



MERO

MASHANTUCKET EMPLOYMENT RIGHTS OFFICE

Final Claim Determination

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

Case Name: Marielaina Holzman v. Foxwoods Resort Casino (Norwich Spa at Foxwoods)	Case Number: 2016-33043
Date of Claim Filing: June 10, 2016	Date of Determination: December 14, 2016

Marielaina Holzman (“Claimant” or “Ms. Holzman”) alleges in her Claim, filed June 10, 2016, and amended November 2, 2016, that she was denied two day advance notice of an open position and promotion to the position of Interim Spa Director at the Norwich Spa at Foxwoods Resort Casino (hereinafter “Spa”), and denied shift assignments, in violation of the Tribal and Native American Preference Law (“Preference Law”), 33 M.P.T.L. ch. 1 § 5(a). Claimant further alleges that the denial of preference in shift assignments adversely affected her work performance, resulting in her employment termination in violation of the Preference Law. Claimant also alleges that the Office of Native American Preference (“ONAP”) failed to issue its decision within 60 days as provided for in Title 33, and that ONAP failed to investigate Claimant’s allegations of denial of shift assignment preference.

A formal hearing was held on December 1 and 2, 2016,¹ pursuant to Title 33 and Title 40, at which the parties had full opportunity to present witnesses and evidence regarding the following claims:

- Whether Claimant was denied preference in promotion to the position of Interim Spa Director or Spa Director at the Spa for the period January 31 to June 8.
- Whether Claimant was denied shift assignment preference between September 18, 2015 and March 17.
- Whether there were circumstances that would toll the statute of limitations to allow consideration of Claimant’s alleged denial of shift assignment preference between August 5, 2015 and September 18, 2015, and, if so, whether Claimant was denied preference.
- Whether ONAP failed to investigate Claimant’s alleged denial of shift assignment preference.

¹ All dates herein are in Calendar Year 2016 unless otherwise noted.

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Claimant was not represented by an attorney. Claimant testified on her own behalf. Respondent, represented by Jeffrey F. Buebendorf, Esq., called The Norwich Inn & Spa General Manager John O'Shaughnessy and Consultant Marie Mozzi as witnesses.² The parties filed post-hearing briefs.

I. Procedural History

A. ONAP

The complaint before ONAP that underlies the MERO claim was filed March 17.³ M-1-25, Complaint of Non-Compliance Form The ONAP decision is dated May 16. M-1- 5

By MERO decision dated July 13, Claimant's alleged failure of the ONAP to issue its decision within 60 days was dismissed. M-1-12 The one business day delay in issuance of the ONAP decision was considered inconsequential. M-1-12 Claimant's alleged denial of two day advance notice of an open position also was dismissed based on Respondent's posting of a Spa Director position at the request of the ONAP in resolution of the violation found by the ONAP.⁴ M-1-12 Claimant included both allegations in her subsequently filed amended claim. M-1-23The MERO confirmed its dismissal of these allegations at the hearing. T-12-13

In response to the question on the ONAP form, "Indicate any preference and/or opportunities you believe you were denied in violation of the Law," Claimant checked several boxes, including "Shift Assignment." M-1-25, Complaint of Non-Compliance Form The questions the ONAP directed at Claimant included no questions regarding shift assignment preference. R-10 Claimant did not offer additional information on the ONAP complaint form or in response to the ONAP questions. See M-1-25, Complaint of Non-Compliance Form and R-10 Claimant testified that to the extent the ONAP considered her claim unclear, the form was structurally deficient and she believed she would have an opportunity to clarify her claims during the ONAP's processes. T-93-94 The ONAP did not investigate Claimant's alleged denial of shift assignment preference. M-1-18

² Respondent did not present as a witness the representative of ONAP who conducted the investigation of Claimant's allegations due to the individual's unexpected unavailability on the day of hearing.

³ Claimant's complaint with the Office of Native American Preference included an allegation relating to training preference that was not included in her Claim with the MERO and is not before the MERO. T-11 Transcript pages are designated T-#; MERO exhibits are designated M-#; Claimant exhibits are designated C-#; Respondent exhibits are designated R-#; and Joint exhibits are designated J-#. References to documents in the MERO Record as of the hearing, reflected on the index submitted as M-1, are designated M-1-#, with the number corresponding to the number entry on MERO Exhibit 1 where the document may be found.

⁴ No independent assessment has been conducted by the MERO as to whether the alleged failure to provide a two day advance posting was a violation, as it is unnecessary to the MERO's determination.

