



**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> Charlene Jones v. Mashantucket Pequot Tribal Nation	<b>Case Number:</b> 2014-33027
<b>Date of Claim Filing:</b> March 5, 2014	<b>Date of Determination:</b> September 30, 2014

On September 8, 2014, the MERO issued a Proposed Claim Determination in the above case. Claimant submitted a timely Request for Mediation. Respondent declined mediation. As there was no agreement of the parties to mediate as required by 33 M.P.T.L. ch. 1 §9(e), the case was not referred to a Title 31 mediation panel of the Peacemakers. No timely Request for Reconsideration was received from either party. Accordingly, the MERO Director issues the following Final Claim Determination.

Charlene Jones (“Claimant”) filed a claim on March 5, 2014, against the Mashantucket Pequot Tribal Nation (“Respondent” or “MPTN”) alleging a violation of Title 33, the Mashantucket Pequot Tribal and Native American Preference Law (“Preference Law”) by failing to consider for hire or hire Claimant in the position of Director of the Mashantucket Pequot Museum and Research Center (“Museum”).

**I. Positions of the Parties**

Claimant asserts that she is a member of the highest preference category who is qualified for the position of Museum Director, for which she applied; therefore, she should have been afforded preference and hired. She further alleges that the position was improperly designated as “key,” claiming that the Mashantucket Pequot Tribal Council (“Tribal Council”) previously recognized through a resolution that the head of the museum is a culturally important position that must be held by a Tribal member. She also contends that Respondent’s actions, including the downgrading of the position and delay in attempting to fill the position, belie the “key” designation.

Respondent denies any violation of the Preference Law and asserts that the Museum Director is a “key” position for which it is not required to afford preference.

**II. Procedural History**

Claimant submitted a sworn affidavit dated March 5, 2014 with her Claim.<sup>1</sup> Claimant provided additional information during the course of the investigation, including a reply dated August 19 to Respondent’s submissions.

<sup>1</sup> All dates hereinafter are in Calendar Year 2014 unless otherwise indicated.

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In conjunction with the service of the Claim on March 5, the MERO issued an interim order requiring Respondent to maintain the position open for 90 days and imposing a processing stay for a reasonable period of time while the Native American Preference Office (“NAPO”) processed Claimant’s internal complaint. Upon being notified that the NAPO had issued a decision, the MERO lifted the processing stay, affording Respondent 30 days to answer the claim and the MERO’s Request for Information (“RFI”), with the opportunity for a ten (10) day extension of time.

On July 8, MERO issued a Notice of Default to Respondent due to its failure to respond timely to Claimant’s claim or MERO’s RFI. Respondent’s July 14 Motion to Open Default was granted. Respondent submitted a position statement, Answer to Claimant’s Affidavit, Response to MERO’s RFI and Affidavit of Dale Merrill, Vice President of Human Resources and Interim Co-Executive Director of the Mashantucket Pequot Museum and Research Center, all dated July 14.

Co-extensive with the lift of the processing stay, the MERO issued an interim order requiring Respondent to maintain the position open for 90 days, which was subsequently extended through August 29.

### **III. Findings of Fact**

On December 19, 2005, Tribal Council passed a resolution entitled, Authorization to Develop a Cultural Apprenticeship Program; Direction to Historical and Cultural Preservation Committee. (Respondent Response to MERO RFI, Exhibit)<sup>2</sup> The resolution directs the development of a Cultural Apprenticeship Program to “encourage Tribal Members to train” for certain “key positions...vital to the cultural strength of the Nation,” including the Executive Director of the Museum. (*Id.*) Claimant signed the resolution as Tribal Council Secretary, a position she held from about 2003 to about 2009. (Respondent Response to RFI, Exhibit; Claimant Affidavit, Exhibit B)

The resolution called for the development of an Apprentices’ Guidebook, which was to be approved by Tribal Council within 90 days of enactment of the resolution. (Respondent Response to RFI, Exhibit) The Guidebook was never approved or implemented. (Respondent Response to RFI, No. 1h)

Tribal member Kimberly Hatcher-White held the position of Executive Director of the Museum from about October 1, 2006, through the end of 2012 or beginning of 2013. (Respondent Response to RFI, No. 1a; Claimant Affidavit, ¶4; Claimant Reply) Prior to Ms. Hatcher-White, the Executive Director

