



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: Ormond Northup v. Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino	Case Number: 2013-33022
Date of Claim Filing: June 13, 2013	Date of Determination: November 20, 2013

On October 21, 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.

Ormond Northup (“Claimant”), spouse of Tribal member Coriene Northup, alleges in his Claim, filed on June 13, 2013, that the Mashantucket Pequot Gaming Enterprise, d/b/a Foxwoods Resort Casino (“MPGE” or “Respondent”) failed to post a floor supervisor position that it filled with an individual who does not have preference, thereby denying Claimant a promotional opportunity 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

Claimant, lawfully married to Tribal member Coriene Northup, alleges that on an unknown date, Respondent failed to post a floor supervisor position at Foxwoods that was awarded to Brian Donnelly, who is not preference eligible, thereby denying preference eligible individuals, including Claimant, the opportunity to apply for and be awarded the position.

Respondent denies any violation of the Preference Law. Respondent asserts that it posted an MGM floor supervisor position in July 2011, which was filled with the non-preference eligible individual, Brian Donnelly, who was transferred in September 2012 to Foxwoods in the same capacity.

II. Procedural History

Claimant submitted a sworn affidavit dated June 13, 2013 with his Claim.¹ He provided additional information during the course of the investigation, including meeting with the MERO Director on August 2 and September 4. Claimant also referred the MERO to witness Don MacPhee, a trustee

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

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and steward for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 2121. (*See Local 2121 Officers and Stewards*, accessed October 21, 2013, <http://region9a.uaw.org/local2121/>)

Respondent submitted a response dated July 29, which included a Position Statement, Answer to Claimant's Affidavit, and several documents. Respondent further submitted responses dated July 29 and August 27 to the MERO's Requests for Information dated June 13 and August 6, respectively. Respondent presented Bruce Massey, Director of Games Administration, for interview by the MERO on August 30.

III. Findings of Fact

Respondent is the Mashantucket Pequot Gaming Enterprise. (July 29 Response)² Respondent admits that Claimant is a spouse of a Tribal member. (July 29 Response, Answer to Claimant Affidavit, ¶ 1)

An open floor supervisor position at MGM was posted on or about July, 2011.³ (July 29 Response, Answer to Claimant Affidavit ¶ 3, Exhibits A and B) The applicants were internal and external, including a Native American. (Memo of August 30 Massey Interview) Two applicants were hired, one preference eligible and the other, Brian Donnelly, an external candidate who was not preference eligible. (July 29 Response, Position Statement, pg. 1 and Response to June 13 Request for Information No. 3; Memo of August 30 Massey Interview)

Generally, floor supervisors are "assigned, promoted and budgeted to a specific property (i.e. MGM or Foxwoods)." (July 29 Response, Answer to Claimant Affidavit ¶ 3) "The Table Games department does not have a formal Transfer Policy." (August 27 Response to August 6 Request for Information No. 1) Respondent does, however, have a transfer policy. (Memo of August 30 Massey Interview) The transfer policy provides, in part, "All position openings will be posted..." (Internal Transfer Policy with effective date of 7/25/12, pg. 1 of 3)

Respondent maintains a "transfer book" in which employees interested in transfer from one property to the other may indicate their interest. (August 27 Response to August 6 Request for Information Nos. 1 and 3e; Memo of August 30 Massey Interview; Memo of August 29 MacPhee Interview) When a transfer opportunity arises, transfer is offered first to any preference eligible individuals who have signed the transfer book, in accordance with the appropriate preference priority. (August 27 Response to August 6 Request for Information No. 3e) If there are no preference eligible individuals in the transfer book, the most senior employee on the transfer request list is transferred. (August 27

² 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." Additional documents are generally referenced by the nature of the document and date.

³ Floor supervisors are also referred to as full floor supervisors. (*See, e.g.*, Claimant's affidavit.)

Response to August 6 Request for Information No. 3e; Memo of August 30 Massey Interview; *See also* Memo of August 29 MacPhee Interview) In addition, according to Respondent, floor supervisors may be transferred to address an “imbalance” in staffing between MGM and Foxwoods. (July 29 Response, Response to June 13 Request for Information No. 1)

