



MERO

MASHANTUCKET EMPLOYMENT RIGHTS OFFICE

Final Claim Determination

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

Case Name: Nancy Walker v. Mashantucket Pequot Gaming Enterprise	Case Number: 2014-33028
Date of Claim Filing: March 14, 2014	Date of Determination: August 8, 2014

On June 30, 2014, the MERO issued a Proposed Claim Determination in the above case. On July 11, 2014, Claimant submitted a timely Request for Reconsideration, alleging that during the application process, the current incumbent in the Assistant to Senior VP and COO position had been deemed unqualified for the position, and where no applicant met the minimum necessary qualifications, Respondent was required to consider preference applicants who can be trained for the position; therefore Claimant should have been afforded an interview and hired. She further alleges that the time period between the lift of the stay on filling the position and the position being filled confirms that there was either no urgency in filling the position or there were no qualified candidates. Claimant's arguments and Respondent's July 29 Response to the MERO's Request for Information have been considered herein.

Nancy Walker ("Claimant") alleges in her Claim that she is a Tribal member spouse who was denied consideration for hire and hire on about March 13, 2014, by the Mashantucket Pequot Gaming Enterprise ("Respondent" or "MPGE") for the position of Assistant to Senior VP and COO, for which she is minimally qualified, in violation of 33 M.P.T.L., the 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 asserts that she should have been considered for hire beyond her application materials and, as the highest preference eligible minimally qualified applicant, hired as Assistant to Senior VP and COO. She alleges that she was not given adequate credit for certain aspects of her education and experience reflected on her application materials, including her educational focus on business administration and her work experience outside of MPGE, and that she should have been afforded an interview and testing to demonstrate her qualifications and allow both parties to explore her suitability for the position. In her request for reconsideration, Claimant further alleges that if no applicants were minimally qualified, Respondent was required to afford her preference to be trained for the position.

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Respondent denies any violation of the Preference Law, contending that the qualification requirements of the position are minimally necessary and Claimant failed to meet the requirements. Respondent urges dismissal of the claim in its entirety.

II. Procedural History

Claimant submitted a sworn affidavit dated March 14, 2014 with her Claim.¹

In conjunction with the service of the Claim on March 14, 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 Office of Native American Preference processed Claimant's internal complaint. Respondent sought relief from the interim order by correspondence dated March 19, in which Respondent waived the internal complaint process and requested that MERO expedite the processing of the Claim.

Both parties were afforded the opportunity to submit information and argument with respect to Respondent's request that MERO lift the interim order. Respondent submitted a March 27 Response to MERO Request for Information and the Affidavit of Dale Merrill, Vice President of Human Resources and Administration dated April 2, which was based on the March 26, interview of Ms. Merrill by the MERO Director. Claimant submitted her arguments by e-mail dated March 21 and through a meeting with the MERO Director on March 31. MERO rescinded the interim order April 1.

Claimant provided additional information during the course of the investigation, including responses on April 19 to Respondent's submissions. Respondent submitted a position statement dated April 17, which included an Answer to Claimant's Affidavit dated April 15 and the Affidavit of Samual Agnello, Senior Recruiter, HR Employment Division, dated April 11.

III. Findings of Fact

Respondent is the Mashantucket Pequot Gaming Enterprise.² Claimant is the spouse of Tribal member Tim Walker and is not restricted in employment on the Reservation. (April 15 Answer to Claimant Affidavit, ¶ 1)

The job description for Assistant to Senior VP and COO is at the level of an Administrative Assistant II, and is comparable to the job description for the Assistant to President and CEO. (March 27 Response to MERO Request for Information, Tab 1) The President/CEO and Senior VP/COO positions are the highest level positions at MPGE, which generates annual revenues in excess of a billion dollars and is one of the largest employers in the region. (March 27 Response to MERO

¹ All dates hereinafter are in Calendar Year 2014 unless otherwise indicated.

² Each of Respondent's submissions is generally identified by brief description and date, with specific documents referenced where appropriate by date and summary description. The parties' witness affidavits are referenced by exhibit number, if applicable, surname of affiant and paragraph number, if applicable. A cited reference is not necessarily the exclusive source of the evidence.

