MERO	**MASHANTUCKET EMPLOYMENT RIGHTS OFFICE** Final Claim Determination **For Claims under Title 33, the Mashantucket Pequot Tribal and Native American Preference Law**

Case Name:	**Case Number:**
John Anthony Colebut v. Mashantucket Pequot Gaming Enterprise, d/b/a Foxwoods Resort Casino	2014-33038
Date of Claim Filing: June 3, 2014	**Date of Determination:** December 23, 2014

On December 5, 2014, the MERO issued a Proposed Claim Determination in the above case. No timely Request for Reconsideration or Mediation was received from either party.[1] Accordingly, the MERO Director issues the following Final Claim Determination.

John Anthony Colebut ("Claimant") alleges in his Claim that on about May 2, 2014, he received from the Mashantucket Pequot Gaming Enterprise, d/b/a Foxwoods Resort Casino, a first written warning, which he alleges was unjustified and administered in retaliation for his prior claim filing activity under the Preference Law, and particularly his appeal of a MERO decision pending in Tribal Court. He further alleges that the Office of Native American Preference supported the retaliation by failing to perform its statutory duties.

The above-referenced claim has been investigated pursuant to 31 M.P.T.L., the Mashantucket Employment Rights Law and 33 M.P.T.L., the Tribal and Native American Preference Law ("Preference Law").

I. Positions of the Parties

Claimant alleges that he was assessed a first written warning on about May 2, 2014 for two incidents that were misrepresented in the warning notice and did not warrant any disciplinary action, in retaliation for his pursuit of prior Preference Law claims before the MERO and the Tribal Court. He further alleges that by failing to perform its duties under the Preference Law, the Native American Preference Office supported the alleged retaliation.

Respondent denies any violation of the Preference Law and asserts that Claimant received the lowest level of discipline for two incidents wherein he did not maintain the standards of conduct expected of a manager. Respondent further alleges that to the extent Claimant alleges a violation of the Preference Law on a basis other than retaliation, Claimant's claims are either barred by the statute of limitations or should be dismissed for failure to exhaust his internal remedies prior to proceeding at the MERO.

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[1] By correspondence dated December 18, 2014, Respondent Mashantucket Pequot Gaming Enterprise advised that it would not seek reconsideration and reiterated its view that the MERO's proposed order exceeds its authority. Respondent represented that its removal of the discipline from the Claimant's file "will not be deemed to constitute acquiescence with or establish precedent relative to any future MERO action."

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II. Procedural History

Claimant submitted a sworn affidavit dated June 3, 2014, with his Claim.[2] Claimant provided additional documents and information to the MERO throughout the investigation, including referring MERO to two witnesses, each of whom was interviewed by the MERO Director at the end of July.

Respondent submitted a response dated July 11, which included a Position Statement, Answer to Affidavit of Claim ("Answer"), Affidavits of Michelle Jolly, Employee Relations Specialist II, Marianne Yeagher, Restaurant Manager, Food and Beverage Department, Teri Milling, Director of Food and Beverage, Steven Thomas, Manager, Tribal and Native American Relations, statements from employees Sylvia Gonzalez and Syeda Babar, and Disciplinary and Performance Improvement Policy effective June 6, 2006.

The MERO issued a Notice of Formal Hearing August 22, for a hearing date agreed upon by the parties of September 12.[3] At Claimant's request, the hearing was postponed to September 26. Both parties participated fully in the formal hearing to supplement the record.[4] Neither party presented witnesses beyond those requested in the notice of hearing by the MERO. Respondent provided documents in response to the MERO's requests in the hearing notice. At the close of the hearing, both parties declined the opportunity to request that additional evidence be received by the MERO.

III. Findings of Fact

Respondent is the Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino. ("Respondent" or "MPGE") (M-Ex1-0025)[5] Respondent admits that Claimant is a Tribal member in good standing within the meaning of Title 33 M.P.T.L.. (M-Ex1-0025)

A. Credibility Resolutions

In determining the credibility of an individual's account, consideration was given to numerous factors, including without limitation, consistency with his or her past accounts, consistency with the testimony of other witnesses, plausibility, the individual's self-interest, motive and his or her demeanor.

B. Claimant's Protected Activity and Respondent's Knowledge of Same

Claimant has filed several claims with the MERO previously. Claimant's filing history is recounted in *Colebut v. MPGE, d/b/a Foxwoods*, MERO Case No. 2013-33018, 2 (July 2013).

