H.O. NO. 2002-1

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BURLINGTON,

Public Employer,

-and- Docket No. RO-2001-51

CWA, LOCAL 1040, AFL-CIO,

Petitioner,

-and-

IABCPW,

Intervenor.

SYNOPSIS

Following a challenged ballot determinative hearing conducted pursuant to N.J.A.C. 19:11-10.3k, a Hearing Officer finds that a municipal court administrator was not a statutory supervisor as of the time of a representation election nor as of the close of the hearing. He recommends further administrative processing, specifically that the challenge be denied, the ballot opened, counted, tallied and the appropriate certification issued.

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For the Public Employer, Dorf & Dorf, P.C., attorneys (Gerald A. Dorf, of counsel, Gerald A. Dorf and Martin T. Lyons, on the brief)

For Petitioner, Weissman & Mintz, attorneys (William G. Schimmel, of counsel)

For Intervenor, Selikoff & Cohen, P.A., attorneys (Steven R. Cohen, of counsel)

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

This matter is before me due to a challenge to a ballot in a secret ballot representation election conducted pursuant to N.J.S.A. 34:13A-5.3, 5.6 and N.J.A.C. 19:11-1.1 et seq. The

resolution of the challenged ballot will determine the election. N.J.A.C. 19:11-10.3(k).[1/]

The issue in dispute is whether the challenged voter is a supervisor within the meaning of the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.3, and, therefore, is not appropriate for inclusion in the petitioned-for, historic, non-supervisory unit. The City of Burlington (City) and the Communication Workers of America, Local 1040, AFL-CIO (CWA) contend the challenged voter, Municipal Court Administrator Elizabeth Fitzpatrick, is a supervisor therefore her ballot should not be counted. The Independent Association of Burlington City Public Workers (the Association) contends that Fitzpatrick was not a supervisor at the time of the election therefore her ballot should be counted.

For the reasons discussed herein I find that Fitzpatrick was not a statutory supervisor at the time of the election nor was she a statutory supervisor as of the conclusion of the hearing in this matter. Accordingly, I recommend the challenge to her ballot

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1/ N.J.A.C. 19:11-10.3(k) provides that "If challenged ballots are sufficient in number to affect the results of an election, the Director of Representation shall investigate such challenges. All parties to the election shall present documentary and other evidence, as well as statements of position, relating to the challenged ballots. After the administrative processing of the challenged ballots and any hearing has been completed, the Director of Representation shall make an administrative determination which shall resolve the challenges and contain the appropriate administrative direction."

be denied, the ballot counted, added to the Tally of Ballots of the election and an appropriate certification issue.

PROCEDURAL HISTORY[2/]

On January 2, 2001, the CWA filed a Petition for Certification (petition) with the Public Employment Relations Commission (Commission) seeking certification as the exclusive representative of all full and part-time non-supervisory employees employed by the City. The petition was supported by an adequate showing of interest. N.J.A.C. 19:10-1.1, 19:11-1.2(a)9 and 19:11-2.1.

On January 12, 2001, the Association requested to intervene on the basis of its recently expired collective negotiations agreement with the City (Association agreement) (I-1)[3/] covering the petitioned-for employees, including Fitzpatrick. On January 19, 2001, the Director of Representation (Director) granted the Association's request to intervene. N.J.A.C. 19:11-2.7(a).

2/ Pursuant to N.J.A.C. 19:11-6.6(e), I take administrative notice of the procedural history of this matter as reflected in the Commission's election and invstigative files. I restate the relevant procedural history herein to establish the time-frame and context of certain conduct of the parties and for ease of reference.

3/ Record references of documents submitted during the hearing are as follows: Commission exhibits - C; Petitioner exhibits - P; Intervenor exhibits -I; Employer/City exhibits - E; Joint exhibits - Jt.

Also on January 19, 2001, the parties entered into an agreement for consent election and sidebar agreement (C-3). The consent agreement scheduled a representation election between the Association, no representative and CWA for February 15, 2001 among all full-time and regular part-time non-supervisory employees of the City of Burlington (C-3). The sidebar agreement provided that Fitzpatrick would vote subject to the Commission's challenged ballot procedure. Additionally, the parties stipulated that a mechanic foreman or supervising mechanic title (held by Walter Sauer), previously included in the unit, was now supervisory, thus excluded (R-4).

On February 15, 2001, the Commission conducted an on-site election. The tally of ballots (C-2) reflect the election results were as follows:

1. There were approximately 43 eligible voters.
2. 20 votes were cast for CWA.
3. 20 votes were cast for the Association.
4. Fitzpatrick's ballot was challenged pursuant to the sidebar agreement.

On February 20, 2001, the Director advised the parties that the challenged ballot was sufficient in number to affect the result of the election. The parties were directed to submit position statements, documentary and other evidence in support of their various positions.

On March 22, 2001, the parties were sent an investigative questionnaire; responses were due April 2, 2001. That deadline was extended to April 6, 2001. The City requested an additional extension of time but was denied.

After considering the parties submissions, the Director determined that a hearing was necessary to resolve the status of the challenged ballot. N.J.A.C. 19:11-10.3(k). A Notice of Hearing was issued on April 12, 2001 (C-1). The parties were advised by letter dated April 20, 2001 that following the issuance of a report and recommendation the Director would make an administrative determination of the following issue, "[w]hether Court Administrator Elizabeth Fitzpatrick was a statutory supervisor pursuant to N.J.S.A. 34:13A-5.3 at the time of the election."

A hearing was conducted on May 21 and June 29, 2001[4/] during which the parties were given the opportunity to examine and cross-examine witnesses and to present evidence in support of their various positions. The parties waived oral argument but submitted post-hearing briefs by August 24, 2001.

Based on the entire record, I make the following:

FINDINGS OF FACT

The Parties

1. The City is a public employer and the CWA and the Association are employee organizations within the meaning of the Act and are subject to its provisions (1T9-1T10).

2. The Burlington City Municipal Court (the court) is a division of the City of Burlington and is staffed by City

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4/ Transcript references are as follows: 1T, 2T, respectively.

employees. The court is operated by the City but the Superior Court of the State of New Jersey provides oversight through Steven Traub, Municipal Division Manager, Burlington County Vicinage (1T27-1T28). The City is a civil service jurisdiction, therefore, its employees' job titles and descriptions, including those in the court, are set by the New Jersey Department of Personnel (DOP) (2T119-2T121). Specific job duties, however, are set by the City and may differ from those outlined in DOP job descriptions (2T120).