B. Respondent's Motion to Dismiss

Prior to the hearing, Respondent filed a Motion to Dismiss the alleged denial of promotion on June 20, which it renewed on July 14, July 26 and November 10.⁵ M-1-6, 13, 17, 25 Respondent's Motion to Dismiss was based on a position of Spa Director being designated as "key" by the Mashantucket Pequot Tribal Council by TCR 060816-01 of 04 (hereinafter "TCR").⁶ M-1-17 33 M.P.T.L. ch. 1 § 9(c) provides, in part, that the MERO "must dismiss a claim without investigation or Hearing...if...ii. The Tribal Council...has designated a position as key..."⁷

The claim alleges denial of promotion to Interim Spa Director as of January 31, and ONAP issued its decision May 16, both prior to the TCR effective date of June 8. Compare M-1-23, 17 and 5 respectively Prior to the hearing, the Record included no evidence as to how the position designated as key by the TCR compared with the position Claimant alleged she was denied in violation of the Preference Law. According to the TCR, the Spa Director position designated as "key" was part of a "restructure of the Spa Operations." M-1-17, TCR, pg. 2 of 4. The TCR includes no indication as to whether the restructure affected the parameters of the Spa Director position. M-1-17 Nor is there an indication in the TCR that the Tribal Council's designation was retroactive. M-1-17 Accordingly, at the outset of the hearing, in accordance with 33 M.P.T.L. ch. 1 § 9(c), the Motion to Dismiss was granted for the period on and after June 8 and was denied with respect to the period January 31 to June 8.⁸ T-15

⁵ Case processing was stayed by the MERO between July 29 and December 1 while the case was in conciliation. See 33 M.P.T.L. ch. 1 § 9(e). During a pre-hearing teleconference November 21, the parties were advised as to the manner in which the issues raised in the November 10 Respondent's Objection to Claimant's Amended Complaint and Renewed Motion to Dismiss would be addressed at the outset of the hearing.

⁶ For a position appropriately designated as "key" under Title 33, otherwise preference eligible individuals are not eligible for preference, but rather compete equally with all other applicants for the available position. See 33 M.P.T.L. ch. 1 § 5(h)

⁷ Neither party challenged the Tribal Council's compliance with 33 M.P.T.L. ch. 1 § 9(c)(ii). The TCR "identified the criteria relied upon in designating the position and how the position meets the criteria" as required by the law. 33 M.P.T.L. ch. 1 § 9(c)(ii) A contrary finding by the MERO would have required referral to the Tribal Council for an opportunity to cure any deficiency. 33 M.P.T.L. ch. 1 § 9(c)(ii)

⁸ Respondent's renewal of its Motion to Dismiss the alleged denial of promotion after the direct testimony of Mr. O'Shaughnessy also was denied. T-133, 135-136

C. Respondent's Objection to the Amended Claim

Respondent's November 10 pleading included Objection to Claimant's Amended Claim. M-1-25 Respondent objected, in part, to the addition of an allegation of termination flowing from the denial of shift assignment preference based on the allegation not having been presented to the ONAP, which issued its decision with respect to Claimant's claims prior to her termination about June 23. See M-1-25, 5; T-34 Respondent also objected, in part, to Claimant's allegations of denial of shift assignment preference as being outside the statute of limitations. M-1-25

At the outset of the hearing, Claimant's allegation in her Amended Claim that the denial of shift assignment preference ultimately led to her termination from employment was dismissed based on the failure to present the claim first to the ONAP. T-13 Also dismissed as being outside the statute of limitations was the Claimant's allegation that she was denied shift assignment preference in December 2014 when there was an opening for Guest Services Supervisor. T-14 Although Claimant's allegation of denial of shift assignment preference in August 2015 when the Guest Services Supervisor position was again vacant also fell outside the statute of limitations, the claim was not dismissed based on Claimant's contention that the statute of limitations should be tolled because she had attempted to advance her claim with the ONAP, which she alleged would not accept the claim. T-14-15 Respondent's remaining objections to the Amended Claim were overruled. T-15

II. Findings of Fact

After careful review and consideration of the record, as well as an assessment of the credibility of the witnesses, the below facts relevant to this determination are found.

A. Claimant

It is undisputed that Claimant is a member in good standing of the Mashantucket Pequot Tribal Nation. T-30-31 Claimant was employed by the Spa as a Spa Supervisor from about November 5, 2014 to about June 23. T-34 Her last day of work was May 13. T-34

B. Norwich Spa at Foxwoods

The Norwich Spa at Foxwoods is a department of the Mashantucket Pequot Gaming Enterprise. T-99 John O'Shaughnessy is the General Manager of The Norwich Inn and Spa ("NIS"), which is also owned by the Mashantucket Pequot Tribe. T-100, 224 In late 2009, discussions were held about leveraging the NIS brand into the Grand Salon and Spa at Foxwoods. T-105-106 A result of the

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discussions was a Letter of Understanding dated November 5, 2009, which provides, in part, "John O'Shaughnessy and key NIS employees of his choice will provide management guidance and other consultant services to the Norwich Spa at Foxwoods." R-11 The "reorganization" was to take effect about January 2010. R-11 The Letter of Understanding was in effect as of the MERO hearing. T-190.