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

[3] The parties were notified by correspondence dated August 15 that the investigation period was being extended to accommodate the parties' scheduling conflicts for a formal hearing.

[4] At the hearing, the parties were provided with a copy of the MERO Record through September 16, 2014, Bates numbered M-Ex1-0001 through M-Ex1-0088. The Transcript (hereinafter "TR" followed by the page number) and exhibits (hereinafter "EX" followed by the exhibit number) received during the hearing comprise the remainder of the Record.

[5] A cited reference is not necessarily the exclusive source of the evidence.

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Claimant's effort to appeal the Final Claim Determination in MERO Case No. 2013-33018 is currently before the Tribal Court in *John A. Colebut v Mashantucket Pequot Gaming Enterprise, et al.,* Docket No. MPTC-CV-AA-2013-190. On April 25, The Honorable Thomas J. Londregan issued an Articulation of his January 14 ruling from the bench denying defendants' Motion to Dismiss the appeal. *See John A. Colebut v Mashantucket Pequot Gaming Enterprise, et al.,* Docket No. MPTC-CV-AA-2013-190, Articulation (April 25, 2014). The Office of the Clerk certified sending the Articulation to all counsel of record and *pro se* parties on April 29. (*Id.*)

Ms. Yeagher and Ms. Jolly credibly denied any knowledge of Claimant's protected activity.[6] (M-Ex1-0041; TR. 27, 45) In her sworn statement, Ms. Milling indicated that she was unaware of the "status of any of [Claimant's] previous filings." (M-Ex1-0055) At the hearing she testified that she had no knowledge of Claimant's filings. (TR. 20-21) Claimant referenced occasions when he advised Ms. Milling of the status of his cases. (M-Ex1-0022) Based on the Record evidence, Ms. Milling had general knowledge of Claimant's protected activity, but did not have knowledge of any recent developments related to Claimant's protected activity.

C. The April 4 Incident

On about Friday April 4, an employee who was required to leave work prior to the end of her shift for personal reasons was unable to reach the assistant restaurant manager or Ms. Yeagher and received permission to leave from Claimant. (M-Ex1-0037, 0082) There is no dispute that Claimant had the authority to release the employee. (TR. 40)

The parties dispute whether Claimant informed the assistant manager about the early out. The assistant manager reported that she was not told by Claimant that he had released the employee. (M-Ex1-0038) Claimant asserts that he informed the assistant manager in the bake shop within less than an hour of releasing the employee. (TR. 35-36; M-Ex1-0082) Claimant's witness, however, did not corroborate Claimant's account. (M-Ex1-0021) Claimant's witness was present when the employee attempted to reach her managers to report her need to leave and when the assistant manager returned looking for the employee and the witness was certain that she had not seen Claimant and the assistant manager together on that day.[7] (M-Ex1-0021)

According to Ms. Yeagher, when she asked Claimant about the incident the following day, Claimant admitted that he did not inform the assistant manager about allowing the employee to leave. (TR. 27-28) It is undisputed that as part of that same discussion, Claimant told Ms. Yeagher that he does not speak to the assistant manager because she is rude to him. (TR. 30-31) Claimant also sought Ms. Yeagher's assistance in disciplining the assistant manager for "rude and discourteous" conduct in violation of policy. (TR. 30-35)

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[6] Ms. Yeagher did not recall whether she had been told by Claimant that he was "in litigation." (TR. 31-32, 33) Crediting Claimant, a reference to being "in litigation" is not sufficiently specific to infer knowledge of Claimant's protected activity.

[7] Information provided by Claimant's witnesses considered relevant and material to a determination was credited. Nevertheless, Claimant took issue with the MERO's decision not to take affidavits from his witnesses. (TR. 9)

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Considering the evidence in its entirety, Claimant did not inform the assistant manager that he had authorized the employee to leave. Particularly notable is Claimant's admission that during the discussion the following day in which he was asked about the incident, he asserted that he does not speak to the assistant manager, because she is rude to him, and went so far as to solicit his co-worker's assistance in disciplining the assistant manager. Claimant's conduct and statements are not consistent with the account of timely notification he provided to the MERO, when he had an interest in providing an account that would not warrant discipline.