Court sessions are held on Monday nights between 5:00 p.m. and 10:00 p.m. or later depending on case load. The court currently consists of one part-time judge and five (5) regular staff; one municipal court administrator, two deputy court administrators and two clerks (1T30, 1T93-1T94, 2T28-2T31).

History of the Municipal Court Administrator and Related Titles

3. Elizabeth Fitzpatrick was hired by the City in 1981 as a deputy court clerk and was represented by the CWA in a unit of non-supervisory, clerical employees (2T15-2T16). CWA's status as the majority representative of non-supervisors at that time was apparently the result of voluntary or informal recognition as there is no record of Commission certification.

In 1987, Fitzpatrick was promoted to court clerk and remained in the non-supervisory unit (2T16). In 1988, the Court appointed Diane Taylor to the title of municipal court administrator (R-3). Thereafter, sometime before 1992, Taylor obtained the title municipal court director and Fitzpatrick

obtained the title municipal court administrator; both titles remained in the non-supervisory unit (2T17; R-2; I-4).

4. In 1992, following a contested election with the CWA, the Association was certified as the majority representative of all clerical and blue collar employees of the City, including the municipal court director and administrator (2T74; C-6).5/

5. In January 1994, the City and the Association entered into an agreement for resolution of dispute resolving a clarification of unit petition (CU-94-6) and two unfair practice charges (CO-94-39 and CO-94-70) (2T83; I-4). As to the clarification of unit petition, the parties agreed that the court director was excluded from the unit as a supervisory title but the court administrator remained in the unit as it exercised no supervisory functions at that time (2T83-2T85, 2T105; I-4, p.4). The parties further agreed that in the event staffing or job responsibilities changed within the court operations, another clarification of unit petition may be filed (2T85; I-4, p.4). No clarification of unit petition has since been filed regarding either title (2T86). Fitzpatrick has since continuously been represented by the Association and has never been represented in the City's supervisory unit (2T17-2T18).

5/ The transcript at 2T74 incorrectly referred to the date of certification as 1982, my notes of the hearing and the certification of representative (C-6) confirm the date was 1992.

6. In 1994, the Legislature enacted N.J.S.A. 2B:12-10(a) providing that "[a] county or municipality shall provide for an administrator and other necessary employees for the municipal court and for their compensation. With approval of the Supreme Court, an employee of the county or municipality, in addition to other duties, may be designated to serve as administrator of the municipal court." DOP and the Judiciary's Administrative Office of the Courts (AOC) subsequently collaborated on the creation of new titles for administrative positions in the courts. Prior to 1994, the title municipal court administrator was unclassified. After 1994, it was retitled municipal court director. Additionally, two new classified titles were created; municipal court administrator and deputy municipal court administrator (1T113-1T116; R-3). According to DOP, use of the municipal court director title was contingent on the size of the municipality, number of municipal courts and the size of caseloads. Smaller municipalities having single municipal courts and smaller caseloads would be required to use the newly classified municipal court administrator title (1T30-1T32; 1T115; R-3).

7. In 1995, the Merit System Board issued a decision deferring mandatory implementation of the DOP/AOC standards where appointments to the unclassified municipal court director title previously existed and were previously approved. Burlington City did not change the title of its municipal court administrator to municipal court director but was instead permitted to retain the

municipal court administrator title as an unclassified title through Taylor's tenure (1T114-1T115; R-3, p.2).

On March 20, 2000, however, DOP directed that Taylor's title as an unclassified municipal court administrator be changed to the unclassified municipal court director title and that upon her separation from service the City abolish the municipal court director title. DOP also determined that Fitzpatrick retain the classified municipal court administrator title and that Michelle Thurber retain the classified deputy municipal court administrator title (1T113-1T116; R-3, p.2). Neither the Merit System Board decision in 1995 nor the DOP directive in 2000 altered the classified municipal court administrator title's job duties or its inclusion in the non-supervisory unit. Neither decision altered the municipal court director's status as a supervisor.

8. On July 19, 2000, the CWA was certified by the Commission as the majority representative of supervisory employees of the City; the Commission described the unit as follows:

> Included: All regularly employed supervisors employed by the City of Burlington including Director Neighborhood Preservation Program, Superintendent Sewer and Drainage, Construction Code Official, Superintendent Public Works, Chief Water Treatment Plant Operator, Chief Sewer Treatment Plant Operator, Supervisor of Roads, Maintenance Supervisor, Court Director, Assistant Director Neighborhood Preservation Program, Tax Collector and Superintendent Water.
>
> Excluded: All managerial executives, confidential employees, non-supervisory employees, police employees, craft employees, professional employees, casual employees, and all other employees of the City of Burlington. (C-5) (emphasis added).

9. In August 2000, the City hired David W. Thompson as its business administrator (1T98). The chief non-elected official, he runs the day-to-day operations of the City including overseeing the administration of the court (1T93). Thompson reports to the mayor and city council (1T139).

On December 20, 2000, Thompson advised Taylor that effective January 1, 2001 the City would abolish the municipal court director title (1T94, 1T119-1T121; P-1). Taylor was offered an assistant court administrator position which she declined (P-1; 1T32, 1T94).

10. The City was the last jurisdiction in Burlington County to utilize the municipal court director title. No other court in the county meets the DOP/AOC volume requirements to warrant its use (1T30-1T32).

Upon elimination of the municipal court director title, it was the City's intention to have Municipal Court Administrator Fitzpatrick run the court (1T98). That intention was conveyed to her informally. She was not advised verbally or in writing of any changes in her job duties or responsibilities (1T98-1T99; 2T54). She and Thompson had at least two (2) brief discussions, either before or after January 1, 2001 (1T168, 2T54). During those discussions Thompson expressed confidence in her that she could "perform the duties that were now required of her, and that [he] would give her all the support that [he] could to ensure that she was successful in running the Court" (1T99).

When asked what he specifically conveyed to Fitzpatrick were her job responsibilities as of January 1, 2001, Thompson replied, "I don't know that I can specifically recall what I conveyed to her, but the purpose of the meeting was to let her know she was now in charge. That I had confidence that she could perform the duties that were required. That I would support her every way I could." (1T169).

Fitzpatrick's duties as municipal court administrator are set forth in a DOP job specification (R-2). When asked to identify elements of the job description relating to hiring, firing, disciplining or effectively recommending same, Thompson recounted areas of general work product supervision, i.e., administrative and clerical operations, duty assignments and review, instruction and training in court procedures, disposition of correspondence and budget requests. He did not identify any job duties directly related to hiring, firing, disciplining or effectively recommending same (1T169-1T175; R-2).

