



MERO

MASHANTUCKET EMPLOYMENT RIGHTS OFFICE

Final Claim Determination

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

Case Name: Tanisha S. Sebastian v. Mashantucket Pequot Gaming Enterprise (Foxwoods)	Case Number: 2014-33033
Date of Claim Filing: April 10, 2014	Date of Determination: July 28, 2014

On July 8, 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.

Tanisha S. Sebastian (“Claimant”) filed a claim on April 10, 2014, against the Mashantucket Pequot Gaming Enterprise (Foxwoods) (“Respondent”) alleging a violation of Title 33, the Mashantucket Pequot Tribal and Native American Preference Law (“Preference Law”) by discipline and termination of employment without involvement of a representative of the Native American Preference Office who was not the discipline decision maker.¹

By correspondence dated May 9, 2014, Respondent requested dismissal of the Claim.² Claimant failed to submit a timely response.

I. Positions of the Parties

Claimant alleges that as to her discipline and termination, Respondent violated the Preference Law by failing to provide the participation of an IP Officer other than a discipline decision maker.

Respondent asserts that there is no violation of the Preference Law alleged in the Claim. First, Respondent contends that the Preference Law does not prohibit an IP Officer from also having assessed the discipline. Further, Respondent asserts that an IP Officer who did not make the disciplinary determination participated in the employment decisions. Respondent urges dismissal on either basis. Alternatively, Respondent argues that the Preference Law requires that Respondent’s internal complaint process be exhausted prior to a MERO claim being filed and requests dismissal of the Claim without prejudice to Claimant’s right to re-file after she exhausts the internal complaint process.

¹ The MERO takes notice that the “Tribal and Native American Preference Officer” or “IP Officer” referenced in 33 M.P.T.L. ch. 1 § 5(k) is located in Respondent’s Office of Native American Preference, which is also known as the Native American Preference Office.

² All dates hereinafter are in Calendar Year 2014 unless indicated otherwise.

Final Claim Determination Case No. 2014-33033
July 28, 2014
MERO Form-33-1680
(12-30-13)

II. Procedural History

On April 11, Claimant acknowledged receipt of the following documents about the Preference Law and the MERO's processes: Tribal and Native American Preference Law (Amended January 26, 2012), Frequently Asked Questions about the MERO (Form-31-0141, 11-02-12), Preference Law Information for Claimants (Form-33-1110, 12-30-13), and the Preference Law Procedures Manual (Rev'd 07-24-09). The signed Claim form also includes Claimant's representation that she would review and comply with the substance of the Preference Law Information for Claimant. She filed her claim with the MERO on April 10, prior to pursuing a complaint with Respondent's Native American Preference Office ("NAPO").

Respondent submitted a request to dismiss dated May 9, supported by the affidavit of Joshua Carter, who held the position of Manager of Native American Preference at relevant times. By correspondence to the parties from the MERO dated May 15, Claimant was afforded until the close of business on May 28, with an opportunity for a ten (10) day extension, to oppose or respond to Respondent's request to dismiss. The letter explained, in part, that a failure to timely oppose the motion would be considered a waiver of any objection. By the same correspondence, the MERO requested that by May 28, Respondent answer an enclosed Request for Information and produce Mr. Carter for interview by the MERO Director.

After she received the MERO's correspondence, Claimant contacted the MERO on May 16 and the requirements set forth in the MERO's correspondence were reviewed with her. On May 27, Respondent presented Mr. Carter for interview and provided documents in response to the MERO's Request for Information.³ Claimant contacted the MERO on May 28 and, upon being advised that Respondent had submitted additional information to the MERO, submitted a written request via e-mail for an extension of time to respond to the request to dismiss in order to address the additional information submitted by Respondent and "outline all relevant objections in one concise submission." Claimant's request was granted by the MERO on May 29, with confirmation of a new response deadline of June 9. When no timely submission was received, the MERO sent an e-mail inquiry on June 10 to which Claimant responded by e-mail on June 16, indicating, in part, that she had disregarded the extended deadline. Claimant further responded to the MERO's e-mail inquiry of June 17 by e-mail dated June 22.