D. The April 5 Incident [8]

Claimant was assigned to oversee Subway as part of a managerial training program. (M-Ex1-0054; TR. 58) Toward the end of the night, he was asked to assist on the line due to the volume of business. (M-Ex1-0083) At that point, employees were working overtime and one of the quick service attendants was about to leave. (TR. 60) The shift leader confirmed that other managers, including those in training, would help on the line during busy periods. (TR. 63-65)

According to Claimant, when he was asked to help, he laughed and told the employees he would help by staying out of their way. (M-Ex1-0083) Claimant believed that he did not have the experience to keep up with the employees making sandwiches, who he described as "moving very quickly." (M-Ex1-0083)

The parties dispute the actions taken by Claimant after he told the employees he would stay out of their way. Claimant testified that he donned gloves and joined the line, standing by the cashier and wrapping sandwiches. (M-Ex1-0083; TR. 49, 70) The two employees, one of whom was cashiering at the time, testified that Claimant did not assist them, but rather stood in the doorway. (M-Ex1-0048, 0050; TR. 61-62, 74-75) The shift leader recalled that Claimant was wearing gloves. (TR. 68)

According to Ms. Milling and Ms. Yeagher, when Claimant was asked about the incident, he admitted putting on gloves and joking about staying out of the way so he would not slow down the employees, but did not assert that he helped in any way, even after being asked directly. (TR. 19-20, 22, 29-30) Similarly, when given the opportunity to address the incident at the disciplinary meeting, Claimant did not present alternative facts. (M-Ex1-0054)

Considering all the evidence leads to the conclusion that Claimant donned gloves, laughed and stood at a distance, but did not wrap sandwiches or otherwise affirmatively assist the employees as requested. Of particular note were the accounts of the shift leader and quick service attendant. Claimant was unable to identify any motive for the two employees to make false claims against him. (TR. 56-57) The testimony of the employees also revealed no ill will against Claimant. (TR. 63-64; 76) Moreover, Claimant's expressed concern that he would not be able to keep up with the employees wrapping sandwiches is consistent with the reasons reported by Ms. Milling and Ms. Yeagher that were given by Claimant for not assisting the employees.

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[8] Given that the disciplinary action with respect to April 5 was limited to a discrete incident involving Claimant's response to a request for assistance, evidence of other events or conduct of April 5 that did not serve as a basis for the discipline, which was submitted by both parties, has not been considered herein.

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E. The Investigation, Recommendation and Discipline

Respondent's Disciplinary and Performance Improvement policy applicable to salaried/supervisory positions states, in part, "It is the responsibility of Employee Relations to conduct an independent inquiry of the incident consistent with Step 2 of 'Management's Role'…" (M-Ex1-0067) Step 2 states, in part, "After questioning the Team Member as noted in Step 1…" (M-Ex1-0063) Step 1 begins, "Always give the Team member the opportunity to explain his/her conduct." (M-Ex1-0063)

The April 4 and 5 incidents were investigated by employee relations representative Michelle Jolly. (M-Ex1-0037 – 0038; TR 38, 43) The April 4 incident was not brought to Ms. Jolly's attention initially as a result of Claimant's conduct, but rather as a result of the upset of the employee who left work early because she believed she was being accused of job abandonment. (TR. 38) During the course of her investigation, Ms. Jolly received the assistant manager's account that Claimant had not conveyed his approval of the employee's early leave. (M-Ex1-0038) She also received the account of Ms. Yeagher that Claimant had admitted that he had not informed the assistant manager about the early leave because the assistant manager is rude to him, so he does not speak with her. (TR. 40) Ms. Jolly did not interview Claimant. (TR. 40)

The April 5 incident came to Ms. Jolly's attention when she received written accounts from the two Subway employees indicating that Claimant had not assisted them on request, but rather had laughed and indicated that he would assist them by staying out of their way. (TR. 43; M-Ex1-0048 and 0050) Ms. Jolly spoke with both employees to confirm the accounts. (TR. 43, 49, 50) She also received the account of Ms. Yeagher that Claimant had admitted that he joked that he was helping by staying out of the way and at no time indicated that he had actually helped the employees. (M-Ex1-0039) Claimant was not interviewed by Ms. Jolly as part of the investigation. (TR. 50-51)

Ms. Jolly testified that it is not unusual for her to conduct these types of investigations without interviewing the accused. (TR. 41) Claimant disputed Ms. Jolly's representation and asserted the right to be interviewed and to review and respond to the employees' written statements. (TR. 6-7, 8, 10, 50-51)