Fitzpatrick was never told that her job responsibilities after January 1, 2001 were any different than they were before that date. She was never told that in light of the abolition of the municipal court director title that she had new or additional responsibilities, and if so, what those responsibilities were or how or when she could exercise her new authority (2T54).

Events After January 1, 2001

11. On January 2, 2001, the CWA filed its petition in this matter[6/] seeking certification as the exclusive representative of all non-supervisory employees employed by the City (1T129).

Also, at some time in early January 2001, Thompson directed his assistant, Robin Snodgrass, to research the accuracy of supervisory titles listed in the recognition clause of the proposed CWA collective negotiations agreement between the City and the supervisory unit (1T123, 1T134, 2T68, 2T80; P-2, p.2). Thompson directed the research because one of the things he "discovered was that the titles people have are not always accurate. By 'accurate' titles that the Department of Personnel says are real titles, we have been in the habit, over the years in Burlington, of inventing titles, I will say." (1T123). Snodgrass was directed to work from the Commission's certification of the supervisor's unit as it was the basis for the recognition clause (1T124; C5). The list of supervisory titles in the Commission's certification was also set forth in the proposed CWA contract (C-5; P-2, p.2).

On January 19, 2001, Snodgrass issued a memorandum to Thompson regarding her research of the supervisory unit. She made eight (8) recommended changes to the titles listed in the recognition clause of the proposed City/CWA contract (1T124, 1T134, 1T149-1T152, 2T79-2T80; P-2). Seven (7) of the recommended changes related to grammar or syntax. For example, the "Chief, Sewage

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6/ Certain parts of the procedural history of this matter may be restated here for context and ease of reference.

Treatment Plant Operator" title was changed to "Chief, Sewer Treatment Plant Operator". Additionally, the word "Code" was deleted from the "Construction Code Official" title and the "Supervisor of Roads" title was changed to "Supervisor, Roads" (1T149-1T152; P-2). The final recommended change, however, was the "Court Director" title was crossed-out and replaced with "Municipal Court Administrator" (1T124-1T125, 1T134, 1T149-1T152, 2T68, P-2 p.2, P-3 p.1).

Snodgrass, who acknowledged she has no labor relations training, did not evaluate job duties performed by the municipal court administrator in making her determination to replace the municipal court director title. She merely looked at titles listed in a title-code book and tried to match corresponding titles. She did not explain what code book she was referring to, nor did she consider or review the Association's collective agreement in her determination to add the municipal court administrator title to the CWA supervisory unit (2T68-2T70, 2T71). Thompson did not direct or advise her to consider job duties performed by the municipal court administrator or consider the Association's collective agreement (2T71).

On the same day Snodgrass issued her memorandum, January 19, 2001, the parties entered into the consent agreement for the conduct of the election among the non-supervisory employees. The parties contemporaneously entered into the sidebar agreement providing that Fitzpatrick would vote subject to challenge (C-4).

12. On January 22, 2001, Thompson wrote to CWA Representative Victor S. Waller forwarding him a copy of the Snodgrass memorandum and requesting his input and comments on the proposed changes to the parties' recognition clause, including the addition of the municipal court administrator title. Thompson requested Waller to let him "know how we can effect these changes in the Agreement." (P-2 p.1).

The City and CWA then entered into a signed (by Thompson and Waller among others) but undated collective agreement covering the term January 1, 2001 to December 31, 2003 (1T127-1T128, 1T134: P-3). The agreement includes a recognition clause which purports to be in accordance with the Commission's certification in RO-2000-10 (C-5; P-3 p.1). The clause, however, describes the supervisory unit as modified by most of Snodgrass' grammar and syntax changes and the municipal court administrator title replaced the court director title (1T128; P-1; P-3, p.1). The changes in the recognition clause were made at Thompson's direction because he believed that he had the right to change the units' structures without filing appropriate petitions with the Commission (1T137).

Although not directly relevant to these proceedings, I take administrative notice of the fact that the Association filed an unfair practice charge (CO-2001-287) against the City and CWA supervisory unit alleging violations of N.J.S.A. 34:13A-5.4a(1), (2), (3), (5), (7) and 5.4b(1), (3) and (5). It essentially contends the City and CWA unlawfully negotiated over terms and

conditions of employment for the municipal court administrator while a question concerning representation was pending before the Commission.

13. On February 15, 2001, the Commission conducted the on-site election for the non-supervisory unit (C-2; C-4). Both the CWA and the Association received 20 votes. Fitzpatrick's ballot was challenged. No choice on the ballot received a majority of the valid votes cast (C-2).

Fitzpatrick's Job Duties as Municipal Court Administrator -- Before and After the Election

14. Fitzpatrick currently reports to both Judge Joseph Montalto[7/] and City Business Administrator Thompson. She is responsible for the daily operation of the court by making job assignments and reviewing and/or correcting the work of the deputy court administrators and clerks when necessary (2T31-2T33, 2T37).

15. Fitzpatrick has been a member of the non-supervisory unit since its inception in the early 1980s and her terms and conditions of employment have always been governed by collective negotiations agreements between the unit and the City (2T78). She has paid dues to the Association since 1992 and has never been a member of the supervisors' negotiating unit, currently represented by the CWA (2T18).

7/ The transcript, at 2T20 and 2T26, incorrectly refers to Joseph Montalto as "Jesus" Montalto.

The Association and City entered into a December 13, 1999 collective negotiations agreement which expired December 31, 2000 (I-1). The agreement describes the unit by reference to titles listed in salary guides appended to the agreement. The municipal court administrator title is listed in the 1998-2000 salary guides.

During the hearing, the City opposed admission of the salary guides because they included vacant titles and titles that have subsequently been clarified or moved into other negotiations units. The City's position, however, is not supported by the record for the following reasons:

A. Sharon Kennedy, Association president since 1992 and member of the negotiating committee during the 1999 negotiations over the collective agreement, proofread the agreement many times, signed it and provided uncontroverted testimony that it was the parties' intention to include the salary guides in the agreement (2T74-2T78, 2T88, 2T101, 2T107).

B. The Association provided an uncontroverted memorandum from the City's chief financial officer confirming that the salary guides appended to the parties' agreement (I-1) were those negotiated and intended to be included in the contract (2T74-2T78; I-1, I-2).