III. Findings of Fact

For purposes of considering Respondent's request to dismiss, the MERO accepts Claimant's allegations of fact in her Claimant Affidavit dated April 11 and other submissions as true and has made reasonable inferences in her favor. The MERO also accepts as true any uncontroverted evidence submitted by Respondent by way of Mr. Carter's affidavit and various e-mail communications among Human Resource and Native American Preference Office personnel.

³ Respondent's Response to May 15, 2014 Request for Information dated May 28, which attaches the documents provided to the MERO on May 27, is hereinafter referred to as "RFI Response."

Claimant is a Tribal member in good standing who was employed by Respondent Mashantucket Pequot Gaming Enterprise as a Human Resource Generalist under the supervision of Cynthia Torraca, Director of Native American Preference and Government Human Resources. (Claimant Affidavit, ¶ 3) Prior to the events at issue here, Claimant had received an initial and final written warning for attendance violations due to a failure to call or show up for work. (See Claimant Affidavit, Attachment, pg. 3 of 5)

On October 2, 2013, Claimant left work mid-day and was absent without notice or permission for the remainder of that day and the following two work days. (Claimant Affidavit, ¶ 3) On Monday, October 7, Claimant met with Ms. Torraca and discussed a leave of absence, but before the end of the day, Claimant was contacted again by Ms. Torraca, who indicated that after discussing the matter with Dale Merrill, Executive Director of Human Resources at the time, Claimant would be suspended pending investigation of her absences. (Claimant Affidavit, ¶ 3; see also RFI Response, Torraca October 7, 2013 e-mail) The issuance of a suspension pending investigation was the next step in Respondent's processes for another infraction of the same nature as that which resulted in the final warning. (RFI Response, Torraca October 7, 2013 e-mail)

Ms. Torraca sought the recommendation of Larry Dutra, Manager of Employee Relations, and specifically asked Mr. Carter to weigh in as well. (See RFI Response, Torraca October 7, 2013 e-mail and Carter October 8, 2013 e-mail) Mr. Dutra offered his analysis, which included his agreement with the suspension pending investigation. (See RFI Response, Dutra October 7, 2013 e-mail) Mr. Carter expressed the agreement of the Office of Native American Preference with the approach recommended by Employee Relations. (See RFI Response, Carter October 8, 2013 e-mail) Mr. Carter's e-mail states, in part, "Please contact us with your final decision and if necessary you may view my calendar outlook to schedule a meeting for the issuance." (RFI Response, Carter October 8, 2013 e-mail) Ms. Torraca made the ultimate decision to move forward. (See RFI Response, Torraca October 8, 2013 e-mail) On October 11, Claimant had a teleconference with Ms. Torraca and Ms. Merrill, who indicated she was serving as the IP Officer, during which the notice of suspension pending investigation was read to Claimant. (Claimant Affidavit, ¶4)

Ms. Torraca, Employee Relations and Mr. Carter all agreed that Claimant should be afforded the opportunity to resign in lieu of termination. (See RFI Response e-mails) On October 16, during Mr. Dutra's interview of the Claimant as part of the investigation, he suggested the possibility that Claimant could resign her employment in lieu of termination and she did. (Claimant Affidavit ¶ 5)

IV. Analysis and Conclusions of Law

A. Claimant's Cooperation in the MERO's Processes

At the outset of the Claim filing process, Claimant was apprised of her obligations to cooperate in the MERO's investigation. A claimant's cooperation includes making herself reasonably available to provide information and evidence, as well as complying with the MERO's submission deadlines. Initially, Claimant actively participated in the MERO's claim processes and took care to comply with the MERO's requirements. After inquiring whether Respondent had submitted additional materials

Final Claim Determination Case No. 2014-33033
July 28, 2014
MERO Form-33-1680
(12-30-13)

in support of its dismissal request, Claimant properly and timely requested an extension of time to file a response in order to address the additional information Respondent had submitted. MERO granted Claimant's request for an extension of time.

After the grant of additional time, Claimant's participation in the investigative process appeared to cease. Claimant did not submit a response by the extended deadline. Upon inquiry by the MERO, Claimant explained that she knowingly allowed the deadline to pass. Under these circumstances where Claimant concedes that she intentionally did not comply with the deadline, the MERO finds no good cause for Claimant's untimely submissions, which were not considered.⁴ By failing to submit a timely objection, Claimant waived any objection to the request to dismiss.