After completing her investigation and finalizing her recommendation, Ms. Jolly reached out to the Office of Native American Preference ("ONAP") to secure its view. (TR. 45-46; EX. 5) Mr. Thomas ("IP Officer") indicated agreement with Ms. Jolly's recommendation that Claimant be assessed a first written warning, the lowest form of discipline. (M-Ex1-0040, TR. 46-47; EX. 5) Ms. Jolly then made her recommendation to Ms. Milling. (M-Ex1-0040, 0054) Ms. Milling, the departmental decision maker, accepts the recommendations of employee relations 99% of the time and this was no exception. (TR. 15-16, 45)

Ms. Milling met with Claimant to deliver the discipline, with Mr. Thomas participating by telephone. (M-Ex1-0054-0055) Claimant asked Mr. Thomas whether he thought the discipline was warranted and Mr. Thomas responded that his role was misunderstood. (M-Ex1-0083) Mr. Thomas addressed his view of his role generally, including "to ensure that [Claimant] was treated fairly in the process and that the policies were reasonably applied." (M-Ex1-0060) Claimant objected to the discipline, claiming it was being assessed in retaliation for his prior filings and indicating his intent to report the matter to his lawyer and the MERO. (M-Ex1-0083)

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IV. Analysis and Conclusions of Law

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

A. Alleged Retaliation

Claimant alleges that Respondent's assessment of a first written warning for the incidents on April 4 and 5 constituted retaliation against Claimant for his pursuit of Preference Law claims, particularly his appeal of a MERO decision pending in Tribal Court. 33 M.P.T.L. ch. 1 § 13(a) provides:

> No Employer shall retaliate against any Person with respect to Employment Opportunities or terms or conditions of employment because such Person has filed a claim or instituted or caused to be instituted any proceeding under or related to this Law or has testified or is about to testify in any such proceeding or because of the exercise by such Person on behalf of himself or others of any right afforded by this Law.

The elements of a retaliation claim were set forth in *Colebut v. MPGE,* Case No. 2010-33005, 14 (October 6, 2010):

> In order to prevail in a claim of retaliation, the evidence must show that (1) the claimant engaged in some known protected activity, (2) the claimant suffered an adverse employment action and (3) a causal connection exists between the protected activity and the adverse action. Respondent can nevertheless defeat the claim if it demonstrates that the adverse action would have been taken notwithstanding any retaliation.

In this case, there is no dispute that Claimant engaged in protected activity by filing and pursuing MERO claims previously, including his appeal of the MERO Final Claim Determination in Case No. 2013-33018 pending in Tribal Court, in which Judge Londregan had issued an April 25 Articulation of his earlier bench ruling.

It is undisputed that Claimant received a written warning for the April 4 and 5 incidents. In order to establish unlawful retaliation, the evidence must also show Respondent's knowledge of Claimant's protected activity and a nexus between Claimant's protected activity and the written warning. The evidence reflects that the investigation of both incidents was conducted by Ms. Jolly, who had no knowledge of Claimant's protected activity. Moreover, the investigation of the April 4 incident was ancillary to an existing investigation and the investigation of the April 5 incident originated with the statements of two employees who had no reason to provide false accounts about Claimant. Ms. Jolly developed her recommendation with respect to discipline two weeks before the judge issued the articulation of his decision in Claimant's appeal. Her recommendation was adopted without alteration and was the lowest level discipline available under Respondent's policies.

Although Ms. Milling, the departmental decision maker, had some general knowledge of Claimant's protected activity, she was not aware of the specifics of Claimant's preference related litigation. Moreover, there is no evidence that Ms. Milling bore any animosity toward Claimant for pursuing claims before the MERO or the Court or manipulated the information that was used in the investigation, either directly or through Ms. Yeagher. The issuance of the judge's articulation of a prior decision close in time

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to the issuance of the discipline is insufficient to establish a nexus between the discipline and Claimant's protected activity. Considered in its entirety, the evidence does not support a conclusion that Claimant's receipt of discipline on May 2 was in retaliation for any preference claims he filed or pursued with the MERO or the Tribal Court.[9]

B. Alleged Failure of Office of Native American Preference to Comply with Preference Law.

Claimant also alleges that by failing to perform its functions as required by the Preference Law, the Office of Native American Preference supported the unlawful retaliation. Although no retaliation violation has been found, Claimant's claims surrounding ONAP give rise to an independent allegation under the Preference Law.[10]