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<sup>2</sup> Respondent’s submissions dated July 14 are attributed to Respondent and referred to by a descriptive term, except for Respondent’s Affidavit of Dale Merrill dated July 14, which is referred to as “Merrill Affidavit,” followed by paragraph reference, if applicable. Claimant’s March 5 Affidavit is referred to as “Claimant Affidavit,” followed by a paragraph reference, if applicable. Claimant’s August 18 submission is referred to as “Claimant Reply.”

position was held by Tribal Member Theresa Hayward-Bell. (Claimant Affidavit, ¶4; Claimant Reply)

As of mid-2012, Ms. Hatcher-White's planned retirement was known. (Claimant Affidavit, ¶5) Claimant sought to train for the position through the Tribal government's Fast Track program, but her request was declined and she was told that "no decisions had been made with respect to the museum or the Museum Director position." (*Id.*)

Since the Museum's inception, the world's largest Native American museum has always received substantial funding from the Tribe. (Respondent Position Statement; Respondent Response to RFI, No. 1e; Merrill Affidavit, ¶ 8; Claimant Reply) Fundraising proved particularly challenging given the Museum's ownership by the Tribe, known for its ownership of the highly successful casino. (Claimant Reply) The Museum has never been self-sustaining and in the prior fiscal year, millions of dollars of funding were provided by the Tribe. (Respondent Response to RFI, No. 1e; Merrill Affidavit, ¶ 8) "Based on the current economic climate, the Tribal Government can no longer afford to fund the Museum at the same level..." (Merrill Affidavit, ¶ 8)

After Ms. Hatcher-White's departure, Tribal Council expanded the existing job responsibilities of Ms. Merrill and Travis Williams, MPTN Senior Financial Planner, to serve as Interim Co-Executive Directors of the Museum. (Merrill Affidavit, ¶ 8) At some point after January, 2013, Ms. Merrill and Mr. Williams began answering to Tribal Council's Chief of Staff ("COS"), who received approval from Tribal Council to change the Executive Director position to a lower paying Director position. (Merrill Affidavit, ¶ 7) The position posting states, in part, "Under the direction of Chief of Staff, the incumbent directs museum development, personnel and financial management; provides conceptual leadership through specialized knowledge of the discipline for the museum..." (Claimant Affidavit, Exhibit A) In addition, the responsibilities of the position were expanded to include achieving substantial self-sustainability of the museum. (Merrill Affidavit, ¶ 8) The position posting states, in part, "Responsible for development and fundraising for museum self-sufficiency..." (Claimant Affidavit, Exhibit A) A multi-million dollar annual monetary target, representing more than one half the funding the Tribe provided in the prior fiscal year, was established for the Director position. (Merrill Affidavit, ¶ 9 and Exhibit A)

Based on the revenue goals established for the Museum Director position, on October 9, 2013, the position was approved by Respondent's Human Resource department to be designated as a "key" position for which preference would not be afforded. (Merrill Affidavit, ¶¶ 9-10, and Exhibit A) About a week later, the position was posted. (Claimant Affidavit, Exhibit A) Claimant is a Tribal Member who was interviewed for the position but was not considered the best qualified candidate and was not offered the job. (Claimant Affidavit, ¶¶ 1, 6; Respondent Answer, ¶ 6; Merrill Affidavit, ¶ 12) Whether the position will be filled is in question; specifically, due to the lack of a "suitable and willing applicant who is capable of raising the funds needed," the position has been "on hold for an undeterminable period of time to be determined by the COS and/or Tribal Council." (Respondent Position Statement; Merrill Affidavit, ¶ 14)

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#### IV. Analysis and Conclusions of Law

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

Specifically excluded from positions for which an employer is required to afford preference under the Preference Law are “key” positions.<sup>3</sup> 33 M.P.T.L. ch. 1 § 5(h). A “key position” is defined as “includ[ing] 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...” *Id.* The burden lies with the party claiming a position is “key” to prove by a preponderance of the evidence that the designation is in compliance with the Preference Law. *Id.*

Respondent has met its burden of demonstrating that the Museum Director is appropriately designated a “key position” pursuant to the Preference Law. Museum Director is not only the highest level managerial position at the Mashantucket Pequot Museum and Research Center, but also charged with substantially expanding existing fundraising and development income. Given the current economic environment, the Tribe has determined that the subsidization of the Museum is unsustainable. The Museum’s new leader would be required to move the Museum toward financial self-sufficiency, with an initial target of generating more than one half of the existing subsidies provided by the Tribe, a multi-million dollar annual additional revenue generation expectation. Claimant herself pointed out the challenges associated with revenue generation for a non-profit institution owned by the Tribe. By not filling the position with the best qualified candidate, the Tribe risks retaining a director who cannot overcome the significant operational and financial challenges faced by the Museum.

