COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

JOHN PELLIGRINI,
Appellant,

v.

CITY OF MALDEN,
Respondent

CASE NO: G2-11-318

Appellant's Attorneys:

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Respondent's Attorney:

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Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, acting pursuant to G.L.c.31, §2(b), brought this appeal to the Civil Service Commission (Commission), to protest his non-selection for promotion to the labor service position of Working Foreman/Laborer in the Sewer Division of the Department of Engineering, Planning & Waterworks (DEPW) of the City of Malden (Malden). Malden moved to dismiss the appeal for lack of jurisdiction on the grounds that the Appellant lacked standing to challenge the promotion of the selected candidate. The Appellant opposed the motion. A hearing on the motion was held by the Commission on March 5, 2012. Thereafter, Malden submitted additional documentation at the Commission's request. (PH Exhibit 5)

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, argument of counsel, and inferences reasonably drawn from the evidence, I find the following facts:

1. The Appellant, John Pelligrini, is a tenured civil service employee who holds the position of Special Motor Equipment Operator/Laborer in Malden's DEPW Waterworks Division, with a civil service seniority date of March 24, 2008. (*Claim of Appeal; Malden Motion; Appellant's Opposition; Hearing Exh. 4*)

2. On or about August 1, 2011, Malden posted a promotional opportunity for the position of Working Foreman/Laborer in the DEPW Sewer Division. The duties of the position involved overseeing employees engaged in the maintenance of Malden's sewer system. The minimum requirements included:

> Current Commercial Drivers License with tanker endorsement required. Must be experienced in the construction and repair of sanitary sewers and drains, including experience in preventing and clearing sewer blocks with the use of sewer jet trucks and other necessary equipment. Must be punctual and dependable.

(*Malden Motion, Exh. 1*)

3. The following applicants submitted resumes and/or letters indicating their interest in consideration for the appointment, with the respective civil service seniority dates:

William Wingertner	August 21, 2000
Paul Bennett	January 18, 2005
John Pelligrini	March 24, 2008
Paul O'Callaghan	March 31, 2008
Donald Myrick	April 22, 2010

(*Malden Motion: Hearing Exh. 4*)

4. Malden offered the position to Mr. Wingertner, the most senior applicant. On September 28, 2011, Mr. Wingertner declined to accept the offer. (*Malden Motion, Exh. 2; Appellant's Opposition)*

5. Malden deemed Paul Bennett, the second most senior candidate, unqualified for the position, based on poor attendance records. Mr. Bennett had used all 90 days of allotted sick time as of the date of the position, and Malden deemed Mr. Bennett was not "punctual and dependable" as required by the job posting. (*Malden Motion*)

6. Malden next offered the job to Paul O'Callaghan, fourth in seniority, skipping over Mr. Pelligrini, the third in line. Mr. O'Callaghan had 2 years prior direct experience in the DEPW Sewer Division. (*Malden Motion; Appellant's Opposition; PH Exh. 5*)

CONCLUSION

Applicable Legal Standard

The Commission may on motion or upon its own initiative dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3). See Iannacchino v. Ford Motor Co. 451 Mass. 623, 635-36, (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues on standing required denial of motion to dismiss)

In addition, a motion for summary decision on any appeal before the Commission, in whole or in part, may be granted pursuant to 801 C.M.R. 1.01(7)(h), if "viewing the evidence in the light most favorable to the non-moving party", the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". To survive a motion for summary decision, the non-moving party must offer "specific facts" to establish "a reasonable hope" to prevail after an evidentiary hearing. Conclusory statements, general denials, and factual allegation not based on personal knowledge are insufficient to establish a triable issues. See, e.g., Milliken & Co., v. Duro Textiles LLC,

451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

Relevant Civil Service Law

The job title of Working Foreman/Laborer, sought by Mr. Pelligrini, is classified as a labor service position and, therefore, promotions to that position are governed by G.L.c.31,§§28 through 30. Pursuant to these statutes, promotions in the labor service are made from among any of the three applicants with the greatest seniority who are qualified for the position, applying the so-called 2n+1 rule. See PAR.19; Stokinger v. City of Quincy, 24 MCSR 416 (2011); Lusignan v. Holyoke G&E Dep't., 20 MCSR 401, further considered, 21 MCSR 287, after hearing, 22 MCSR 137 (2009); Brienzo v. Town of Acushnet, 20 MCSR 530 (2007). An appointing authority is not required to state reasons for selecting among the qualified candidates within the 2n+1 group and the other candidates do not have recourse to appeal to the Commission from their non-selection, even if they were more senior than the selected candidate. Id.

In the present case, the three most senior candidates who applied for the position and were deemed qualified were Messrs. Wingertner, Pelligrini and O'Callaghan. Malden asserts that it picked Mr. O'Callaghan as best suited for the job. Absent proof that the selection of Mr. O'Callaghan was tainted by political or personal bias or improper favoritism, Malden's choice of one of the three most senior qualified candidates for a labor service promotion could not be challenged as a matter of law.[1]

[1] Mr. Bennett, who was disqualified, would have had a right of appeal to obtain Commission review of the decision to disqualify him. E.g., Lusignan v. Holyoke G&E Dep't., 20 MCSR 401, further considered, 21 MCSR 287, after hearing, 22 MCSR 137 (2009). Mr. Bennett did not appeal to the Commission, however, and Mr. Pelligrini did not dispute such a claim, and, indeed, he would not have standing before the Commission to make such a claim indirectly for an alleged violation of someone else's civil service rights that the purported victim did not challenge directly..