Mr. Donnelly was transferred from MGM to Foxwoods about September 9, 2012. (July 29 Response, Response to June 13 Request for Information No. 2) Respondent did not post or otherwise consider applicants for the Foxwoods floor supervisor position filled by Mr. Donnelly. (July 29 Response, Response to June 13 Request for Information No. 3) Respondent asserts Mr. Donnelly’s transfer was an involuntary transfer resulting from tensions in the department that Respondent attributed to Mr. Donnelly having been hired from outside the organization. (Memo of August 30 Massey Interview) Claimant’s evidence also included anecdotal accounts of tensions in the department, with an alternative attribution. (*See, e.g.*, Memo of August 29 MacPhee Interview) The transfer resulted in no change in Mr. Donnelly’s position, shift or pay. (August 27 Response to August 6 Request for Information No. 3e) Although Claimant’s witness was not aware of the involuntary transfer of any floor supervisors, he believed involuntary transfers are used in certain circumstances, such as when employees have a “beef” with one another or an employee has a restraining order against another employee. (Memo of August 29 MacPhee Interview) He recalled the involuntary transfer of an employee due to tensions between the employee and his supervisor (Memo of August 29 MacPhee Interview)

Respondent asserts that if Mr. Donnelly had not been transferred, no employee would have been transferred, as there was no open position. (Memo of August 30 Massey Interview) At the time of Mr. Donnelly’s transfer, there were approximately five (5) Native American floor supervisors between the two properties. (Response to August 6 Request for Information Document Production August 30 for *In Camera* Review; Memo of August 30 Massey Interview) Between Mr. Donnelly’s transfer and the filing of the Claim, a total of approximately 15 floor supervisors from both properties took voluntary layoffs.⁴ (Memo of August 30 Massey Interview)

Claimant first became aware that Mr. Donnelly was a floor supervisor at Foxwoods in about May, 2013. (Claimant Affidavit ¶ 3) Mr. Massey had no reason to believe that Claimant would have had knowledge of Mr. Donnelly earlier. (Memo of August 30 Massey Interview)

Claimant contacted Joshua Carter, the Native American Preference Officer. (Claimant Affidavit ¶ 5; Response to Claimant Affidavit, ¶ 5) Claimant asserts he complained to Mr. Carter that the floor supervisor position that had been awarded to Mr. Donnelly had never been posted as required. (Claimant Affidavit, ¶ 5) Respondent alleges Claimant merely “inquire[d] about Mr. Donnelly’s position as Floor Supervisor,” and “Mr. Carter advised him that he would consult with Ms. Merrill to obtain further information on that matter.” (Response to Claimant Affidavit, ¶ 5) According to

⁴ Notwithstanding Mr. Donnelly’s low seniority, he was not subject to layoff due to sufficient interest from other floor supervisors in the voluntary layoff opportunity. (Memo of August 30 Massey Interview)

Respondent, "At no time during the conversation did the Claimant mention anything about filing a MERO claim."

IV. Analysis and Conclusions of Law

Jurisdiction over the parties is undisputed and asserted. Claimant is a preference eligible spouse of a Tribal member and Respondent is an employer within the meaning of 33 M.P.T.L.

A. Claim Procedures

The Claim, filed on June 13, 2013, alleges that on a date uncertain, Respondent failed to post an open position of floor supervisor at Foxwoods, which was awarded to Brian Donnelly, who is not preference eligible. The evidence establishes that Mr. Donnelly was initially hired at MGM in 2011 and was transferred to Foxwoods in September, 2012.

To be timely, a Preference Law claim must be filed with the MERO "within one hundred eighty (180) days of the alleged noncompliance." 33 M.P.T.L. ch. 1 §9(c)(2) Claimant stated under oath that he had no knowledge of the alleged noncompliance until about May, 2013, when he was supervised by Mr. Donnelly for the first time. Respondent presented no evidence to demonstrate that Claimant had earlier knowledge of facts giving rise to his claim that the Foxwoods floor supervisor position was not posted and did not contest the timeliness of the Claim. In the absence of evidence that Claimant knew or should have known of the alleged noncompliance prior to May, 2013, the MERO finds Claimant's cause of action did not accrue until May, 2013 and his Claim as it relates to Mr. Donnelly's September 2012 transfer is, therefore, timely filed.⁵

The Preference Law also requires that a Claimant exhaust internal remedies through Respondent's Tribal and Native American Preference Officer prior to filing a claim with the MERO. See 33 M.P.T.L. ch. 1 § 9(a) Respondent admitted that Claimant contacted the Tribal and Native American Preference Officer, Joshua Carter, but asserts that Claimant did not specifically indicate his intent to file a "MERO" claim. Respondent did not, however, raise as a defense the Claimant's failure to exhaust the internal remedies or request deferral of the Claim pursuant to the MERO's procedures. See, *Compliance and Claims Procedures Manual for the Mashantucket Pequot Tribal and Native American Preference Law*, § 3.4.2 (Rev. 07-24-09). A claimant is not required to utter any special words to invoke the internal claim process. The MERO finds that Claimant articulated to Mr. Carter his complaint that the position in which Mr. Donnelly was placed was not posted, thereby depriving preference eligible individuals from an employment opportunity. Through no fault of his own, Claimant was not provided the opportunity to pursue a claim with Respondent's Native American

⁵ Claimant does not allege a violation relating to Respondent filling a floor supervisor position at MGM, but even assuming Claimant's claim could be read so broadly to include Mr. Donnelly's 2011 hire, the evidence showed that the position was posted; therefore, Claimant should have known at that time sufficient facts to form a belief as to Preference Law compliance and the allegation is time barred.