C. The City adopted an ordinance on February 2, 2001 setting salary ranges for various titles and part-time positions. The ordinance changed the salary of the mechanic foreman/supervising mechanic title held by Walter Sauer. That title was listed on the non-supervisory guide and was previously represented by the Association. It was removed and added to the supervisory unit by agreement of the parties in January 2001. The ordinance did not, however, change the municipal court administrator's salary which was also listed on the guide (2T80-2T82; 2T86-2T88; I-3).

D. Fitzpatrick and Business Administrator Thompson confirmed that her salary was governed by the Association's contract as of January 2, 2001 (1T33, 2T27, 2T47-2T53; I-1).

Based on the foregoing, I find that the salary guides in the Association agreement (I-1) are accurate and include the municipal court administrator title. I now consider the statutory elements of supervisory status codified in N.J.S.A. 34:13A-5.3, specifically whether Fitzpatrick hires, fires, disciplines or effectively recommends hiring, firing or disciplining City employees.

Hiring

16. As to the hiring of court employees, Deputy Court Administrator Michelle Thurber was hired directly by the previous municipal court judge in 1989. Priscilla Coleman, the other deputy court administrator, was hired in August, 2000, by Judge Montalto (2T25-2T26). Former Court Director Taylor apparently sat-in on the Coleman interviews but there is no evidence of her further participation in the hiring process (2T26).

17. The court recently (post-election) hired two new employees. A deputy court clerk was hired in late May or early June and a court clerk was hired in late June, 2001 (1T103-1T104, 2T39-2T41). Advertisements for the positions were placed at Thompson's direction by his assistant, Snodgrass, at some time in January 2001 (2T19). Additionally, Administrative Specialist Meg Guinan,[8/] an employee of the AOC, placed advertisements regarding

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8/ The transcript at 2T19 incorrectly refers to Guinan as "Greg."

the positions (2T19-2T20).

Fitzpatrick did not play any role in advertising for the new hires, nor had she ever done so in her position prior to 2001 (2T18). Moreover, Fitzpatrick had not been involved in screening applications, resumes or referrals (2T20). Applications and resumes sent to the court fax machine were reviewed by Judge Montalto. In early 2001, Fitzpatrick did call an applicant to schedule an interview for Judge Montalto but was not otherwise involved in the process (2T21). Thompson was not aware that Fitzpatrick was scheduling an interview for Judge Montalto--he assumed that since Fitzpatrick was coordinating one of the interviews that she knew she was involved in the hiring process (1T107-1T110, 1T178-T179). Before the election, however, she was not directed by Judge Montalto or Thompson to screen or evaluate applications (2T21).

For his part, Thompson stated, with regard to whether Fitzpatrick had any hiring authority after January 1, 2001, "I don't know that we had any specific direct discussions with regard to hiring of personnel. Just my communicating to her that she was now the supervisor of the working unit, and that all of the things that would be expected of her were now hers." (1T100).

After the election, Fitzpatrick's input was solicited in May and June regarding candidates for the two open positions. She reviewed the applications and picked the candidates to be interviewed (2T54). She recommended a candidate for the deputy

court administrator position to Thompson who then hired the candidate (2T55). Thompson and Fitzpatrick disagreed, however, regarding the hiring of a candidate for the clerk position. There was only one candidate and according to Fitzpatrick, they could have sought and interviewed others. Thompson, however, directed her to offer the candidate a position at the maximum or top-end of the applicable salary guide for the position (2T41, 2T61). Fitzpatrick offered the candidate the position at the minimum or low-end of the guide, an approximately $10,000 pay difference (2T44-2T45, 2T55). Fitzpatrick spoke to Thompson about her proposal for hiring the candidate, he rejected it and hired the candidate at the higher rate (2T47).

As to both hiring determinations, neither the City nor CWA presented any evidence that Thompson considered Fitzpatrick's recommendations or that they were accepted by him without independent review or analysis. The fact that Thompson hired the clerk at the high end of the salary guide, contrary to Fitzpatrick's suggestion, indicates to me that Fitzpatrick's recommendation to hire the clerk at the low end of the guide was not adopted by the City without Thompson's independent review and analysis.

Based on the foregoing, I find that prior to the February 15, 2001 election Fitzpatrick did not have the authority to hire or recommend hiring (2T18). I also find that after the election Fitzpatrick was not authorized to make independent hiring determinations and her recommendations were subject to independent

review and analysis by a higher level authority--Thompson. Therefore, I cannot find that her hiring recommendations were effective. Additionally, I find there is insufficient evidence to conclude that Diane Taylor, as court director, hired or effectively recommended hiring any court employee.

Firing/Discipline

18. There is insufficient evidence to conclude that former Municipal Court Director Taylor ever disciplined or effectively recommended that any employee be disciplined. Fitzpatrick recalled that in 1989 Taylor recommended to then-Municipal Court Judge Roger Main that an employee, Mary Ranier, be disciplined but it was Judge Main who disciplined Rainer, not Taylor (2T25, 2T45-2T46). No evidence was presented that Taylor's recommendation was accepted by the judge without independent review or analysis.

Fitzpatrick did not ever witness nor does she have any personal knowledge that Taylor reprimanded, warned, suspended or terminated any employee (2T24). She did not witness Taylor ever recommending an employee be reprimanded, warned, suspended or terminated (2T24).

19. In September 2000, Deputy Court Administrator Thurber was suspended for conduct unbecoming a public employee. The preliminary notice of discipline was signed by the judge or business administrator, not the municipal court director (Taylor) or municipal court administrator (Fitzpatrick) (1T111-1T113, 1T141). Following an internal hearing, a City hearing officer recommended that her employment be terminated (1T111-T113).

The extent of Fitzpatrick's involvement in the matter was that in late April or May 2001 Thompson asked her whether there was any reason not to go forward with the decision to terminate Thurber (1T113, 1T141). Thompson contends Fitzpatrick agreed with the decision (Id.). Fitzpatrick, however, contends she told him that she did not want to get involved; whatever the decision she would "go with the flow." Prior to the Thurber incident, her opinion concerning disciplinary matters had never been sought (2T26-2T27).

Thurber was subsequently terminated. The termination decision was made by the mayor and two attorneys. Fitzpatrick was not involved in the decision. The termination letter to Thurber was signed by the mayor, business administrator and judge, not Fitzpatrick (1T113, 1T141, 1T180-1T181). Moreover, Thompson and Fitzpatrick agreed that even if Fitzpatrick had opposed Thurber's termination, the group's decision to terminate would have superceded her opposition (1T180, 2T59). Additionally, Fitzpatrick believed, and the City did not refute, that the termination decision had already been made when her opinion was sought (2T59).