C. Spa Oversight

At relevant times, the management positions at the Spa were Spa Director, Assistant Manager, Spa Supervisor and Guest Services Supervisor. T-107-108 Prior to January 31, 2016, the Spa Director was Stella Gustafsson. T-31-32 The Spa knew of Ms. Gustafsson's departure about two weeks in advance. T-108 At that time, the Spa also was on notice that as of mid-February, the Assistant Manager would be taking a leave of absence for an indeterminate period. T-108-109

Mr. O'Shaughnessy testified to the circumstances requiring "safeguarding the company's interests and ensuring the ongoing provision of services." T-109 He also viewed the Spa Director's departure as an opportunity to re-evaluate the structure, both the involvement of NIS with the Spa and the Spa's internal structure. T-109-110

Spa Consultant Marie Mozzi was retained. T-108-109 Ms. Mozzi had extensive spa experience, was consulting with NIS at the time and was familiar with the Spa's operations from prior consulting work at the Spa. See R-12, T-40-43, 109, 276-277 The purchase order for Ms. Mozzi's services reflected her retention to serve as Interim Spa Director, with the Spa Director job description attached. R-4, T-191-192 Claimant was informed of Ms. Mozzi's retention as Interim Spa Director. T-38 MPGE leadership was also informed of Ms. Mozzi's retention to oversee the Norwich Spa at Foxwoods operations. R-12

Mr. O'Shaughnessy testified, "It was my evaluation that in order to meet the ongoing needs of the department and the organization that we needed to bring in Miss Mozzi for a limited engagement while we worked through the evaluation of the entire operation..." T-109 He worked with Jason Guyot, VP Resort Operations and Development, to whom he reported regarding the Spa, and Cinque Dames, a member of the Tribal Business Advisory Board, to whom he reported with respect to NIS operations, regarding the question of NIS's continued involvement with the Spa. T-109-110.

Mr. O'Shaughnessy testified to having "limited" involvement in the Spa, because he did not work there every day, so part of Ms. Mozzi's engagement was to "help evaluate the operation and make recommendations on an appropriate structure for moving forward." T-111 He testified that he "clarified" the scope of her responsibilities in a document in March. T-197, R-5 Because the result of the evaluation may have included the elimination of the Spa Director position, Mr. O'Shaughnessy did not believe it was appropriate for a Spa Director to perform the organizational

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analysis, which he considered beyond the scope of the responsibilities of Spa Director. T-117-118, 198, 238 According to Mr. O'Shaughnessy, the Spa Director position was vacant and not open between January 31 and June 8. T-116, 125-126

D. Spa Director as "Key" Position

Mr. O'Shaughnessy testified that he always considered the Spa Director position "key." T-123, Prior to the June 8 Tribal Council Resolution, the Spa had no documentation of a "key" designation. T-216 When Ms. Gustafsson was hired in 2013, the single preference eligible applicant was not minimally qualified for the position. T-225

There is no indication in the ONAP decision that Respondent informed the ONAP that it believed the Spa Director or Interim Spa Director position to be "key" under the Preference Law. See M-1-5 Mr. O'Shaughnessy testified that he responded to the ONAP's written inquiries without knowing the context of the questions. T- 201 The ONAP decision found, in part, that Claimant's "rights were violated when the department did not post the Spa Director position and instead hired a consultant to perform the very same duties and responsibilities." M-1-5

The Tribal Council provided three (3) bases under the Preference Law for its June 8 approval of the Spa Director position as "key":

1. It is a high-level Managerial position such that the Employer would risk significant damage or loss if the position is not filled with the best qualified candidate regardless of preference.
2. It has a substantial impact on the ability of the Employer to execute its strategic objectives.
3. The position directly enhances the strategic capabilities of the Employer.

Doc. 17, TCR pg. 3 of 4.

