



MERO

MASHANTUCKET EMPLOYMENT RIGHTS OFFICE

RESPONSE TO PUBLIC INQUIRY
UNDER THE
MASHANTUCKET PEQUOT TRIBAL
AND NATIVE AMERICAN PREFERENCE LAW

The following Response to Public Inquiry under Title 33, M.P.T.L., as amended, (“Preference Law”) provides the public with the benefit of the MERO’s interpretive guidance relating to a specific public inquiry. This response is based solely on the facts presented below. The reader is expected to be familiar with the terminology utilized in the law and procedures manual.

Public Inquiry: The inquiry questions the MERO’s policy not to permit a respondent or its representative to be present during the MERO’s interview of a non-managerial employee of the respondent. The issue arose when, in response to the MERO’s request, respondent’s counsel presented a witness at the MERO’s office. Claimant was not in attendance. The witness indicated, and respondent’s counsel confirmed, that the witness was an employee of respondent who did not hold a managerial position. Respondent’s counsel further confirmed that the witness was not a client.¹ The MERO excluded counsel from the interview.

Counsel clarified that the asserted right to attend the interview was based on a belief that both parties, or their representatives, should be entitled to attend witness interviews, citing to counsel’s experience with the Connecticut Commission on Human Rights and Opportunities (CHRO). The “time-tested trial system” is cited in support of a belief that the interviewee’s responses would not be swayed by the presence of one or both parties.²

MERO Response: The MERO agrees that in the context of a CHRO fact finding hearing or a court trial, generally both parties and their representatives are permitted to be present when witnesses testify.³ If the MERO’s investigative processes included

¹ Issues raised by an attorney representing both a respondent employer and a non-managerial employee go beyond the scope of this inquiry and are not addressed herein.

² Given the inquiry’s focus on permitting both parties to be present during witness interviews, the MERO declines to address the suggestion that an interviewee’s responses would not be swayed by the presence of a single party.

³ While the procedures of other agencies and the courts are not binding on the MERO, the MERO is open to considering existing procedural structures in evaluating its own procedures. With respect to the CHRO, the statute states that the “executive director of the Commission or his designee shall determine the most appropriate method for processing any complaint...” C.G.S. § 46a-83(c). The MERO is not aware of a singular approach to the presence of the parties when interviews are conducted by CHRO investigators outside the context of a fact finding hearing. In its guidance to employers, the Equal Employment Opportunity Commission states, in relevant part, “You may be present during interviews with management personnel, but an investigator is allowed to conduct interviews of non-management level employees without your presence or permission.” <http://www.eeoc.gov/employers/investigations.html>. Accordingly, the MERO’s policy appears to be consistent with the policies of the types of agencies inquiring counsel believes should serve as comparators.

hearings, the presence of both parties generally would be required. To date, however, the MERO has not utilized investigative hearings.

The MERO appreciates some of the observations with respect to the process of taking witness affidavits and the potential value that could be added by the presence of the parties.⁴ The inquiry states, in part:

Additionally, there are significant reasons why parties should be permitted to attend witness interviews. By way of background, in the experience of the undersigned, the MERO interview process involves oral questioning of witnesses by the MERO Director. Upon completion of the interview, the Director prepares a typed statement (or affidavit) reflecting her understanding of the witness's responses. As an initial matter, it bears noting that such an attempt to reduce the witness's comments to writing is readily susceptible to inadvertent and unintended mischaracterization and/or error. Notwithstanding the fact that the witness may be permitted an opportunity to review and correct the statement prior to signing, significant concern exists that the witness may not apprehend or appreciate the import of any such errors or, even if s/he does, may not feel comfortable challenging the MERO Director's recollection of his/her response.

The potential limitations cited with respect to the affidavit process are equally applicable to affidavits taken by the parties outside the presence of the MERO and the opposing party. Arguably, when a party takes a witness affidavit, the motivation to advance the party's interests rather than engage in a neutral fact finding inquiry makes the process more susceptible to mischaracterization or error. Similarly, a witness may feel less comfortable challenging an inquiry or correcting an error in an affidavit if the affidavit is being prepared with oversight by the party, especially if there may be a perception or issue of control, such as when a witness is an employee and the oversight is by the employer or its attorney. Notwithstanding these potential limitations, to date the MERO has accepted affidavits prepared and presented by parties.

The correspondence further states, in part:

Additionally, in the absence of party input, the contents of the signed statement obviously would be limited to those comments and responses that the MERO Director, at that particular moment, determined to be relevant and probative of the issues in the case. This determination, however, is one on which reasonable minds might disagree. If brought to the MERO's attention at the time, on further reflection the Director might conclude that information that initially did not seem

⁴ Some aspects of the characterization of the manner in which the MERO takes witness affidavits, or the suggestion that a fixed process is utilized in all instances are not accurate, however, for purposes of discussion the potential issues identified with the affidavit taking process are considered.

important, actually is determinative in resolving a particular fact or issue. Nonetheless, such information would be lost forever if, because of the parties' absence, they are prohibited from suggesting its inclusion in the witness's signed statement. Finally, in the absence of the parties, the MERO Director lacks the opportunity for input regarding a proposed line of questioning that might reveal useful information.