Based on the foregoing, I find that prior to the February 15, 2001 election Fitzpatrick did not have the authority to fire, discipline or effectively recommend the firing or disciplining of any court employee (2T18). I also find that after the election Fitzpatrick was not authorized to make independent firing or disciplinary determinations. Additionally, I find there is insufficient evidence before me to conclude that former Court

Director Taylor fired or effectively recommended disciplining any court employee.

20. The City presented additional evidence it contends may be considered indicia of Fitzpatrick's supervisory status, including budget responsibilities, conducting performance evaluations, authorizing overtime, and attending management courses. That evidence is provided here to complete the record.

Budget

21. The former court director was responsible for the court's budget. Those responsibilities, however, were limited to providing input to the business administrator (1T101-1T103, 2T62). The breadth or scope of that input is not clear.

Before January 1, 2001, the municipal court administrator's budget involvement was limited to purchasing court supplies and monitoring overtime usage to stay within the budget (1T102-1T103).

Fitzpatrick was not involved in formulating the 2001 budget and her involvement, if any, was never discussed before or after Taylor left the court. Before the election in this matter, Fitzpatrick was not told that she would be required to provide budget input. It is now likely, however, that she will be required to provide input to the business administrator in the same manner Taylor did previously (1T142, 2T62).

Performance Evaluations

22. During the May hearing, Thompson testified that Fitzpatrick was required to conduct performance evaluations of court

employees but offered no examples of her actually doing so (1T103). During the June hearing, Fitzpatrick testified that she never conducted any performance evaluations--before or after the election, and was not trained to do so (2T57, 2T62-2T64). Their testimony is not inconsistent.

It was not until mid-to-late June, 2001, that Fitzpatrick was advised a new evaluation system was being implemented and she would be required to evaluate the deputy court administrators. She advised Thompson that she never conducted evaluations before and was not trained to do so now (2T62-2T64). There was no testimony regarding the scope of her involvement in the new program, whether following her evaluations of deputy court administrators she could recommend personnel actions, if so, to whom and whether such recommendations would be adopted without independent review or analysis.

Based on the foregoing, I find that before and after the election, and up to the second day of hearing, Fitzpatrick did not perform employee evaluations. While it now appears likely that she will be required to perform employee evaluations to some degree, the scope of her anticipated involvement is not clear.

Overtime

23. Thompson testified that Fitzpatrick was required to monitor and approve overtime usage by court employees but offered no examples of her actually doing so (1T103, 1T144). Fitzpatrick testified that although she makes determinations when overtime may

be necessary, who may be assigned to work it, and prepares the call-out schedules (essentially an on-call list for police department matters that arise outside regular court hours), she does not believe that she has the authority to approve overtime without Thompson's authorization (2T22, 2T37-2T39, 2T56). Before the election in this matter, if Thompson were not available to approve overtime, she would not direct it be worked. Since the election, however, she has taken that liberty in his absence (2T64).

Based on the foregoing, I find that before the election Fitzpatrick was not authorized to independently approve overtime without Thompson's consent. I also find that since the election, up to the second day of hearing, although she has taken the liberty to approve overtime in Thompson's absence, such conduct does not necessarily imply that she has been so authorized.

Management Courses

24. According to Municipal Division Manager, Burlington County Vicinage Traub, Fitzpatrick was required to participate in an AOC orientation, periodic meetings, annual conferences and two AOC training courses, Principles I and II. Those programs are intended to educate employees on court procedures and the role of various court personnel. Even crediting Traub, however, it is not clear whether any of the foregoing programs specifically taught and/or directed Fitzpatrick to engage in supervisory functions (1T80-1T81). Neither the City nor the CWA offered any further information regarding the foregoing programs.

25. Although called as a witness in this matter by the City, the balance of Traub's testimony more readily supports the Association's position in this case. It is apparent he believes the municipal court administrator title should be considered supervisory and in his professional opinion expected that individuals holding the title be involved "to some degree" in hiring and disciplinary processes, including making recommendations (1T36-1T37, 1T61). It was his opinion that the AOC and State Judiciary view the title as a supervising employee (1T44-1T45).

However, Traub's opinions aside, one of the few relevant facts he offered bearing on the issue in this matter was that he and Fitzpatrick casually discussed the goings-on of the court, specifically vacancies and possible candidates to fill positions (1T66). He did not, however, have any discussions with her regarding disciplinary matters (1T67). Although he has worked with Fitzpatrick for many years and talks to her often, he did not have any personal knowledge that she ever hired, fired, disciplined or effectively recommended the hiring, firing or disciplining of any employee as of February 15, 2001 (1T48-1T52).

Traub also noted there are no municipal court administrators in Burlington County who have the authority to hire or fire employees (1T71). Traub acknowledged that municipal court judges and hiring authorities (municipalities) would be more likely to sign notices of disciplinary action than the municipal court administrator (1T57-1T58). He also acknowledged that Fitzpatrick

was a municipal employee, paid by the City not the AOC or State (1T70).

Succinctly, the essence of Traub's testimony was aspirational, "[w]e would like to see them [municipal court administrators] have the total hiring and firing authority. Actually, in an ideal world, in a few municipalities, I think Municipal Court Judges have been made the hiring authorities in a couple of municipalities, but not in Burlington County" (1T70). When asked if there were any municipal court administrators in the State having the authority to hire or fire, he was vague, "I don't know the names of the Courts. It is in North Jersey someplace. It is either Hoboken or Passaic or someplace up there. I am not sure" (1T72). Neither he, nor the City supplemented or confirmed the answer or provided information concerning how the circumstances in those municipalities were the same or different from the circumstances in Burlington.

26. Based on the entire record in this matter, I find that from the date of her hire in the early 1980s to the date of the election, February 15, 2001, and up to the second date of hearing in this matter, June 29, 2001, Fitzpatrick did not hire, fire, discipline or effectively recommend the hiring, firing, or disciplining of any City employee (2T18-2T19).

ANALYSIS

The Parties' Positions

The City contends the municipal court administrator is a statutory supervisor because the position has, and regularly exercises the power to effectively recommend the hiring, discharge and discipline of municipal court employees.[9/] The City also contends that supervisory status should not be measured solely by the municipal court administrator's authority as of the time of the election. Finally, it contends there is a conflict of interest between the municipal court administrator duties and those of other unit members and requests the title be found to be supervisory and excluded from the petitioned-for unit. Similarly, the CWA argues that the municipal court administrator's supervisory status should not be measured solely as of the date of the election and that she is a supervisor under both the New Jersey Employer-Employee Relations Act and the National Labor Relations Act, thus should not be allowed to vote in this matter and a runoff election should be directed.

