COMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

STEVEN MURZIN,
Appellant

V. Docket No. G1-04-397

CITY OF WESTFIELD,
Respondent

Appellant's Attorney: John Connor, Esq.
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Respondent's Attorney: Peter H. Martin, Esq.
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Commissioner: John J. Guerin, Jr.

DECISION

DECISION ON RESPONDENT'S MOTION FOR SUMMARY DECISION

Procedural Background

On or about September 27, 2004, the Appellant, Steven Murzin, (hereafter "Appellant" or "Murzin") appealed his non-selection by the City of Westfield (hereafter "the City") to the position of Permanent Laborer. On December 22, 2004, the Appellant filed a Motion to Amend the appeal to include a claim for promotional bypass, a claim

for violation of G.L. c. 31, §2(b) and a request that the Civil Service Commission enter an order recognizing him as a Permanent Laborer with a seniority date of December 9, 2002. On January 24, 2005, the City submitted an opposition to the Appellant's request for an order recognizing him as a Permanent Laborer and a Motion for Summary Decision.

Factual Background

The Appellant has been registered on the list of applicants for City Labor Service positions since April 23, 1999. He began his employment in June 1999, working as a Seasonal Laborer in the Waste Collection division of the Public Works Department ("DPW") through September 30, 1999. From October 1, 1999 through December 13, 1999, the Appellant was employed as a Laborer on an emergency basis. From June through September 2000, 2001 and 2002, the Appellant was rehired as a Seasonal Laborer.

On April 27, 2002, the City notified all Labor Service applicants that it was hiring permanent intermittent laborers to fill temporary vacancies in the DPW Trash and Recycling division. The position required an employee to "be on call and available to work during the hours of 7 a.m. to 3:30 p.m. Monday through Friday." The Appellant indicated he was interested in the position and he and eleven other Labor Service applicants were appointed to the position of Permanent Intermittent Laborer on December 22, 2002.

On July 13, 2004, the City requisitioned a list of certified applicants for a full time Permanent Laborer position. The Appellant was one of four eligible applicants on the list. He was not selected.

Appellant's Motion to Amend/ Respondent's Grounds for Dismissal

Appellant's Employment Status

The Appellant contends that the City cannot be allowed to create a Permanent Intermittent Laborer position in place of a permanent appointment as a laborer as doing so would undermine civil service laws. He argues that since his December 2002 appointment to the position of Permanent Intermittent Laborer, he has worked continuously in the Department of Public Works and thus should be recognized as a Permanent Laborer with a December 2002 seniority date. The Appellant asserts that his original appointment was to a Permanent Laborer's position as there is no position in the Municipal classification plan for "permanent intermittent laborer". He states that all municipal job classification plans must conform to the "Municlass Manual", a municipal classification plan required under G.L. c. 31 § 5(b). See City of Somerville v. Somerville Municipal Employees Associates, 20 Mass. App. Ct. 594 (1985). In the relevant section of the Municlass Manual, the Manual Labor Group, General Laboring Services, Laborer, the term "permanent intermittent laborer" does not appear.

The Respondent maintains that the Appellant *is* a permanent employee but his permanent intermittent status is such that he is less than a full time tenured employee. The City's claim regarding the Appellant's employment status as a Permanent Intermittent Laborer is supported by an affidavit from the City's Personnel Director, who also performs all delegated responsibilities as the administrator of the Labor Service program in Westfield. She attests that in late 2002 she created a roster of individuals interested in intermittent work as laborers and the Appellant was one of the permanent

intermittent laborers. She states that intermittent laborers were not subject to the durational limits imposed on emergency laborers and were eligible to attain civil service status.

The City argues that the Municlass Manual lists job titles, not frequency of work. It contends that the term Permanent Intermittent employee appears in the Administrative Manual Delegation of Labor Service, as issued by the Commonwealth of Massachusetts Human Resources Division and used to fill vacancies in the Labor Service.

Based on a thorough consideration of the parties' arguments, the Respondent's view of the Appellant's employment status is correct. The Appellant's status since December 2002 is that of a tenured Permanent Intermittent Laborer but less than a full time tenured employee. The term permanent intermittent employee may not be explicitly referenced in the Municlass Manual, but appears in numerous Civil Service Commission decisions. *See e.g.* Rossborough v Plymouth Police Department, D-4833 (1994); Durkan v Boston School Department, G2-03-271 (2006). Further, the third paragraph of G.L. c. 31, § 34, regarding probationary periods, also supports the Respondent's position with regard to the Appellant's employment status. "Following his original appointment as a permanent employee to a less than full-time civil service position, including a reserve, intermittent, call, recurrent, or part-time position, a person shall serve a probationary period…before he shall be considered a less than full-time tenured employee…." Accordingly, the Commission should not enter an order recognizing the Appellant as a Permanent Laborer with a seniority date of December 9, 2002.

Appointment of Permanent Laborer

Labor Service positions, unlike positions within the Official Service, "are those jobs for which the applicants do not have to take a competitive examination and appointments are made on the basis of priority of registration." City of Everett v. Teamsters, Local 380, 18 Mass. App. Ct. 137, 140 n.4 (1983) (citing G.L. c. 31, §§1, 28-29). Labor Service position applicant lists are to list the names of the applicants "in the order of the dates on which they filed their applications." G.L. c. 31, § 28.

In the present matter, the Appellant argues that he was bypassed with regard to the City's appointment of one full time Laborer from a list composed of four intermittent laborers. He contends that he was the second most senior applicant for the Permanent Laborer position but was bypassed when he was not selected for appointment.

The Personnel Administration Rules ("PAR") define bypass as follows: the selection of a person whose name or names by reason of score, merit preference status, court decree, decision on appeal from a court or administrative agency, or legislative mandate appear lower on a certification than a person or persons who are not appointed and whose names appear higher on said certification. PAR.02.

A second affidavit from the City's Personnel Director states that in July 2004 she received a requisition from the Superintendent of Public Works for one permanent full-time laborer. She states that her staff reviewed the employment status of those individuals employed as permanent intermittent laborers within the Department of Public Works and determined that four permanent intermittent laborers had attained status in that title, including the Appellant. Her affidavit attests that each had started work as a permanent intermittent laborer on December 9, 2002 and each had the same seniority date. All four

were placed on the list of eligible individuals sent to the Appointing Authority, who selected the third of the four candidates listed.

Based on the above, the Appellant was not bypassed. The selection of the employee one name below the Appellant was not as a result of score, merit preference, or the other reasons stated in the definition of bypass. All candidates for the full time position had the same seniority. If several employees have the same seniority date, their names are certified within their common seniority date in order of their standing on the eligible list which they were appointed to the intermittent position.

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge *v.* Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). See Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac *v.* Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston *v.* Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster *v.* Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield *v.* Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service *v.* Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). “In making that analysis, the Commission must focus on the fundamental purposes of the civil service system-to guard against political considerations, favoritism and bias in governmental employment decisions...and to protect efficient public employees from political control.

When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." City of Cambridge *v.* Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997*)*

As the Appointing Authority has provided reasonable justification for its actions and in the absence of any evidence of inappropriate actions or policies on the part of the Appointing Authority in this case, there is no cause here for the Commission to intervene.

Conclusion

Based on the above, the Appellant's appeal filed under Docket G1-04-397 is hereby ***dismissed***.

Civil Service Commission

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John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Taylor, Guerin and Marquis, Commissioners) on May 3, 2007.

A True copy. Attest:

_____
Commissioner

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL c. 30A s. 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.

Notice to:

John Connor, Esq.
Peter H. Martin, Esq.