Claimant’s argument that Respondent’s actions demonstrate that the position is not appropriately designated as “key” pursuant to the Preference Law is not persuasive. Neither the downgrade of the position nor the failure to make more substantial efforts earlier to fill the position changes the fundamental facts that the Museum Director is the highest level position at the world’s largest Native American museum and the responsibilities of the position include the challenge of substantially expanding fundraising and development initiatives. Even assuming Claimant is correct that the position had not been considered “key” in the past, her argument is unavailing. The most recent Executive Director of the Museum assumed the position prior to enactment of the Preference Law, which provides for the “key” exclusion. Respondent was not precluded from changing the position, the responsibilities of the position or the designation as “key” when re-evaluating the Museum’s leadership role after the former Executive Director’s approximately six (6) year tenure, especially given the significantly less favorable economic climate.

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<sup>3</sup> Absent an exception or exclusion, when the Tribe is the employer, preference in employment opportunities, including hire and transfer to open positions, is required to be afforded first to minimally qualified members of the Tribe. 33 M.P.T.L. ch. 1 §§ 4(c) and 5(a).

Contrary to Claimant's assertion, the 2005 Tribal Council apprenticeship program resolution does not require that the Museum's highest position be held by a Tribal member. Tribal Council's resolve in 2005 to introduce an apprenticeship program to encourage Tribal Member succession in culturally significant positions reflected the Tribe's desire to protect and strengthen its culture. The "key position" designation in the resolution refers to culturally important positions.<sup>4</sup> Training Tribal member successors for these positions, however, was contingent on the apprenticeship program, which was never implemented notwithstanding oversight by a Tribal Council that included Claimant. Moreover, even assuming the program had been implemented, the resolution provides no guarantee of position or employment, even if a Tribal member had completed an apprenticeship program.<sup>5</sup>

## V. Disposition

For the above reasons, Respondent's designation of the Director of the Mashantucket Pequot Museum and Research Center Museum as a "key position" pursuant to 33 M.P.T.L. ch. 1 § 5(h) was not in violation of the Preference Law. Accordingly, Respondent was not required to afford preference in employment for the position of Museum Director. Claimant's 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 30<sup>th</sup> day of September, 2014.



Ursula L. Haerter  
MERO Director

<sup>4</sup> "Key position" as used in the apprenticeship program resolution thus bears no relationship to the "key position" definition under the later enacted Preference Law.

<sup>5</sup> Any allegation that Claimant was denied the opportunity to develop a Fast Track program for the position of Executive Director in 2012 is outside the statute of limitations and not addressed herein. 33 M.P.T.L. ch. 1 § 9(c)(2).



**MERO**

**MASHANTUCKET EMPLOYMENT RIGHTS OFFICE**

**Notice of Parties' Appeal Rights**

**For Claims under Title 33,  
the Mashantucket Pequot Tribal and Native American Preference Law**

**Case Name:**

Charlene Jones v Mashantucket Pequot Tribal Nation

**Case Number:**

2014-33027

**Date of Mailing of MERO Final Decision:**

September 30, 2014

Pursuant to Title 33, the Mashantucket Pequot Tribal and Native American Preference Law, as amended, the Preference Law Procedures Manual, and Title 40, the Administrative Procedure Act, the MERO has issued a Final Decision in the above-referenced case. A party dissatisfied with a Final Decision may appeal the MERO's final determination to the Mashantucket Pequot Tribal Court in accordance with 40 M.P.T.L. ch. 3.

**Form of Appeal:** An appeal must be in writing on a form available from the Tribal Court clerk. A copy of the MERO Final Decision 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 MERO Final Decision.

**Appeal Hearings:** Appeal hearings in Tribal Court are conducted in accordance with 40 M.P.T.L. ch. 3 and the rules of the court.

**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 Clerk:** Telephone Number: (860) 396-6115. Location: 101 Pequot Trail (Public Safety Building) Mailing Address: Mashantucket Pequot Tribal Court, Office of the Tribal Court Clerk, P.O. Box 3126 Mashantucket, CT 06338-3126.

If no timely appeal is filed, the MERO Final Decision is binding on the parties and may be enforced by the MERO in Tribal Court.

**Contact the clerk of the Mashantucket Pequot Tribal Court for an appeal form.  
Direct questions about Tribal Court appeal processes to the court.**

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