The Association counters that neither the City nor CWA have established, through substantial credible evidence, that the municipal court administrator was a supervisor on the date she cast her ballot, thus the challenge should be denied and her ballot counted.

9/ The City concedes, in its Brief at pp. 9, 16, and 18 that Fitzpatrick does not have the unilateral authority to hire, fire or discipline, therefore, it relies solely on her purported authority to effectively recommend hiring, firing or disciplining.

Standard Of Review

N.J.S.A. 34:13A-5.3 provides public employees the right "to form, join and assist any employee organization...." The statute, however, also precludes, in most circumstances, supervisory employees from being represented in negotiations units with non-supervisory employees. N.J.S.A. 34:13A-5.3 provides, in relevant part that,

> ...nor, except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership...

The Commission derives its authority in this matter from N.J.S.A. 34:13A-6(d) which provides that "[t]he division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and non-supervisors,...."

The Commission has interpreted N.J.S.A. 34:13A-5.3 and 6(d) as containing the statutory definition of supervisor; an employee having the authority to hire, discharge, discipline, or effectively recommend same. Cherry Hill Department of Public Works, P.E.R.C. No. 30 (1970). Supervisory status, however, depends upon more than a job title, job description or mere assertion that an employee may have supervisory authority.

> The bare possession of supervisory authority without more is insufficient to sustain a claim of status as a supervisor within the meaning of the Act. In the absence of some indication in the record that the power claimed possessed is exercised with some regularity by the employees in question, the mere "possession" of the authority is a sterile attribute unable to sustain a claim of supervisory status.

Somerset Cty. Guidance Ctr., D.R. No. 77-4, 2 NJPER 358, 360 (1976).

The Act does not, however, expressly allocate the burden of proving or disproving the application of statutory exemptions. While the Commission has the statutory obligation to make appropriate unit determinations, the general rule of statutory construction requires the party seeking the application of a statutory exemption bear the burden of proving its applicability. See NLRB v. Kentucky River Community Care, Inc., __ U.S. __, __, 149 L. Ed. 2d 939, 945-946, 121 S.Ct. 1861, 1866-1867 (2001) (NLRA does not expressly allocate the burden of proving or disproving supervisory status but as a matter of statutory construction, party claiming statutory exemption bears burden of proof). The City and CWA, therefore, bear the burden in this case of establishing the applicability of the statutory exemption codified in N.J.S.A. 34:13A-5.3.

The Timing Issue

Based on the Director's statement of the issue in this case, the parties seemingly contend the timing of the determination of supervisory status is critical to their respective positions. The Association, consistent with the Director, contends

Fitzpatrick's employment status and thus her eligibility to vote may only be measured by her duties and authority as of the time of the election. The City and CWA contend that a broader measure, encompassing authorized but unexercised power as of the time of the election, coupled with post-election conduct, warrant finding she is a supervisor.

"In a representation election, voter eligibility is normally affected by an employee's employment status both during the payroll period or voting eligibility and on the date of the election." Rockaway Tp., D.R. No. 91-21, 17 NJPER 132 (¶22053 1991) (future plans for employee's employment status and final result of any employer action is too indeterminate to deprive employees the basic statutory right to choose their majority representative). The foregoing principle and the Director's framing of the issue in this case recognize the fundamental fairness of measuring voter eligibility based on pre-election, defined, objective considerations, not post-election, speculative or indeterminate considerations subject to the employer's control.

Moreover, as a practical matter, the City and CWA, by seeking to exclude the municipal court administrator from the non-supervisory unit, are essentially requesting the Commission to modify a long standing, stable negotiations unit during the pendency of a legitimate, and in my view, overriding, question concerning representation. The Commission has consistently addressed the issue of modifications to an extant collective negotiations unit during

the pendency of a legitimate representation matter. The policy is to promptly proceed with an election in an appropriate, petitioned-for historical unit and not to process requests made by any party to modify the existing unit. See generally, North Bergen Bd. of Ed., D.R. No. 89-21, 15 NJPER 185 (¶20078 1989); Barnegat Bd. of Ed., D.R. No. 88-15, 14 NJPER 16, 18 (¶19005 1987); see also City of Newark, D.R. No. 85-24, 11 NJPER 344 (¶16126 1985); City of Hoboken, D.R. No. 85-4, 10 NJPER 597 (¶15276 1984); State of New Jersey (N.J. Civil Service Assn.), D.R. No. 81-20, 7 NJPER 41 (¶12019 1980), aff'd P.E.R.C. No. 81-95, 7 NJPER 133 (¶12056 1981), request for rev. den. P.E.R.C. No. 81-112, 7 NJPER 189 (¶12083 1981).

That policy is directed more to the suspension of clarification of unit petitions during the pendency of contested representation matters, however, the guiding principle applies--the Commission should determine the majority representative of the historical unit first, then determine modifications, if any, to that unit structure based on post-election considerations. That is precisely why the Commission created a separate clarification of unit process. It recognizes unit structure may be fluid and flexible and may change over time and therefore clarification may be necessary. See generally, Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977); Jamesburg Bd. of Ed., D.R. No. 2002-2, __ NJPER ___ (¶_____ 2001).

In a contested election to determine the majority representative of a historical unit, however, unit fluidity and

flexibility must yield to objective considerations. The unit structure must be frozen in time, however briefly, so that majority representative status can be measured by a vote of unit members.

In this case, that is particularly appropriate since the municipal court administrator has been represented by the non-supervisory unit since its inception in the 1980s. The only significant change was occasioned by the City when, approximately six weeks before the election, it discontinued use of the municipal court director title and, thereafter, sought and obtained a stipulation that the municipal court administrator vote by challenged ballot. Considered in the light most favorable to the City and CWA, disregarding their respective burdens of proof, their positions in this case suggest that at most, the municipal court administrator's job duties were undergoing changes during the 6-week period leading up to the election and following the election. Balanced against the title's over 10-year inclusion in the non-supervisory unit, however, the City and CWA should not benefit by this short period of arguable uncertainty.

