



**MERO**

**MASHANTUCKET EMPLOYMENT RIGHTS OFFICE**

**Final Claim Determination**

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

<b>Case Name:</b> Charlene Jones v. Mashantucket Pequot Gaming Enterprise	<b>Case Number:</b> 2014-33030
<b>Date of Claim Filing:</b> March 14, 2014	<b>Date of Determination:</b> July 8, 2014

On June 16, 2014, 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.

Charlene Jones (“Claimant”) filed a claim on March 14, 2014, against the Mashantucket Pequot Gaming Enterprise (“Respondent” or “MPGE”) alleging a violation of Title 33, the Mashantucket Pequot Tribal and Native American Preference Law (“Preference Law”) by failing to transfer or hire Claimant into the position of Manager Tribal and Native American Relations.

**I. Positions of the Parties**

Claimant, a member of the Mashantucket Pequot Tribal Nation (“Tribe”), asserts that the Tribal Member who filled the position, Steven Thomas, was not preference eligible because he was not “in good standing.” She further alleges that Mr. Thomas was not minimally qualified and the Preference Law’s presumption to the contrary should not preclude further investigation of her Claim. She contends that she should have been selected for the position, because she is better qualified than the incumbent.

Respondent asserts that the Claim fails to state a claim upon which relief can be granted by the MERO.

**II. Procedural History**

Respondent filed a Motion to Dismiss Claim dated March 27, 2014. (“Respondent’s Motion”) Claimant filed a timely Objection to Respondent’s Motion to Dismiss dated April 23, 2014.<sup>1</sup> (“Claimant’s Objection”)

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

### III. Findings of Fact

For purposes of considering Respondent's Motion to Dismiss, all facts alleged by Claimant are accepted as true and all reasonable inferences are construed in Claimant's favor.<sup>2</sup>

Claimant and Mr. Thomas, both Tribal Members, applied and interviewed for the MPGE position of Manager Tribal and Native American Preference ("Manager"). (Claimant's Affidavit ¶¶ 2-4) Claimant's education and experience exceeded the minimum necessary qualifications and Mr. Thomas's education and experience fell below the minimum necessary qualifications set forth in the position posting. (See Claimant's Objection) Mr. Thomas was awarded the Manager position on about December 15, 2013. (Respondent's Motion, PeopleSoft printout)

During the application process, Mr. Thomas was awaiting sentencing for a felony conviction of theft concerning an Indian tribal government receiving federal funds. (Claimant's Affidavit ¶ 5; Claimant's Objection) In about February, he was sentenced, which included his restriction to home confinement for the first three (3) months. (Claimant's Affidavit ¶ 7; Claimant's Objection)

On March 12, during his employment probationary period, Mr. Thomas was banished by the Elders Council for one (1) year from the Mashantucket (Western) Pequot Reservation and all tribal lands, except his home, to/from his employment, and any location required by his employment. (See Claimant's Objection, Notice to Membership dated March 14) The Elders Council considers a Tribal Member to be in good standing if the Tribal Member is not currently subject to an Elders Council banishment order. (See Correspondence from Joyce Walker, Chairwoman of Mashantucket Pequot Tribal Elders Council, April 10)

The Tribe's Incentive program for Tribal Members excluded convicted felons from receipt of any incentive payments for the period between the charge and the satisfaction of the sentence. (Claimant's Objection) A felon also may not serve on Tribal Council pursuant to the Tribe's Constitution. (Claimant's Affidavit ¶ 6; M.P.T.N. Const., Art. VII, § 1)

The Mashantucket Pequot Temporary Rental Program requires Tribal Member applicants to be "in good standing" with the Tribe by not being currently banished and with the Housing Department by not having outstanding debt to the Tribe of more than \$1500. (Claimant's Objection) Tribal Members who owe a debt to the Tribe also are ineligible for benefits under the Tribal Member Assistance Program unless they enroll in automatic payroll deductions to repay the debt. (Claimant's Objection)

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<sup>2</sup> The March 14 affidavit Claimant provided in support of her Claim is hereinafter referred to as "Claimant's Affidavit."