Request for Information, No. 2; April 15 Answer to Claimant's Affidavit, ¶ 5) At relevant times, MPGE has been operating under financial stress. (See Merrill Affidavit, ¶ 6)

The Assistant to Senior VP and COO position posting includes the following language: "Associate's degree preferred with a minimum of six (6) years of related executive administrative experience." (See Claimant Affidavit, Exh. A) As explained by Ms. Merrill, the minimum of six (6) years of executive administrative experience was intended to elicit applicants who are at the pinnacle of their careers. (Merrill Affidavit, ¶ 2) In contrast, the job description for an Administrative Assistant I, which is for an assistant to a vice president who would oversee a particular function within MPGE, provides, "Associates degree or business school certificate preferred with three (3) to five (5) years of experience in an administrative capacity." (March 27 Response to MERO Request for Information, Tab 1)

On about March 11, Claimant applied for the position of Assistant to Senior VP and COO. (Claimant Affidavit, ¶ 4) Claimant's application materials include the following education and experience:

- High School and Associate's Degree in Business Administration
- 7 years Owner/Operator of DBSI Computers LLC – Director of Human Resources and Finance; expanded business to 30 employees and \$2.5 million annually.
- 9 years Owner/Photographer NC Photography
- 1 year, 3.5 months Behavioral Health Assistant (MPTN Tribal Health Services)
- 3.5 months Data Entry Clerk (MPGE Purchasing)
- 10 months Administrative Assistant I (MPTN Museum)
- 8 months Secretary II, (MPTN Vocational Rehab)

(Claimant Affidavit, Exh. B; March 27 Response to MERO Request for Information, Tab 4; *see also* Claimant's April 19 submission)

Claimant was the highest preference eligible applicant for the position. (March 27 Response to MERO Request for Information, No. 5) She asserts that the positions she held with the Mashantucket Pequot Tribe reflect three (3) years of executive administrative assistant experience. (See Memo re March 31 Meeting with Claimant) For purposes of initial review of Claimant's qualifications, Respondent's Human Resources department credited Claimant with two and one half (2.5) to three (3) years of executive administrative support experience.³ (See March 27 Response to MERO Request for Information, Tab 4; April 15 Answer, Agnello Affidavit, ¶ 6 and Claimant Affidavit, ¶ 4) No credit was afforded Claimant, however, for her work experience outside the positions she held with the Tribe. (See Agnello Affidavit, ¶¶ 6-7)

Respondent concluded that Claimant was not minimally qualified for the Assistant to Senior VP and COO based on its assessment that Claimant did not have "six years of related executive administrative experience." (March 27 Response to MERO Request for Information, No. 4) As a

³ Ms. Merrill assessed the credit as "generous," indicating that she saw nothing that reflected executive administrative support experience. (Merrill Affidavit, ¶ 5)

result, Claimant was not afforded the opportunity to be interviewed or tested or otherwise to continue in the application process.⁴ (April 15 Answer to Claimant's Affidavit, ¶ 6)

The successful applicant, who is not preference eligible, submitted her application on March 14. (July 29 *In Camera* Response to Second MERO Request for Information) She was initially informed that her application materials did not reflect the required six (6) years of executive administrative experience, but only five (5) years. (Id.) After pointing out two (2) years of executive administrative experience on her resume that had not been credited, the applicant was considered to have met the experience requirement and permitted to continue in the process. (Id.) The applicant was not given credit toward the six (6) year experience requirement for prior administrative experience that was not at an executive level, including several years as an assistant to a quality control manager. (Id.) After the required testing, and interview on April 11, she was offered the position on April 22. (Id.)

IV. Analysis and Conclusions of Law

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

When the Mashantucket Pequot Tribe is the employer, the Preference Law requires, with limited exception, that preference be afforded in employment opportunities, including consideration for hire and hire, first to members of the Tribe and second to spouses of Tribal members, provided the preference eligible individuals meet the minimum necessary qualifications of the positions. 33 M.P.T.L. ch. 1 §§ 4(c) and 5(a), "Minimum Necessary Qualifications" means those job-related qualifications that are essential to the performance of the basic responsibilities of each employment position, including any essential qualifications concerning education, technical skills, training or job-related experience." 33 M.P.T.L. ch. 1 § 4(h). No one of a preference level equal to or higher than Claimant met the minimum necessary qualifications of the Assistant to Senior VP and COO position; therefore, if Claimant had established that she was minimally qualified, Respondent was required to offer her the open position.