Respondent submitted two job descriptions for the position of Spa Director, the first with a preparation and approval date of May 16, 2013 and the second with a preparation and approval date of June 17, 2016. R-1 and R-2, respectively. Both descriptions provide that the Spa Director "oversees all aspects of the day-to-day Spa & Salon operations and related services." Compare R-1 and R-2 The language of both descriptions is comparable under "Essential Duties and Responsibilities" and "Qualifications." Compare R-1 and R-2 The requirements include broad responsibilities consistent with the Spa's oversight, including with respect to financial management, personnel, provision of services and development. R-1 and R-2

Beyond the preparation and approval dates, overall the two descriptions are the same, with the exception of two additions in R-2. First, in the R-2 Synopsis and Summary sections, the Spa Director

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is responsible for the Spa's "financial performance, and provides strategic guidance and oversight of the implementation of strategic initiatives at the spa." In addition, R-2 reflects the designation of the position as "key." Mr. O'Shaughnessy testified that there was no change in the expectations of Spa Director associated with the revised job description; that the additional language in the job description was to clarify existing responsibilities and indicate that the position had been designated as "key." T-132-133

E. Shift Assignment Claims

1. Guest Services Supervisor Position Filled by Clinton Cox About August 5, 2015⁹

Claimant testified to her belief that there should have been a "rebid" when the Guest Services Supervisor position was open. T-78 Her belief is based on the fact that when she was the Spa Supervisor and there was an opening among the massage therapists, a rebid would be conducted. T-78 Claimant spoke with Stella Gustafsson about changing shifts before the position was filled, but no change was granted Claimant. T-79-80 Claimant testified that she raised her request to change shifts with Ms. Gustafsson "multiple times" and the matter was "just deferred" or she was told she "wasn't eligible." T-80

Claimant conceded that she did not file a claim alleging denial of shift assignment preference related to the Guest Services position filled by Mr. Cox. T-81 She believed she could resolve the matter through discussion and attempted to contact ONAP to set up a meeting, T-81-82 She did not recall if she indicated the reason for her meeting request and no longer has access to the Spa's e-mail system to review the correspondence. T-81

2. Alleged Denial of Shift Assignment Preference After January 30

The Spa is open from 8 a.m. to 9 p.m. R-15, T-27 Ms. Gustafsson generally worked Tuesday through Thursday, 9 a.m. to 5 p.m. and Friday and Saturday, 7:30 a.m. to 3:30 p.m. T-277 Ms. Mozzi testified that she attempted to maintain the same schedule, but when she had conflicts with other commitments, she would ask the Guest Services Supervisor, who she considered the day shift supervisor, to change his work schedule. T-277 In addition, after January 30, there were other circumstances that caused work schedules to be changed, including the Assistant Manager's six (6) week leave of absence, previously approved vacations and sick leave requests. T-279

⁹ Claimant testified that the Guest Services position filled by Clinton Cox was the only alleged denial of shift assignment preference for the period August 5, 2015 to January 1, 2016. T-78

According to Respondent's records, the Assistant Manager generally worked the 7:30 a.m. to 3:30 p.m. shift five (5) days per week. R-7 The Claimant testified that the Assistant Manager afforded preference for a work schedule opening resulting from the absence of an employee. T-71

The Spa Supervisor generally worked the 1:15-9:15 p.m. shift four (4) or five (5) days of the workweek. R-7 The massage therapists worked between 9 a.m. and 8 p.m.. T-66 The massage therapists' final appointments were scheduled to conclude by 8 p.m. T-66, R-15 When Claimant served as Spa Supervisor, an opening among the massage therapists would result in a shift rebid. T-78

The Guest Services Supervisor typically worked 9 a.m. to 5 p.m. or 10 a.m. to 6 p.m. three (3) days per week and 1:15 – 9:15 p.m. on the two days each week the Spa Supervisor was off. T-66, R-7 The 10 a.m. to 6 p.m. was added to the Guest Services Supervisor's schedule at the urging of Claimant, who requested assistance up to 6 p.m. due to the workload. T-79 Leading up to Ms. Gustafsson's departure, it appears that the Guest Services Supervisor generally worked 10-6 at least one day per week, typically on Fridays. See R-7 The Guest Services Supervisor is primarily responsible for the front desk activities and the locker room staff. T-144 The receptionists start work at 7:30 a.m. and the doors open at 8 a.m. T-281

Mr. O'Shaughnessy and Ms. Mozzi both testified that the busiest time of the workday for the Guest Services Supervisor is 11 a.m. to 4 or 5 p.m. and the busiest time of the workday for the Spa Supervisor is 11 a.m. to 4 p.m.. T-144-145, 281 From an organizational standpoint, one supervisor was required to work in the morning and one was required to work in the evening. T-145 At no point during the relevant period was the Guest Services Supervisor position open. R-6

III. Analysis and Conclusions of Law

Jurisdiction over the parties and with respect to the Claim is undisputed and asserted. Claimant is a Tribal member who is in good standing with the Tribe. Claimant alleges she was denied the employment opportunity of promotion to Interim Spa Director or Spa Director at the Norwich Spa at Foxwoods about January 31, 2016. She further alleges denial of preference in shift assignments about August 5, 2015 and between January 31, 2016 and her departure.