Regardless of the manner in which a witness is questioned, or by whom, the questions are always limited by an assessment at that time of what is important. The MERO recognizes that parties may add value to the questioning of witnesses. The exclusion of parties from the process of the MERO taking certain witness affidavits, however, does not mean that such an opportunity is "lost forever." Currently, there are several avenues available to parties to add value without being present when the MERO takes an affidavit, including without limitation the following: (a) if a party identifies a potential witness and information the witness could provide, the information may be brought to the attention of the MERO; (b) if a party has knowledge of a planned MERO interview, the party may offer to the MERO proposed lines of inquiry or specific questions, or may apprise the MERO of information that may inform the MERO's questioning;⁵ or (c) a party may request that the MERO follow-up with a witness with additional questions after an affidavit is complete.⁶ In addition, when the MERO issues a proposed claim determination, the citations to evidence often discloses how a particular witness's testimony is relied upon by the MERO. A party could raise an issue with respect to the witness's testimony through a request for reconsideration.

The MERO's process of issuing a proposed claim determination serves a broader purpose. As pointed out in the inquiry, the CHRO's fact finding investigation results in a reasonable cause determination that may be appealed to a public hearing before the agency, whereas the MERO's fact finding investigation results in final agency action. In part to make certain that the MERO has not overlooked evidence or argument that may yield a different result and to provide the parties full opportunity to advance their cases at the investigative stage, the MERO implemented the process of issuing a proposed claim determination prior to a final claim determination. Upon receipt of a proposed claim determination, either party may request reconsideration based on existing evidence, or, if a party believes the MERO overlooked evidence, may request that the MERO accept additional evidence presented by the party. Furthermore, while the parties currently do not have a hearing opportunity before the MERO, a final agency determination may be appealed to a hearing in Tribal Court.

The Preference Law provides that investigations be concluded within ninety (90) days of the filing of a claim.⁷ The MERO believes its current investigative process permits a

⁵ Nothing herein precludes the MERO from conducting an interview of a non-managerial employee witness without the knowledge of the parties under appropriate circumstances.

⁶ Generally, parties to a case may request a copy of evidence in the MERO's file, which includes affidavits. The MERO may charge a reasonable fee for the administrative costs of producing the documents.

⁷ Comparatively, the CHRO conducts its fact finding hearings within 190-370 days after issuance of a merit assessment review determination, for a total investigative period of 280-460 days.

thorough investigation and appropriate due process within the time constraints of the law. The time limitation on the MERO's investigations creates a challenge for revising the investigative process to include a hearing or other opportunity for the presence of the parties at witness interviews. Nevertheless, the MERO is willing to consider the possibility of revising its procedures.

Equitable considerations counsel against permitting certain witnesses to submit testimony through party prepared affidavits while requiring other witnesses to appear in person and respond to questions. Therefore, any process by which both parties would be permitted to be present during the interview of witnesses should be applicable not only to witnesses who may currently be interviewed by the MERO outside a party's presence, but also to those witnesses whose testimony would otherwise be advanced solely by affidavit obtained by a party.

Moreover, the MERO would be inclined to require attendance of the parties at the witness interviews. If attendance at witness interviews were permissive rather than mandatory, it is quite possible that parties, especially claimants who are often not represented by counsel, would not fully appreciate the importance of appearing or raising questions. In order to make certain both parties understand the importance of the proceeding and have equal opportunity to participate in the process, the possibility of default for non-attendance would be considered.

Generally, both a claim and the respondent's response are necessary to identify relevant witnesses. Currently, respondents are afforded thirty (30) days from receipt of a claim to file a response, with the possibility of a ten (10) calendar day extension. If respondents' time to answer a claim is not curtailed, approximately five (5) weeks, or twenty-five (25) business days would remain for the MERO to identify, schedule and conduct interviews of all witnesses of both parties.⁸ In the MERO's experience, it is not likely to be able to schedule all those concerned unless the scheduling occurs prior to the employer submitting its response, even though the hearing or witness interview conference would occur after the response is submitted. Alternatively, or co-extensively, the amount of time respondents are permitted to answer claims could be curtailed to increase the available time to schedule interviews. Regardless of the approach, the Preference Law time constraint on investigations poses a logistical challenge for implementing a procedure that permits attendance by the parties at witness interviews. At this time, the MERO maintains its current procedures.

The MERO appreciates counsel taking the time to present concerns about the MERO's processes. The MERO is interested in additional views on the issues raised and invites additional comment from the public.

⁸ Although the ninety (90) day investigatory time frame is directory rather than mandatory, the MERO is committed to holding the parties to the investigatory time period the Tribal Council has determined to be reasonable. If a change to the law is being sought, inquiring counsel may wish to direct any requests to the Mashantucket Pequot Tribal Nation Office of Legal Counsel.