The job posting provides, "Associate's degree preferred with a minimum of six (6) years of related executive administrative experience." Claimant holds the preferred associate's degree, but was considered by Respondent not to have the related experience. Claimant alleges that the language of the posting provides that the six (6) years of related experience is "preferred" rather than "required," as Respondent asserts. Alternatively, she alleges that if the six (6) years of related experience is required, her application materials demonstrate that she meets the requirement.

There is no doubt the posting provision could have been drafted more clearly. Nevertheless, "preferred" immediately follows and modifies "associate's degree," while the six (6) years of

⁴ Since about October 2013, Claimant's applications for five positions were rejected at the initial stage of the process. Specifically, Claimant applied for four positions (Director, Tribal and Native American Relations, Operations Research Analyst, Casino Marketing Data Administrator and Paralegal I) for which she believed she was qualified. In each case, she was deemed not to be minimally qualified based on review of her written application materials and was not granted an interview. (April 15 Answer to Claimant Affidavit, ¶¶ 2-3)

experience is prefaced by “minimum,” meaning “the lowest number or amount that is possible or allowed.” (Merriam Webster, <http://www.merriam-webster.com/dictionary/minimum>, June 26, 2014) Respondent’s intent that at least six (6) years of related experience is required is a fair reading of the language. There is no evidence that Respondent was inconsistent in its interpretation of the requirement or applied the requirement in a disparate manner. Accordingly, the “six (6) years of related executive administrative experience” is a requirement for the position.

Job-related experience is specifically recognized in the law as a potential element of minimum necessary qualifications. 33 M.P.T.L. ch. 1 § 4(h) Here, Respondent sought someone who not only had the technical expertise, but also the professional work experience to support the demands of assisting the newly hired second in command of a high volume, financially stressed business. Many of the individual skill requirements in the posting do not fully convey the level of the position. For example, “coordinating office activities including scheduling appointments [and] providing information to callers” does not adequately capture the nuances of those responsibilities at the highest support levels, where an assistant is routinely required to employ sound judgment, diplomacy, and problem solving skills, and to maintain confidentiality in a high stress environment under circumstances where failing to do so may have significant ramifications. By requiring substantial work experience as an executive administrative assistant, Respondent sought to be assured that the applicants for the position would have the appropriate depth of necessary relevant work experience. The six (6) year minimum is consistent with a progression from Respondent’s lower executive administrative support position, which requires three (3) to five (5) years of experience. In addition, the Record includes no evidence that the experience requirement was imposed to create a barrier to employment for preference eligible individuals or Claimant. The six (6) year minimum is the same as that for the Assistant to President and CEO, which was established several years earlier. Under the circumstances, including that the administrative position supports the Vice President and Chief Operating Officer of a financially stressed company with over a billion dollars in annual revenue and thousands of employees, the establishment of “a minimum of six (6) years of related executive administrative experience” as minimally necessary is reasonable.

There is no question that Claimant’s work experience outside her work for the Tribe was not under the title “executive administrative assistant.” She nevertheless contends that she possesses the required “related” experience beyond the three (3) years credited work experience with the Tribe through a combination of her education and work experience otherwise.⁵

Claimant alleges that her education through her associate’s degree should be afforded work experience credit because of her business administration focus in her studies at both the high school

⁵ Claimant received relevant work experience credit for any time she worked for the Tribe in an administrative support capacity, even when the position title did not reflect the high level executive administrative support experience sought. Claimant contends her actual responsibilities went beyond the position descriptions; therefore the credit was appropriate. Ms. Merrill disagrees that Claimant performed work comparable to executive administrative support and would not have afforded Claimant any credit for the positions she held with the Tribe. Determining the appropriateness of the 2.5-3 year credit was unnecessary to the MERO’s decision and; therefore, not considered.

and college levels. Even assuming the educational programs included some type of “work” element, which has not been shown, providing work experiences as an aspect of the educational experience to prepare students for their professions would not constitute executive administrative work experience.