The Tribal Council has declared that a purpose of the Preference Law is "[t]o clearly set forth the requirements for all Employers within the jurisdiction of the Tribe to provide preference in Employment Opportunities for Tribal Members, Spouses of Tribal Members and Native Americans who meet the Minimum Necessary Qualifications of the job." 33 M.P.T.L. ch. 1 § 3(a). If an employment opportunity existed at the Spa for which Claimant asserted a right and was minimally qualified, as a Tribal member, Claimant was required to receive the highest level of preference.

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A. Alleged Denial of Preference in Promotion to Interim Spa Director or Spa Director

The Preference Law requires that minimally qualified members of the Mashantucket Pequot Tribe be afforded first preference by the Tribe for open positions for which preference is required to be afforded. 33 M.P.T.L. ch. 1 § 5(a). If a position is appropriately designated as “key,” the Tribal department is not required to afford preference. 33 M.P.T.L. ch. 1 § 5(h).

It is undisputed that Stella Gustafsson’s departure about January 30 resulted in a vacancy in the open position of Spa Director. Also undisputed is that shortly prior to Ms. Gustafsson’s departure, Spa Consultant Marie Mozzi was retained, initially for a four to five month period. Respondent’s records reflect that Ms. Mozzi was considered the Interim Spa Director. Claimant recognized that Ms. Mozzi’s tenure exceeded that of a temporary position for which preference would not be required to be afforded. See M-1-25, RPI 33-0903 (September 16, 2009) Consistent with the ONAP decision, Claimant contends that Ms. Mozzi performed duties co-extensive to those that had been performed by Ms. Gustafsson or were otherwise within the existing Spa Director job description. Respondent asserts that Ms. Mozzi was not an employee of the Spa, but a consultant retained through NIS pursuant to the Letter of Understanding. Respondent further contends that Ms. Mozzi’s responsibilities exceeded those duties that would be performed by the Spa Director and that the Spa Director position was vacant during the relevant period.

Based on the record evidence, Ms. Mozzi was retained to oversee the Spa as Interim Spa Director and to conduct an operational assessment to help determine, in part, if the staffing structure should be altered. While such a structural assessment may be considered to be within the responsibilities of a Spa Director, Mr. O’Shaughnessy testified to his belief that an external assessment was required because consideration was being given to eliminating the position that would otherwise be charged with making the assessment. Under either party’s view, at a minimum, Ms. Mozzi was performing the duties of Spa Director that were performed by Ms. Gustafsson.

The operative Spa Director job description for the period January 31 to June 8 was the Spa Director job description that was in effect when Ms. Gustafsson held the position. Although Mr. O’Shaughnessy testified that he always considered the Spa Director to be a “key” position, the evidence suggests that prior to Ms. Gustafsson’s departure, consideration was never given to whether the position was “key” under the Preference Law, because the issue had not arisen. As Mr. O’Shaughnessy pointed out, no minimally qualified preference applicants applied in 2013 when Ms. Gustafsson was hired. As late as the ONAP decision on May 16, there is no evidence that the Spa asserted that the position was “key.”

Nevertheless, after the ONAP issued a decision adverse to Respondent, Respondent received a “key” designation for Spa Director from the Tribal Council. In the June 8 TCR, the Tribal Council

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found three (3) independent bases under Title 33 for designating the Spa Director as “key.” First, the Spa Director is considered by the Tribal Council to be a high level managerial position such that the Tribe would risk significant damage or loss if the position was not filled with the best qualified candidate regardless of preference. See 33 M.P.T.L. ch. 1 § 5(h)(i). In addition, the Spa Director has a substantial impact on the ability of the Tribe to execute its strategic objectives and third, the position directly enhances the Tribe’s strategic capabilities. See 33 M.P.T.L. ch. 1 § 5(h)(i).

After the Tribal Council granted the designation, a job description was approved that included select additions to the prior job description, consistent with the Tribal Council’s determination. In addition to adding “key” designation language, the revised job description includes in the Synopsis and Summary sections specific reference to the oversight of finances and implementation of strategic initiatives, as well as the provision of strategic guidance, which do not appear in the earlier job description. Notably, the remainder of the job descriptions’ substance appears unaltered, including the sections, “Essential Duties and Responsibilities,” “Qualifications,” and “Education and Experience.”