Preference Office. Accordingly, Claimant's efforts to pursue his claim internally were sufficient to meet his obligations under the Preference Law.

B. Failure to Post Position

Employment opportunities under the Preference Law include transfer and promotion. 33 M.P.T.L. ch. 1 § 4(c) The Preference Law requires that Tribal employers afford preference to minimally qualified candidates in accordance with the law's hierarchy, first to Tribal members, second to Tribal member spouses and third to Native Americans. 33 M.P.T.L. ch. 1 § 5(a)

In September 2012, Respondent transferred Floor Supervisor Brian Donnelly from MGM to Foxwoods without posting a Foxwoods floor supervisor position. Claimant asserts that the floor supervisor position at Foxwoods was an employment opportunity that was required to be posted. Respondent asserts that the transfer did not constitute an employment opportunity because there was no open position, but rather the reconfiguration of existing staff between MGM and Foxwoods. Respondent concedes that generally employees are not transferred between MGM and Foxwoods, but distinguishes this situation, which Respondent characterized as an involuntary transfer due to tensions in the department. Claimant's witness substantiated departmental tensions as well as management's use of an involuntary transfer under similar circumstances.

Under the unique circumstances of this case, Respondent was not required to post the Foxwoods floor supervisor position in September, 2012.⁶ Specifically, the evidence from both parties supports a finding of an involuntary transfer related to tensions among MGM floor supervisors involving Mr. Donnelly. The transfer involved no change in title, position, shift, compensation or benefits, and no change in the overall number of employees in the position. There is no indication that the transfer was designed to deny a preference eligible employee an employment opportunity or that Respondent has invoked involuntary transfers in such a manner or with such frequency that preference eligible employees have been adversely affected. Furthermore, Respondent's approach was consistent with its own transfer policy, which requires posting only of open positions.

Moreover, even assuming Respondent had been subject to a posting obligation, the opportunity would have extended to preference eligible employees who were floor supervisors, not to those like Claimant for whom the opportunity would have been a promotion. There is no question that the total number of floor supervisors between MGM and Foxwoods did not change by virtue of the transfer. The position from which Mr. Donnelly transferred was not an open position that was then filled.⁷ Given these circumstances where the total number of employees at MGM and Foxwoods in the

⁶ The MERO declines to address what, if any, posting or other Preference Law obligations may be associated with other factually distinguishable transfer situations.

⁷ To the contrary, at some point subsequent to the transfer, Respondent implemented a layoff that resulted in a reduction in the total number of floor supervisors.

position remained unchanged and there is no evidence of backfilling the “vacated” MGM position, any opportunity would have been for a transfer only. As such, because Claimant was not at that time a floor supervisor at MGM, he would not have been eligible for the employment opportunity had one existed.⁸

V. Disposition

Respondent was not in violation of 33 M.P.T.L., the Tribal and Native American Preference Law, when it did not post a position of Foxwoods floor supervisor in about September, 2012. Accordingly, the Claim is dismissed in its entirety.

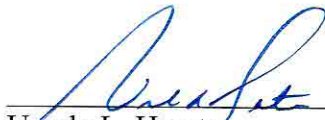
VI. Notice of Publication

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 20th day of November, 2013



Ursula L. Haerter
MERO Director

⁸ Claimant misconstrues Respondent’s obligations in this regard. Claimant argues that in the absence of preference eligible transfer candidates, Respondent is required to consider any minimally qualified preference eligible employees seeking promotion prior to considering non-preference employees for transfer, even if doing so means displacing a non-preference employee to maintain the same overall number of employees within the position classification. The Preference Law, however, specifically identifies transfer and promotion as two distinct employment opportunities. See, 33 M.P.T.L. ch. 1 §4(c). Consistent with the Preference Law, Respondent’s system for voluntary transfers between MGM and Foxwoods includes a “transfer book” in which employees indicate interest, and a process of providing transfer opportunities first to preference eligible employees in accordance with the law’s preference priorities, and then to non-preference employees by seniority.



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MASHANTUCKET EMPLOYMENT RIGHTS OFFICE

Notice of Parties' Appeal Rights

**For Claims under 33 M.P.T.L.,
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Case Name:

Ormond Northup v. Mashantucket Pequot Gaming Enterprise, d/b/a Foxwoods Resort Casino

Case Number:

2013-33022

Date of Mailing of Final Claim Determination:

November 20, 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)