In the context of disciplinary actions, the preference afforded under the law is limited. The Preference Law requires the Tribal and Native American Preference (IP) Officer to "oversee[] Tribal Employer compliance with the employment preferences required by this law [which] responsibilities shall include…participation in any employment decisions related to this Law…" 33 M.P.T.L. ch. 1 §5(k). The Tribal Court has found that the failure of the Mashantucket Pequot Gaming Enterprise to comply with the requirements of its Disciplinary Improvement Policy applicable to Native Americans holding salaried/supervisory positions constitutes a violation of Title 33. *Johnson v. Mashantucket Pequot Gaming Enterprise*, 5 Mash.Rep. 450, 453-454 (2012); *overturned on other grounds*, 2014 WL 505113, 6 Mash.App.___(Docket No. CV-AA-2011-184, Mash. Pequot Ct. Appeals, Feb. 5, 2014) (Bigler, J).

The court developed a "bright line test" to determine compliance; specifically, that the decision maker state unequivocally that the IP Officer had input into the final decision, and that the IP Officer provide input with respect to the final decision after both the IP Officer and final decision maker have had the opportunity to review the finalized employee relations materials and the decision maker has had the opportunity to craft an ultimate decision, and prior to the employee being advised of the decision. 5 Mash.Rep. 454. As articulated by the appellate court in its February 5 decision, "[T]he district court's directive is imminently sound. In the future, the Defendant Gaming Enterprise now knows what is expected of it, and failure to document full compliance may be considered by the Courts in review of Indian Preference cases." 2014 WL 505113, 10.

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[9] Given the MERO's determination, it is unnecessary to address Respondent's alternative argument that discipline would have been assessed notwithstanding any retaliation.

[10] Any argument that Claimant failed to exhaust his internal remedies prior to proceeding with his MERO claim against ONAP is not persuasive. The exhaustion requirement is premised on the existence of an "effective complaint process" and an individual's failure to utilize the process must be unreasonable. *See* 33 M.P.T.L. ch. 1 §9(a). Here, Claimant objected immediately to the discipline and the manner in which ONAP participated, alleging retaliation and indicating his intent to go to MERO. Claimant was merely told that he misunderstood the ONAP's role without being advised of the availability of any ONAP complaint process. Under these circumstances, even assuming ONAP offered Claimant an "effective complaint process," Claimant's failure to continue to pursue his complaint with ONAP was not unreasonable.

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Merely a few months after the appellate court's decision, Respondent failed to meet the exacting requirements set forth by the court. [11] (See M-Ex1-0040, 0054, and 0059) The IP Officer's input was provided to Ms. Jolly prior to Ms. Milling receiving Ms. Jolly's recommendation and making a final determination. In addition, there is no evidence that Ms. Milling and the IP Officer conferred prior to administering the discipline, as required.

Moreover, the Preference Law's requirement that the IP Officer participate in employment decisions requires that the investigation be reviewed with a critical eye. As Mr. Thomas recognized, ONAP's role includes making certain that Native Americans are treated fairly and policies are applied reasonably. In this case, the investigation was not conducted in accordance with the requirements of Respondent's policies, in part because Claimant was not afforded an opportunity to be heard directly by the investigator. Rather, Ms. Jolly accepted the accounts of Claimant's responses as they were relayed through his co-worker. Accordingly, Claimant did not receive the full benefit of the required independent inquiry.

V. Disposition

Respondent did not retaliate against Claimant in violation of the Preference Law when it issued Claimant a first written warning on about May 2, 2014.

Respondent failed to comply with the requirements of the Preference Law by ONAP's failure to participate in the disciplinary process as required or provide input in the final decision in accordance with the Tribal Court's "bright line test." Respondent is ordered to rescind the first written warning, cease and desist from noncompliance and conform ONAP's procedures to the requirements of the law.

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 23rd day of December, 2014

Ursula L. Haerter
MERO Director

[11] In support of its defense, Respondent submitted the Disciplinary and Performance Improvement Policy effective June 5, 2006, which pre-dates enactment of the Preference Law. Respondent's submission does not appear to be the version of the policy in effect during the relevant period. *Compare, Johnson v. MPGE*, 2014 WL 505113, fn. 2 *with* M-Ex1-0067.

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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:
John Anthony Colebut v. Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino

Case Number:
2014-33038

Date of Mailing of MERO Final Decision:
December 23, 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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