The MERO may not conduct an independent analysis of the Tribal Council’s determination that the position is “key.” See 33 M.P.T.L. ch. 1 § 9(c)(ii) The TCR identifies the “criteria relied upon in designating the position and how the position meets the criteria” as of June 8 and as reflected in the revised job description. 33 M.P.T.L. ch. 1 § 9(c)(ii) Given that the Tribal Council has determined that as of June 8 the Spa Director position was not a preference eligible position, it is incumbent upon the MERO to consider whether the Tribal Council’s reasoning and conclusion in designating the position “key” would apply to the approximately four (4) month period prior to the TCR when the earlier job description was in effect.

One basis for the Tribal Council’s determination was that the Spa Director position met the Preference Law’s definition of a “high-level managerial...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.” 33 M.P.T.L. ch. 1 § 5(h)(i). During the period in question, the Spa Director position was responsible for the oversight of all aspects of daily Salon and Spa operations. The essential responsibilities and qualifications reflected on the job description reveal overarching responsibility for the Spa, including without limitation financial performance, personnel matters, service standards and growth. The Spa managerial functions remained unaltered in the post-TCR job description and the Spa structure pursuant to the Letter of Understanding with NIS continued in effect. Accordingly, the MERO finds that the managerial functions underlying the Tribal Council’s determination were within the responsibilities of the Spa Director position during the relevant period, from January 31 to June 8. Therefore, based on the Tribal Council’s reasoning and determination that the Spa Director position as of June 8 was a high level managerial position, the Spa Director position for the period January 31 to June 8 was a “key” position as defined in 33

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M.P.T.L. ch. 1 § 5(h)(i).¹⁰ Correspondingly, given that the responsibilities of the Interim Spa Director position held by Ms. Mozzi consisted, at a minimum, of the responsibilities of the Spa Director position, the Interim Spa Director position for the period January 31 to June 8, 2016, was “key” under 33 M.P.T.L. ch. 1 § 5(h)(i).

Based on the Record evidence, at relevant times, the Spa Director and Interim Spa Director positions were “key” positions under the Preference Law. Respondent therefore did not violate the Preference Law about January 31, 2016, when the Spa did not afford preference to Claimant for the position of Spa Director or Interim Spa Director.¹¹

B. Alleged Failure to Afford Preference in Shift Assignments

The Preference Law defines “shift assignments” as “those shift assignment opportunities resulting from an open position, or those opportunities to maintain a shift assignment during shift reassignments.” 33 M.P.T.L. ch. 1 § 4(n) When the Tribe is the employer, preference in shift assignments is required to be afforded members of the Mashantucket Pequot Tribe and their spouses. 33 M.P.T.L. ch. 1 § 5(d)

1. Guest Services Supervisor Opening in about August, 2015

Generally, to be timely filed, any allegation within Claimant’s complaint would have had to arise within the 180 day period prior to her filing with ONAP on March 17. See 33 M.P.T.L. ch. 1 § 9(a)(i) In this case, Claimant alleged that she had tried unsuccessfully to file with ONAP and was rebuffed. She was therefore given the opportunity to present evidence at the hearing to show a basis for tolling the statute of limitations.

Claimant testified, however, that at the time she did not believe filing a complaint would be necessary. Instead, she unsuccessfully attempted to schedule a meeting with the ONAP representatives to discuss the matter. Given that Claimant had no intent of filing a complaint with the ONAP at the time she made efforts to reach the ONAP representatives regarding her belief that

¹⁰ As previously noted, the “high level managerial position” is an independent basis for the “key” designation under Title 33. 33 M.P.T.L. ch. 1 § 5(h)(i). Therefore, the MERO need not consider whether the strategic orientation of the position, which served as the foundation for the two additional bases for the Tribal Council’s determination, was new or merely a clarification of the scope of the existing position.

¹¹ Given the “key” position determination, no consideration has been given to whether the Claimant was minimally qualified for the position. The MERO also declines to consider whether the Spa’s outsourcing of the responsibilities of an existing Spa position through the Letter of Understanding would constitute a violation of Title 33 if a preference exception did not apply.

there was a preference issue, there is no evidentiary basis for a conclusion that Claimant attempted to file a complaint, much less that the ONAP refused to accept a complaint.

Based on the Record evidence, Claimant has failed to establish that the statute of limitations should be tolled. Claimant's allegation that she was denied shift assignment preference about August 5, 2015 is dismissed as untimely.¹²

2. Alleged Denial of Shift Assignment Preference After January 30

Claimant advances more than one theory of denial of shift assignment preference after January 30. She alleges that whenever there is an open position, such as when the Spa Director position became vacant, a "standing open shift assignment" becomes available. T-273 She further alleges that on any given day when a scheduled management employee is absent, the absence constitutes a "forfeiture" that creates an open shift assignment. T-273 She gave as an example that she should have been offered a shift on the Saturday for the week ending February 6 when a day shift opening occurred that was filled otherwise. Similarly, Claimant argues, if the Spa Consultant was absent, her absence created an open shift.