Claimant further points to her seven (7) years as an owner of a computer business that she grew to a \$2.5 million business with 30 employees and for which she directly handled the finance and human resources functions, and her nine (9) years as owner of a photography business, for which she handled all aspects of the business. Operating a small business certainly requires a multitude of skills, many of which relate to administrative functions, but by the same token developing and exercising administrative skills is fundamentally different from a small business owner’s perspective than from an executive support perspective. Respondent’s work experience requirement was intended to reflect someone at the top of his/her career as an administrative support professional; someone who had worked for at least six (6) years providing administrative support at an executive level. Claimant’s experience as a business leader does not constitute “related executive administrative experience.”

Claimant asserts that she should have been granted an interview to demonstrate she is minimally qualified and to allow both parties to further explore whether the position would be an appropriate fit for Claimant.⁶ She points out the difficulty of detailing on a resume or application every conceivable capability or skill derived from her years as a business owner. The diverse work experiences associated with business ownership and operation can be difficult to convey or assess due to the many roles required of an entrepreneur in running a small business. Absent an alternative method of determining the appropriate credit to afford business experience when evaluating whether an applicant is minimally qualified for a position, an interview may be required. In this case, however, the minimum necessary qualification at issue was six (6) years of a particular type of work experience. Respondent was able to discern from Claimant’s application materials that she did not possess sufficient years of work experience as an executive level administrative professional; therefore, an interview was not required.

Alternatively, in her Request for Reconsideration, Claimant alleges that when the current Assistant to Senior VP and COO was an applicant, she was found not to be minimally qualified. Under those circumstances, argues Claimant, pursuant to 33 M.P.T.L. ch. 1 § 5(a) Respondent was required to consider whether Claimant could be trained for the position before it considered an applicant who is not preference eligible.⁷ While Claimant is correct that in the absence of minimally qualified candidates, a trainable spouse of a Tribal member would receive preference over a trainable non-

⁶ Claimant points to Respondent’s denial of an interview in each of her five (5) applications between October 2013 and the filing of the Claim and asserts that her employment outside of the positions she has held with the Tribe is not being appropriately credited.

⁷ 33 M.P.T.L. ch. 1 § 5(a) provides, in relevant part, “If no candidate for an Employment Opportunity meets the Minimum Necessary Qualifications, then preference shall be given first to Tribal Members, then to Spouses of Tribal Members, and then to other Native Americans, who are capable of being trained to the Minimum Necessary Qualifications of the position.”

Native American, in this case such an analysis was unnecessary, because the incumbent was a qualified applicant.⁸

Notably, Respondent's treatment of the incumbent during the application process reinforces that the six (6) years of executive level administrative experience was a requirement. Specifically, the applicant was initially told that she was not qualified due to insufficient relevant experience when certain executive level support experience on her resume was not credited. Moreover, at no time was she credited for her years of administrative support work for positions that were not executive level.

Claimant's work history does not include enough years of the specific work experience required to be minimally qualified for the position of Assistant to Senior VP and COO. Respondent was presented with a qualified applicant, who was hired and holds the position. Accordingly, under the circumstances presented here, Respondent was not required to continue to consider Claimant's application beyond the initial assessment or afford her an interview or testing for the position.

V. Disposition

Respondent did not violate the Preference Law when it determined that Claimant was not minimally qualified for the position of Assistant to Senior VP and COO based on her application materials and discontinued further consideration of her application. 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 8th day of August, 2014.



Ursula L. Haerter
MERO Director

⁸ Contrary to Claimant's arguments, the three (3) weeks between the MERO interim order being lifted and an offer being extended does not reflect a lack of urgency in filling the position or a lack of qualified candidates. Rather, the time lapse reflects Respondent's compliance with the MERO's processes, as it substantially ceased processing applications while the interim order was in effect.



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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:

Nancy Walker v. Mashantucket Pequot Gaming Enterprise

Case Number:

2014-33028

Date of Mailing of MERO Final Decision:

August 8, 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.**

MERO Form-33-1690
(06-09-14)