B. Respondent's Alleged Failure to Comply with the IP Officer Participation Provision of the Preference Law.

Claimant's Claim challenges Respondent's compliance with the Tribal employer's obligations under 33 M.P.T.L. ch. 1 § 5(k), *Tribal and Native American Preference (IP) Officer*, which provides:

The Tribe as an Employer must employ an individual whose job duties include overseeing Tribal Employer compliance with the employment preferences required by this Law. The individual's responsibilities shall include, without limitation, participation in any employment decisions related to this Law, such as the preferences provided in Section 5 and any disciplinary determinations, including discharge. This position shall not be eliminated by the Tribal Employer unless the Mashantucket Pequot Tribal council approves such action.

Specifically, she contends that Respondent violated the Preference Law by not providing her with an "objective" IP Officer who was not involved in the decision to discipline her.⁵ She contends that Ms. Merrill made the decision to suspend Claimant pending investigation of the matter and it was a conflict of interest for her to serve as both the discipline decision maker and the IP Officer. She alleges that the Preference Law requires an independent IP Officer who engages in sufficient "participation" to make certain the preference eligible employee's rights are protected. She believes she may have experienced a better outcome if Respondent had complied with the Law.

Contrary to Claimant's understanding, the Manager of Native American Preference was involved in the process from the first communication Ms. Torraca had with Employee Relations. While it appears that Ms. Torraca, in consultation with Ms. Merrill, had made a preliminary decision with respect to the manner of proceeding based on Respondent's progressive discipline process, Ms. Torraca also specifically asked Employee Relations and the Office of Native American Preference for their input, which was provided. Mr. Carter, the representative of the Office of Native American

⁴ The MERO notes, however, that the untimely submissions did not appear to include any additional material evidence or argument.

⁵ For purposes of this decision, the MERO accepts as true Claimant's conclusion that a suspension pending investigation constitutes a disciplinary action.

Preference, agreed with the course of action and indicated that he would make himself available for a meeting with Claimant once the investigation had been completed. As suggested by the IP Officer, Respondent afforded Claimant the benefit of allowing her to resign in lieu of termination, an opportunity that exceeded the requirements of the Preference Law.⁶

The Preference Law requires the IP Officer's "participation in any employment decisions related to this Law," with the overall objective of "overseeing Tribal Employer compliance with the employment preferences required by this Law." 33 M.P.T.L. ch. 1 § 5(k) Generally, the Preference Law does not preclude an employer from disciplining or terminating a preference eligible individual for violations of employer policy. In this case, Claimant's admitted noncompliance with Respondent's attendance policies does not give rise to a preference question. Nevertheless, Claimant received the benefit of an IP Officer other than a decision maker who actively monitored the disciplinary process and advocated for Claimant. Under these circumstances, Respondent satisfied the requirements of 33 M.P.T.L. ch. 1 § 5(k) and did not violate the Preference Law.⁷

V. Disposition

For the above reasons, and absent objection by Claimant, Respondent's request to dismiss is granted and the Claim is dismissed.

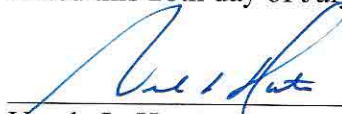
VI. Notice of Publication

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 28th day of July, 2014



Ursula L. Haerter
MERO Director

⁶ Although Claimant may have hoped for an alternative outcome, as a Human Resources Generalist, she was undoubtedly fully aware that termination was the most likely result of her admitted violations of the attendance policies when she already had a final warning for attendance violations.

⁷ As the MERO's decision is dispositive of the Claim, the MERO declines to address Respondent's alternative bases for seeking dismissal, specifically that the Law does not preclude the IP Officer and disciplinary decision maker from being the same person and that Claimant did not exhaust Respondent's internal complaint process before proceeding at the MERO.



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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:

Tanisha S. Sebastian v. Mashantucket Pequot Gaming Enterprise (Foxwoods)

Case Number:

2014-33033

Date of Mailing of MERO Final Decision:

July 28, 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)