scheduled. *Id.*

On March 9, 2009, Claimant responded that she was "in no hurry to partake with this BOR mockery," but did not offer any alternative dates. (June 7 Response, Exhibit 6) Ms. Williams responded the same day, interpreting Claimant's message as a lack of interest in proceeding and informing her that the BOR hearing was being canceled as a result. *Id.* Claimant was equally quick to indicate that she was interested in participating in the BOR hearing and to ask that the package of materials for the hearing be sent to her via certified mail. *Id.* Once again, Claimant offered no date for rescheduling the BOR. *Id.* The following day, Ms. Williams confirmed by e-mail that the BOR hearing would remain scheduled for March 25 unless Claimant requested a date change, preferably within 24 hours. *Id.*

On March 18, 2009, Claimant indicated that she had had another death in her family, was not able to proceed on March 25 and would call Ms. Williams the following day. (June 7 Response, Exhibit 6) After twelve days of not having heard anything further from Claimant, Ms. Williams notified Claimant of a new hearing date of May 27. *Id.* Claimant informed Ms. Williams that May 27 was not viable due to observance of a traditional grieving cycle, and asked to be contacted to discuss a date in June or July. *Id.* The following day, April 3, 2009, Ms. Williams provided four possible dates in June and July from which she asked Claimant to select by April 10, 2009. *Id.* On April 15, 2009, Larry Dutra, Manager of Employee and Labor Relations, informed Claimant that the BOR hearing was scheduled for July 8 at 10 a.m. because Claimant had not responded to Ms. Williams' earlier message. *Id.* Claimant responded four (4) days later,

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5 BOR decisions are subject to review by the Tribal Court pursuant to 8 M.P.T.L.

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requesting July 15 for the BOR hearing. *Id.* The BOR hearing was rescheduled to July 15. *Id.* Claimant subsequently requested confirmation that the BOR hearing would go forward on July 15. *Id.* Thereafter, Claimant called Mr. Dutra, then followed up with a July 13, 2009 e-mail confirming that she was unable to proceed with the July 15 hearing date because of "unforeseen medical reasons," but she was interested in participating as well as contacting the MERO. *Id.* She indicated her willingness to provide medical substantiation of her need for a further extension of time. *Id.*

By e-mail response the same day, Mr. Dutra reviewed Respondent's attempts to schedule the Board of Review hearing since Claimant's initial request on December 8, 2008 and indicated that pursuant to employer policy, because the hearing had already been rescheduled once, it could not be rescheduled again. (June 7 Response, Exhibit 6) Mr. Dutra nevertheless offered to forward any medical documentation substantiating Claimant's travel restrictions to the Executive Director of Employee and Labor Relations and requested that any documentation be submitted no later than July 20, 2009. *Id.* He also provided contact information for the MERO. *Id.* Claimant responded the following day that she would contact Mr. Dutra, but she did not contact him or submit any medical documentation. (June 29 Respondent Response to Request for Information, No. 7; Claimant Failure to Respond to Request for Information, No. 4)

B. Claimant's Application for Rehire

At the time of Claimant's termination from employment, Respondent's rehire policy provided that if an employee was terminated for misconduct, the employee would not be eligible for rehire.[6] (June 7 Response, Exhibit 4, Rehire policy with Effective Date 10-1-07) The policy specifically cites as an example of misconduct, "sexual harassment." *Id.* When she was terminated, Claimant was not advised that she was ineligible for rehire. (Claimant Affidavit, ¶ 8; June 29 Respondent Response to Request for Information, No. 5) Absent an inquiry, Respondent does not offer rehire eligibility information to any separating employee. (June 29 Respondent Response to Request for Information, No. 5)

Beginning about February 9, Claimant attempted to apply for the position of Senior Staff Consultant, Healthcare Systems at PRxN through Respondent's on-line application system. (Claimant Affidavit, ¶ 2) When she was unable to access the system, she was assisted by Human Resource representative Latoya Cluff. (Claimant Affidavit, ¶ ¶ 3 and 4) She was informed by Ms. Cluff that she had a "no hire" designation. (Claimant Affidavit, ¶ 2) On about February 14, Claimant was informed by Ms. Cluff that her application had been accepted by the system but that did not mean it would be processed and if she wished to request an exception to the "no hire" designation, she was required to contact Larry Dutra. (Claimant Affidavit, ¶ 4) On February 15, Claimant received an e-mail that states, in part, "After a review of your previous

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[6] The relevant provisions of the revised policy in effect when Claimant sought rehire are comparable. (*See* June 7 Response, Exhibit 4, Rehire policy with Effective Date 3/19/12,)

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employment with the Mashantucket Pequot Tribal Nation we regret to inform you that we are not able to consider you for re-employment at this time." (Claimant Affidavit, Exhibit A)

When an applicant with a "no hire" designation contacts Mr. Dutra, he explains the basis for ineligibility and advises the applicant of the opportunity to request an exception by submitting a written request and supporting documentation. (June 29 Respondent Response to Request for Information, No. 1) In the past, applicants have contacted Mr. Dutra, but never availed themselves of the opportunity to request an exception to the "no hire" designation.[7] (June 29 Respondent Response to Request for Information, Nos. 1 and 2) In addition to being advised by Ms. Cluff in mid-February, Claimant was again advised of the opportunity to request an exception in the April 26 response to her complaint to the Native American Preference Office. (June 7 Response, Exhibit 2) Claimant did not contact Mr. Dutra to request an exception to the "no hire" designation. (June 29 Respondent Response to Request for Information, No. 4; Claimant Failure to Respond to Request for Information, No. 3)