Moreover, the challenged ballot procedure was not established to afford employers the opportunity to cloak challenged voters with statutorily exempt job duties during the pendency of post-election procedures. It was intended, in part, to promote administrative efficiency. In cases where the disputed factual issue as to voting eligibility is not substantial or material, the election proceeds with the disputed employee being afforded the

opportunity to vote subject to challenge. The Commission recognizes that allowing an employee to vote by challenged ballot leaves the question as to their eligibility in doubt. The Commission's policy, however, balances that doubt and the probability in most cases that the challenged vote(s) will not determine the outcome of the election, against the need for determining, without undue delay, the choice of the exclusive representative by a majority of potential voters whose eligibility to vote is not in dispute.

The challenge ballot procedure, therefore, provides disputed voters with the opportunity to cast ballots in the election and at the same time allows non-disputed voters the opportunity to resolve the question concerning representation in as expeditious a manner as possible. Such a procedure is preferable to the delay inherent in conducting formal proceedings regarding employee eligibility before the election. See Morris Cty. Park Commission, D.R. No. 80-17, 6 NJPER 37 (¶11019 1979); No. Brunswick Tp., D.R. No. 78-4, 3 NJPER 260 (1977).

In short, the challenge ballot procedure freezes employment status in time for purposes of the election. It preserves the parties' and Commission's ability to go back to that time, if necessary, to consider objective evidence of employment status. It was not intended to broaden the time-frame to include post-election conduct for determining voter eligibility as the City and CWA suggest. Doing so may create an opportunity for employers to manipulate election results. In an effort to control the outcome of

elections, employers could challenge ballots and then, during the administrative investigation, begin cloaking the challenged employees with job duties triggering statutory exemptions.

Finally, as to the timing issue, even if there were no challenge ballot procedure and the Commission conducted a hearing on Fitzpatrick's eligibility before the election, the evidence would illustrate the municipal court administrator's employment status--at that time. While the City and CWA could certainly attempt to argue contingent, future duties that may be assigned to the position, a pre-election hearing would only measure the supervisory status of the title at that time. See generally Rockaway Tp., 17 NJPER 132.

Based on all the foregoing, the Director's statement of the issue, "[w]hether Court Administrator Elizabeth Fitzpatrick was a statutory supervisor pursuant to N.J.S.A. 34:13A-5.3 at the time of the election" is appropriate, supported by Commission precedent and policy and shall guide my determination in this matter.

Fitzpatrick's Employment Status As of the February 15, 2001 Election

In this case, the municipal court administrator, as of the date of the election, did not have the authority to hire, fire or discipline (Findings of Fact nos. 16-20, 26). The City concedes, in its Brief at pages 9, 16, and 18 that even now, after the election, Fitzpatrick does not have the unilateral authority to hire, fire or discipline. Although CWA does not make this concession, I make this finding based on the evidence (Findings of Fact nos. 16-20, 26). The critical issue, therefore, is whether the municipal court

administrator had the authority to "effectively recommend" such personnel actions as of the date of the election.10/

An "effective recommendation" occurs when the recommendation is adopted without independent review or analysis by a higher level of authority. Teaneck Bd. of Ed., E.D. No. 23 (1971); Borough of Avalon, P.E.R.C. No. 84-108, 10 NJPER 207 (¶15102 1984), adopting H.O. No. 84-11, 10 NJPER 149 (¶15075 1984).

The City and CWA contend that during the six weeks between the time the municipal court director title was eliminated (December 31, 2000) and the election (February 15, 2001), the municipal court administrator had the authority, but not the opportunity to effectively recommend hiring, firing and disciplining. While the City may have intended to make the municipal court administrator a statutory supervisor during that period, the specific job duties required to confer supervisory status were not meaningfully conveyed to Fitzpatrick before the election (Findings of Fact nos.10 and 17).

Following the elimination of the court director title, Fitzpatrick was not promoted, she received no pay increase, her DOP job description remained the same, and there were no clearly articulated or defined changes to her job duties before the election. Based on Business Administrator Thompson's own

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10/ The City's and CWA's reliance on private sector case law regarding supervisory status, particularly the independent judgment standard, is misplaced given the precedent and experience the Commission and courts of this state have interpreting the Act.

description of his meetings with Fitzpatrick in early January, it is not at all clear what she was told her job duties would be following the elimination of the court director title (Findings of Fact nos. 10 and 17). Merely telling Fitzpatrick that she is now in charge and that he was confident she could perform the duties that were required and that she was the "supervisor of the working unit, and that all of the things that would be expected of her were now hers" (Findings of Fact nos. 10 and 17) is insufficient to meaningfully confer supervisory status. It does not specify any particular job duty or statutory element of supervisory status. Stated differently, in order for her to be a supervisor, she not only has to have supervisory authority, she has to know she has such authority. The City and CWA have not met their burden of proof on this point. NLRB v. Kentucky River Community Care, Inc.

Additionally, to the extent the City and CWA contend Fitzpatrick merely assumed the prior supervisory duties of Court Director Taylor, as of January 1, 2001, the same communication problem persists. Although the court director title was included in the supervisory unit by stipulation in 1994, neither party presented any evidence that Fitzpatrick knew or was told that Taylor exercised such authority and would now be required to do the same. Simply put, the City (Thompson) assumed Fitzpatrick knew what authority it (he) intended her to have following Taylor's departure.

Moreover, Thompson demonstrated to me, by his testimony regarding the DOP job descriptions (Finding of Fact no. 10), that

his understanding of the definition of supervisor is inconsistent with the Commission's interpretation of the statute. Even if Fitzpatrick understood his statement to mean that she was now responsible for certain job duties, as encompassed by the municipal court administrator DOP job description, those duties do not necessarily give rise to supervisory status. Since Thompson could not be sure what he specifically told Fitzpatrick during the early January meeting(s) about her supervisory responsibilities, I will not infer or speculate that what he told her gave rise to supervisory duties. That is part of the City's burden of proof in this case and it was not met. NLRB v. Kentucky River Community Care, Inc.

Additionally, the timing of the City's conduct in negotiating or attempting to negotiate the inclusion of the municipal court administrator title in the CWA supervisory unit is compelling. While I will not speculate as to whether any unfair practices occurred, as a charge is pending, I do note that the sidebar agreement between the parties was dated January 19, 2001. That was the same day Snodgrass issued her memorandum to Thompson and crossed-out the court director title, replacing it with the court administrator title in CWA's supervisory unit (Findings of Fact nos. 11 and 12.

Snodgrass was operating at Thompson's direction, did not consider specific job duties being performed by Fitzpatrick at that time and concedes she had no labor law training. The timing of the

sidebar agreement and the Snodgrass memorandum suggests that Thompson was acting on Snodgrass' recommendation when he solicited the sidebar agreement. There is no evidence he sought legal advice, as such, his decision was not a studied conclusion that the municipal court administrator was then possessed of any actual statutory supervisory authority.