"Shift assignments" are "those shift assignment opportunities resulting from an open position, or those opportunities to maintain a shift assignment during shift reassignments." 33 M.P.T.L. ch. 1 § 4(n) Where the provisions of a Tribal law are found to be ambiguous, as they are here, the Tribal Court has found that its "objective is to ascertain and give effect to the apparent intent of the legislature..." *Cole v. Mashantucket Pequot Gaming Enterprise*, 1 Mash.Rep. 433, 437, 2 Mash. 52 (1996) (citations omitted) The Courts "interpret statutory terms by reading them in context and not in isolation." *Dulin v. Brown*, 1 Mash.Rep 51, 55, 1 Mash. 39 (1995) As the enforcing agency, the MERO applies the same principles of statutory construction in discerning the Tribal Council's intent in Title 33.

The potential pool of what may be considered "shift assignments" is delimited by the express words in the law; specifically, shift assignments for which preference is required to be afforded may only be one of the following two types, "those shift assignment opportunities resulting from an open position or those opportunities to maintain a shift assignment during shift reassignments." 33 M.P.T.L. ch. 1 § 4(n) The language represents two distinct opportunities under different circumstances.

To "maintain" a shift assignment during shift reassignments would allow a preference eligible employee to preserve his or her existing shift assignment. The preference eligible employee would be able to keep the status quo, rather than being at risk of losing any gains that had been made up

¹² Due to the dismissal as untimely, the merits of the allegation have not been considered.

to that point in time. Reading the clause in the context of the entire provision, “shift reassignments” must refer to a situation where there is no open position, because open positions are separately addressed. Therefore, in a situation where there are no open positions and shifts are reassigned, Tribal members and their spouses have preference to keep their existing shifts.¹³ In this way, non-preference employees may not choose to displace a preference eligible employee from his or her existing shift. Similarly, employees who are not preference eligible and who have achieved a favorable shift by virtue of long tenure or other factors are not at risk of having a preference eligible employee choose their shifts and cause them to be moved to less favorable shifts. Such a reading reflects the balance of rights reflected in Title 33 by affording preference eligible employees a tangible benefit without creating adverse circumstances for non-preference employees that may cause valued employees to leave employment.

The definition also provides for “shift assignment opportunities resulting from an open position.” 33 M.P.T.L. ch. 1 § 4(n) In contrast to the reassignment clause that allows preference eligible employees to maintain the status quo, the “open position” clause affords preference to eligible employees who may wish to move to a shift considered more favorable that is associated with the open position. Claimant gave an example in her testimony, explaining that when an opening arose among massage therapists under her supervision, the massage therapists were afforded the opportunity to change their shifts. Under these circumstances, any preference eligible massage therapists would have received preference for the open shift. Once all the existing employees have completed their selections, the shift that was not selected would be associated with the open position.

Preference eligible employees do not receive additional preference for work schedules. For example, if the only massage therapist who works shift X is on vacation, the employee’s absence on the work schedule does not create an “open position.” A temporary absent reflected on a work schedule is not equivalent to a vacant position. To find otherwise would create an undue burden on the Tribe.

The MERO has consistently read the shift assignment preference provision in accordance with the above reasoning. See e.g., *Guide for Tribal Employers re: Rights of Preference Eligible Individuals*, MERO Form 33-5306, which states, in part:

What is shift preference? Shift preference is required to be provided to Tribal Members and Spouses for open positions and to maintain shift assignments during reassignments, but is not intended to displace employees or provide preference for work schedules.

¹³ The addition of the 10 a.m. to 6 p.m. shift for the Guest Services Supervisor at Claimant’s urging may be considered an example of a shift reassignment.

Accordingly, the MERO is not persuaded by Claimant's contention that any time an employee is absent, there is a shift "forfeiture" that results in an "open position" preference opportunity.¹⁴ A temporary absence does not create an "open position" under the Preference Law that could be a shift assignment preference opportunity. Such modifications in work hours that may occur constitute changes to work schedules and do not change employees' regular shifts.

Claimant's alternative argument is that every open position creates a "standing open shift assignment." An open position certainly may create an open shift opportunity. Every open position, however, does not result in a shift assignment opportunity for which preference may be asserted. Shift assignment opportunities generally exist where there are multiple positions that are interchangeable.¹⁵ There may be factors that preclude positions from being interchangeable, such as particular skill sets or licensing requirements. For example, if an opening results from the departure of a massage therapist, those who are not licensed massage therapists would not be eligible to be considered for the open shift.