IV. Analysis and Conclusions of Law

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

An employment opportunity under the Preference Law includes consideration for hire for an open position. 33 M.P.T.L. ch. 1 § 4(c) When the Tribe is the employer, as here, preference is required to be afforded first to Tribal members, second to Tribal member spouses and third to Native Americans. 33 M.P.T.L. ch. 1 § 5(a) Eligibility for preference is contingent on a preference eligible individual meeting the minimum necessary qualifications of the position. 33 M.P.T.L. ch. 1 §§ 4(h) and 5(a) Accordingly, as a Native American, Claimant is entitled to receive third tier preference by the Tribe for any employment opportunities for which she meets the minimum necessary qualifications.

The Preference Law generally does not preclude an employer from maintaining and enforcing reasonable policies that apply equally to preference and non-preference individuals or requiring compliance with such policies as a minimum necessary qualification for open positions. *Ward v. Mashantucket Pequot Gaming Enterprise*, MERO Case No. 2012-33015, 8 (April 2013) Respondent has a legitimate business interest in maintaining a workplace free of employee misconduct. A policy precluding the rehire of prior employees who committed sufficiently egregious workplace misconduct that they were terminated is a reasonable restriction based on legitimate business interests. Respondent evaluates exception requests on a case-by-case basis.

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[7] In addition to the applicants who contact Mr. Dutra directly, referrals of Tribal members may be made through a Tribal program administered by the Career/Life Assessment & Planning Center (CAP). Members of the Mashantucket Pequot Tribe are afforded the opportunity to seek removal of a misconduct based "no hire" designation through CAP. (June 29 Respondent Response to Request for Information, Nos. 2 and 3; Tab 1) Successful completion of the program and continued compliance with its terms result in a CAP endorsement that the individual is ready to re-enter the workforce, but the endorsement does not guarantee the grant of an exception to the "no hire" designation. (June 29 Respondent Response to Request for Information, Tab 1, pg. 3)

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The record contains no evidence that the policy was not enforced or was implemented in a manner inconsistent with the Preference Law.[8] *See e.g., Ward v. Mashantucket Pequot Gaming Enterprise*, MERO Case No. 2012-33015, 10-11 (April 2013)(policy compliance requirement was not minimum necessary qualification where no showing of consistent enforcement)

MERO is an agency of limited jurisdiction. In this case, Claimant alleges that an unjustified termination for misconduct in 2008 resulted in a denial of preference for rehire in 2013. Where, as here, Claimant's termination was subject to an appeal process that included review by the Tribal Court, the MERO's consideration of the circumstances surrounding the termination is limited to whether Claimant was denied the right to contest her termination or somehow hindered by Respondent in the pursuit of that right. The record contains no such evidence. To the contrary, Respondent afforded Claimant every opportunity to schedule a Board of Review hearing on a date and time convenient for Claimant. Notwithstanding Claimant's unresponsiveness and repeated failure to offer dates of availability, Respondent engaged in over four (4) months of efforts to schedule the BOR hearing. Even when Mr. Dutra informed Claimant that the hearing would not be rescheduled again, the door was left open for her to appeal with the submission of medical substantiation for her inability to attend the scheduled date. Claimant initially indicated interest, after which she did not follow through, allowing the time period to lapse without providing any information. Claimant voluntarily chose not to take advantage of the opportunities to challenge her termination, so the termination for misconduct stands.

Claimant appears to suggest that if she had been informed at the time of her termination that she would not be eligible for rehire, she would have completed her challenge to the termination. Respondent does not specifically offer rehire eligibility information to separating employees, and the Preference Law does not require otherwise. Claimant could have reviewed Respondent's policy during employment or asked a question during the termination process. Furthermore, there is no indication from the evidence that knowledge that the termination resulted in a "no hire" status would have yielded a different result. To the contrary, just as she declined to follow through with the Board of Review, Claimant similarly never contacted Larry Dutra to request an exception to the "no hire" designation after being advised of the process at least twice.

Under the circumstances presented here, eligibility for rehire was a minimum necessary qualification for employment that Claimant did not meet. Absent grant of an exception to the "no rehire" designation, Claimant's termination for misconduct, which was not contested by Claimant, disqualifies her from employment with the Mashantucket Pequot Tribal Nation.[9]

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[8] The fact that the Tribe offers CAP services that include a program to help Tribal members maximize the potential for the grant of an exception to a "no hire" designation does not compromise Respondent's policy, which permits any affected applicant to seek an exception.

[9] As the MERO's decision is dispositive of the case, no consideration is given to Respondent's alternative defense that Claimant would not have met the minimum necessary qualifications of the position had she been granted an exception to the "no hire" designation.

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V. Disposition

Respondent did not violate 33 M.P.T.L., the Tribal and Native American Preference Law, when it denied Claimant consideration for hire for the position of Senior Staff Consultant, Healthcare Systems at PRxN, due to Claimant's failure to meet the minimum necessary qualifications for the position because of her ineligibility for rehire. Accordingly, the Claim is dismissed in its entirety.

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.

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 26th day of August, 2013.

Ursula L. Haerter
MERO Director

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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:
ReGina J. Zuni v. Mashantucket Pequot Tribal Nation

Case Number:
2013-33019

Date of Mailing of Final Claim Determination:
August 26, 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.

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