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

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

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). “Tribal Member” is defined as “a duly enrolled member of the Mashantucket (Western) Pequot Tribe who is in good standing.” 33 M.P.T.L. ch. 1 § 4(p).

Claimant does not dispute that a Tribal Member is not in good standing when banished, but argues for a more expansive view of the circumstances under which a Tribal Member is considered not to be in good standing. She points to the restrictions imposed pursuant to the Tribe’s Constitution, and certain policies or programs, on the rights or benefits of Tribal Members who are felons or indebted to the Tribe. Claimant asserts that just as felons and debtors are subject to eligibility restrictions for certain Tribal benefits, they should be considered not to be in “good standing” and ineligible for preference under Tribal law.

Whether or not certain circumstances result in a Tribal Member losing his/her good standing with the Tribe is a determination that is not within the MERO’s jurisdiction. Pursuant to the Tribe’s Constitution, the Elders Council is vested with the authority to make determinations regarding “banishment or exclusion of any person from the Mashantucket (Western) Pequot Reservation and tribal lands...and the removal of any Tribal benefits and membership privileges.” M.P.T.N. Const., Art. XII, § 1(d).

A Tribal Member is not in good standing only during the term of a banishment order issued by the Elders Council. The Elders Council exercised its Constitutional authority and determined that Mr. Thomas was not in good standing with the Tribe as of March 12, on the terms set forth in its Banishment Order. The MERO is not authorized to impose its own decision or modify the timing or terms of the Elders Council’s Banishment Order. Accordingly, as of Mr. Thomas’s hire as Manager on December 15, 2013, he was a Tribal Member in good standing.

As a member of the highest preference category, a Tribal Member “awarded an employment opportunity is conclusively presumed minimally qualified for the position.” 33 M.P.T.L. ch. 1 § 9(g). The minimally qualified presumption that a highest preference level incumbent enjoys under the Preference Law is absolute. Even the strongest of evidence showing that the incumbent lacked the necessary qualifications for the position cannot overcome the presumption. Here, regardless of any evidence to the contrary, Mr. Thomas is minimally qualified by operation of the presumption.

Claimant’s policy and equity arguments that the presumption should not be permitted to bar further investigation of her Claim are unavailing. The conclusive presumption in the Preference Law is unequivocal and the MERO may not add to or alter those words.

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MERO Form-33-1680  
(12-30-13)

Because the incumbent is conclusively presumed minimally qualified, the relative strengths of the two Tribal Member candidates cannot give rise to a cause of action. The Preference Law requires that the position be “awarded to the best [minimally qualified] candidate, as determined by the Employer.” 33 M.P.T.L. ch. 1 § 5(a). The employer’s discretion to choose the “best candidate” is specified in the law and not subject to second guessing by the MERO. In this case, Respondent chose Mr. Thomas over Claimant, as was its right.

Claimant’s argument that Mr. Thomas became ineligible for continued employment within the employer’s 90 day probationary period because he was confined to home arrest and/or banished, also does not give rise to a cause of action under the Preference Law. The Preference Law imposes affirmative obligations on employers to afford preference to eligible individuals for employment opportunities, including hire into open positions and employment retention in non-disciplinary situations such as layoffs. See 33 M.P.T.L. ch. 1 §§ 4(c) & 5(a). The Preference Law does not require an employer to remove or terminate a Tribal Member under any circumstances.<sup>3</sup>

## **V. Disposition**

For the above reasons, Claimant has failed to allege a viable claim under the Preference Law; therefore, further investigation is not warranted. Respondent’s Motion to Dismiss is granted and the Claim is dismissed.

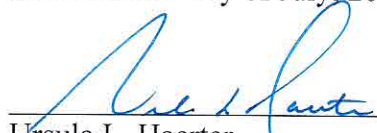
## **VI. Notice of Publication**

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.

## **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 8<sup>th</sup> day of July, 2014.

  
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Ursula L. Haerter  
MERO Director

<sup>3</sup> Notably, the Preference Law permits an employer to retain an incumbent employee even if the employee is not Native American and was placed in the position in violation of Title 33. See 33 M.P.T.L. ch. 1 § 11.



**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 Gaming Enterprise

**Case Number:**

2014-33030

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

July 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)