In order for Claimant to move to an earlier shift rather than maintain her shift, the "open position" language of the definition had to be implicated. The only open position at issue in Claimant's case is that of Spa Director. The Spa Director position is a higher level managerial position than the Spa Supervisor position, with correspondingly different focus and responsibilities. The Preference Law does not require an employer to afford shift assignment preference for an open shift associated with a vacant position that is not comparable to the position held by the employee seeking preference.¹⁶

For the foregoing reasons, there were no shift assignment preference opportunities during the relevant period for which Claimant was eligible to be considered. Accordingly, Respondent did not deny Claimant shift assignment preference in violation of Title 33.

C. Alleged ONAP Failure to Investigate Shift Assignment Preference Allegations

In addition to her allegations of denial of preference, Claimant alleges that the ONAP failed to investigate her shift preference claims. Respondent does not dispute that the ONAP did not

¹⁴ To the extent one or more managers at the Spa maintained a practice of affording preference for work schedules, as Claimant testified, nothing precludes an employer from affording preference benefits that extend beyond the law's requirements, but doing so does not confer a right under Title 33 that is not otherwise provided for in the law.

¹⁵ The MERO has insufficient information to consider Respondent's argument that shift assignment preference is required only within a job code.

¹⁶ Whether or not Claimant would have been eligible to assert shift assignment preference for an open Guest Services Supervisor position, given the similarities of the positions and their comparable peak work periods is not before the MERO, because there was no open Guest Services Supervisor position within the period in question.

investigate Claimant's shift assignment preference allegations, but contends that Claimant offered no information in support of her claims and that Claimant's focus throughout the investigation was solely on the alleged denial of promotion. Claimant testified that she checked the box alleging a shift assignment preference violation and, based on prior experience with the ONAP believed she would be contacted further about her claims.

The ONAP has an affirmative obligation to investigate the allegations presented in a complaint. 33 M.P.T.L. ch. 1 § 9(a)(i) Once a complaint has been filed, the burden falls to ONAP to make adequate and appropriate inquiries of those involved. The ONAP complaint form completed by Claimant solicits nominal information about a complainant's allegations. Both Claimant and Respondent described an investigative process consisting of responding to written inquiries. None of the inquiries directed to Claimant asked for additional information related to her having checked the shift preference box. Checking the box was sufficient to place the ONAP on notice of the allegation.

When the Tribe is the employer, the ONAP is charged with investigating and attempting to resolve complaints. 33 M.P.T.L. ch. 1 § 9(a)(i) The law provides that when the Tribe is the employer, the MERO's proceedings be invoked only after the ONAP has completed its investigation and efforts to resolve the matter, and issued a decision. 33 M.P.T.L. ch. 1 § 9(a)(ii) Once a MERO claim is filed, the MERO receives the benefit of the ONAP decision. 33 M.P.T.L. ch. 1 § 9(a)(ii) If the ONAP fails to address all allegations in a timely filed complaint, the parties do not receive the benefit of the ONAP's resolution efforts and neither the parties nor MERO receive the benefit of an ONAP decision.

The importance of the ONAP's role in Preference Law complaints against the Tribe cannot be overstated. The ONAP's failure to perform its functions fully and capably may result in delaying a resolution or prolonging litigation, and increasing expenses for all concerned. The ONAP's role under the Preference Law was expanded in the 2014 amendments to Title 33. With the benefit of two (2) years of experience since the amendments, Respondent is advised to review the ONAP's processes and make necessary adjustments to ensure processing of preference issues consistent with the explicit and implicit requirements of Title 33.¹⁷

IV. Disposition

For all the foregoing reasons, Claimant's alleged denial of the employment opportunity of promotion to Interim Spa Director or Spa Director at the Norwich Spa at Foxwoods about January 31, 2016, and alleged denial of preference in shift assignments about August 5, 2015, and on and

¹⁷ Nothing herein precludes the MERO from taking any other actions permitted under Title 33 if Respondent's Office of Native American Preference does not fulfill the requirements set forth in the law in any respect in the future.

after January 31, 2016, are found to be without merit and dismissed in their entirety. In light of the ONAP's failure to investigate Claimant's allegations of denial of shift assignment preference, Respondent is advised to review the ONAP's processes and implement any necessary changes to allow the ONAP to fulfill its duties fully under Title 33.

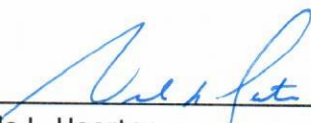
V. Appeal Rights

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.

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.

Dated this 14th day of December, 2016



Ursula L. Haerter
MERO Director

Final Claim Determination Case No. 2016-33043
December 14, 2016
MERO Form-33-1680
(12-30-13)