Mr. Pelligrini has not set forth any assertion, much less presented "specific facts" to suggest that Malden selected Mr. O'Callaghan over him for ulterior motives unrelated to merit principles. Rather, Mr. Pelligrini's opposition to the motion to dismiss argues that, as a matter of law, Mr. O'Callaghan was junior (by one week) to the first three candidates who applied, and, thus, he did not fall within the "2n+1" group of qualified candidates from whom the selection had to be made. He contends that the formula prescribed in the applicable civil service law and rules requires selection from among the first three candidates "willing to accept", which he interprets to mean the three most senior candidates who applied. See PAR.09(1), incorporated by reference in PAR.19(5). According to the Appellant's argument, the fact that Mr. Wingertner later declined to accept the appointment did not remove him from the list of candidates "willing to accept". Thus, the Appellant claims that Mr. O'Callaghan fell outside the "2n+1" group and Malden was not authorized under civil service law and rules to offer him the promotion. The Appellant, presumably, would also claim that, since Malden has admitted that Mr. Bennett was not suitable, it would logically follow that Mr. Pelligrini was the only choice, the promotion of Mr. O'Callaghan should be vacated, and Mr. Pelligrini should be awarded the position.

Malden disputes the Appellant's interpretation of PAR.09 and PAR 19(5). Malden claims that the rules must be interpreted to mean that a person who was offered the position and declined cannot be deemed a person "willing to accept" within the meaning of the rule. In effect, Malden argues that the rule should be construed to have intended to afford an appointing authority the discretion to appoint from among at least three of the most senior qualified candidates available (assuming at least three applied). Thus, if one

candidate dropped out during the hiring process, the appointing authority would be allowed to "drop down" the list and consider the next most senior candidate who applied.

The Commission has not previously decided an appeal in which this issue was controlling and it need not reach the question here. With the disqualification of Mr. Bennett (which Mr. Bennett did not contest), Mr. O'Callaghan fell within the "2n+1" group, whether or not Mr. Wingertner should have been counted or not. Thus, the answer to the question is not determinative in this case.

To be sure, there are sound arguments for either party's interpretation. Under the Appellant's interpretation, the possibility for "gaming" a labor service promotional appointment process, either for or against someone is clearly a factor to be considered. If a candidate wanted to keep another candidate out of the mix, he or she could, theoretically, recruit one or more other senior candidates to apply, although they really weren't interested. This would leave the appointing authority no choice (or a more limited choice than the rules contemplated).

On the other hand, in labor service, unlike official service, competitive examinations are not given and there are no "certifications" issued of candidates in rank order of civil service scores, which the candidates must formally sign "willing to accept." Compare G.L.c.31, 7, 8 & 27, PAR.09 (official service) with G.Lc.31, §28 & 29, PAR19(5) (labor service) Thus, strict translation of the "willing to accept" terminology in the law and rules written for official service may not be entirely appropriate in the context of the labor service promotional process. Rather, in labor service, among two qualified candidates, there is some force to interpreting the statute to favor promoting the senior-most qualified candidate, remembering that the appointing authority is never required to

accept an unqualified candidate. It is also relevant that the recourse of non-selected candidates to appeal to the Commission from labor service promotions are more limited than are "bypass" appeals in the official service.

Finally, there is the factor that, at any time, an appointing authority is generally allowed reasonable discretion to decline to fill any vacancy. See Callanan v. Personnel Administrator, 400, Mass. 597, 600-601 (1987) ("The civil service system confers only limited rights to those on eligibility lists. . . . individuals do not have a vested right in their particular positions on the eligibility list once it is established); Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991) (An "expectation of selection based on his position on a civil service list does not rise to the level of a property list entitled to constitutional protection.") See also Somerville v. Somerville Mun. Employees Ass'n, 20 Mass.App.Ct. 594, 597, rev.den., 395 Mass. 1102 (1985); Gillespie et al v. Boston Police Dep't, 24 MCSR 170 (2011); O'Toole v. Newton Fire Dep't, 22 MCSR 563 (2009); Mandracchia v. City of Everett, 21 MCSR 307 (2008); Burke et al v. Human Resources Div. 21 MCSR 177 (2008); Catterall v. City of New Bedford, 20 MCSR 196 (2007); Lizotte v. City of New Bedford, 12 MCSR 40 (1999)

Thus, even were the Commission to adopt the Appellant's interpretation of PAR.09 and PAR.19(5), an appointing authority who was dissatisfied with the narrow options left after the first (and second) choices declined the offer, could, presumably, simply cancel the posting and repost the position at a later date in order to broaden the pool of candidates from which it could select. The subject, perhaps, also may be addressed, or could in the future be addressed, through the collec19tive bargaining process, where it

might be possible to flesh out a reasonable approach tailored to particular circumstances, so long as it is consistent with basic merit principles.

Because this question presents an issue of first impression that would appear to arise only rarely, and might be a subject covered by collective bargaining, it seems best to be deferred here to another time. Thus, the Commission declines to take a position on the non-dispositive legal issue and leaves the interpretation of the "willing to accept" language in PAR.09 as applied to labor service promotions under PAR.19(5) to consideration should it arise in a future case. The technical issue aside, however, the Commission will continue to be vigilant to assure that, should something truly untoward appear afoot with a labor service appointment or promotion, there will always be recourse to provide appropriate relief to remedy such misconduct.

In sum, for the reasons stated above, Malden's Motion to Dismiss is granted and the appeals of the Appellant, John Pelligrini is hereby ***dismissed for lack of jurisdiction.***

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners) on April 19, 2012.

A True Record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.
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Notice to:
Maureen Medeiros, Esq. (for Appellant)
Jordan L. Shapiro, Esq. (for Respondent)
John Marra, Esq. (HRD)