Although both the City and CWA contend that as of the date of the election Fitzpatrick had authorized but unexercised supervisory power, neither party cites controlling precedent for the proposition. The CWA relies upon a hearing officer's report and recommendation in Ocean Cty. Bd. of Chosen Freeholder, H.O. No. 79-3, 4 NJPER 487 (¶4223 1978). In that case, the hearing officer sustained a voter eligibility challenge because the voter had been promoted to a known supervisory position--supervisor, central mail room. The supervisor in that case held the supervisor, central mail room position but had not exercised supervisory authority as of the date of the election. That case is distinguishable.

Here, there is no evidence that Fitzpatrick was promoted to a known, clearly defined, supervisory position. She held the same job title that had always been included in the non-supervisory unit. Her job description was the same as it had always been and Thompson's communications to her regarding her duties following the elimination of the court director title were inconclusive. She was not specifically directed to exercise any supervisory authority. She did not actually exercise any supervisory authority.

In the absence of evidence that Fitzpatrick actually exercised supervisory authority before the election, this case hinges solely on the City and CWA's assertion that she possessed but did not exercise it. As such, the Somerset Cty. Guidance Ctr. principle applies. Fitzpatrick's bare possession of supervisory authority without more is insufficient to sustain the City and CWA's claims of supervisory status within the meaning of the Act. There are no indications in the record that the power they claim she possessed was exercised with any regularity before the election. Her alleged mere possession of the authority is a sterile attribute unable to sustain a claim of supervisory status.

This conclusion is consistent with prior precedent. The unit status of municipal court administrators has been considered in approximately four (4) reported cases. In three of those cases, the title was included in non-supervisory units.

In Edgewater Borough, D.R. No. 92-27, 18 NJPER 230 (¶23103 1992), the Director found the Borough's municipal court administrator was neither a managerial nor supervisory employee. In that case, the Borough alleged the court administrator made hiring recommendations, had full purchasing authority for court equipment and materials and established the court's hours of operations subject to approval by the municipal judge. The administrator also established job duties for a deputy court administrator and oversaw her performance. As to supervisory status, the Director found the court administrator merely directed the deputy's work which was not

sufficient to support a finding of supervisory status under the Act. Id. at 231.

Likewise, in Ringwood Borough, D.R. No. 93-19, 19 NJPER 196 (¶24093 1993), the court administrator title was included in an administrative unit together with a deputy court administrator and administrative secretaries. In Neptune City Borough, D.R. No. 97-3, 22 NJPER 345 (¶27179 1996), the Director directed a new election in a unit of non-supervisory blue and white collar employees that included a court director and deputy court director. The new election was ordered because the employer conferred pre-election benefits on certain previously unrepresented employees. The importance of the decision, as with Edgewater and Ringwood, however, is that court administrators have been found to be non-supervisory and thus included in units with deputy court administrators and other clerical employees.11/

The facts in this case are consistent with Edgewater, Ringwood and Neptune City. The municipal court administrator has

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11/ Conversely, in Barnegat Tp., D.R. No. 94-26, 20 NJPER 251 (¶25124 1994) a court administrator who supervised a deputy court administrator and violations clerk and prepared financial and statistical reports was included in a petitioned-for supervisory unit. In that case, neither party contested the court administrator's supervisory status. There, the Township asserted she was ineligible for representation because she could file grievances against the judge. The Director found the Township's position insufficient to defeat the general, Constitutional, right of representation. The court administrator was included in a unit with all department heads. See also Clayton Borough, D.R. No. 89-26, 15 NJPER 223 (¶20093 1989) (court clerk made effective recommendations regarding hiring).

long been included in the non-supervisory unit and has no authority to hire, fire, discipline or effectively recommend same. She was not involved in formulating the current budget and her anticipated future involvement is speculative. She did not conduct performance evaluations nor was she authorized to independently approve overtime. Finally, her participation in AOC orientation programs, periodic meetings, annual conferences and two training courses do not clearly establish that she was directed or authorized to engage in supervisory functions.

Based on all the foregoing, I find that as of the date of the election Municipal Court Administrator Fitzpatrick was not a statutory supervisor, thus the challenge to her ballot should be denied. The ballot should be opened, counted and the Tally of Ballots should be amended to reflect the result of the election and an appropriate certification of representative issue.

Fitzpatrick's Employment After The February 15, 2001 Election

Even if Fitzpatrick's employment status were based on conduct occurring after the election, I reach the same conclusion. Following the election, Fitzpatrick was directed to engage in conduct that more readily reflects traditional supervisory functions, specifically her involvement in the hiring process. However, even that conduct, as of the second day of hearing, is insufficient, in my view, to cloak her with supervisory status.

The post-election analysis turns on the same considerations as the pre-election analysis; whether the municipal court

administrator had the authority to "effectively recommend," personnel actions in the nature of hiring, firing and/or disciplining that are adopted without independent review or analysis by a higher level of authority. Teaneck Bd. of Ed.; Borough of Avalon. She did not have or exercise such authority.

Several months after the election[12/] Fitzpatrick reviewed applications and picked candidates to be interviewed. Following interviews, she and Thompson collaborated on the hiring decisions. She recommended a candidate for the deputy court administrator position; Thompson then hired the candidate. Thompson and Fitzpatrick disagreed, however, regarding the hiring of the candidate for the clerk position. They could have sought and interviewed others but Thompson directed her to offer the candidate the position at the maximum or top-end of the salary guide. Fitzpatrick offered the candidate the position at the minimum or low-end of the guide. Thompson overruled Fitzpatrick's decision and hired the candidate at the higher rate (Findings of Fact nos. 16 and 17).

12/ I note that the City, in its brief at p. 11 and 12, alludes to the fact that shortly after the election Fitzpatrick initially refused to participate in interviews of potential candidates. The City asserts that but for the Association having advised her not to participate, Fitzpatrick would have "regularly exercised and participated in the interviewing of candidates..." It seems to me the City makes more of this conduct than it warrants. It certainly has the authority to direct her to engage in job-related activity and/or discipline her for inappropriate refusal, however, those are internal personnel matters that have no bearing on this case because she ultimately did participate in the interview process. The issue, therefore, is not her refusal to participate, but the extent to which she did participate.

Although Thompson testified in this matter, neither the City nor CWA presented any evidence that Thompson considered Fitzpatrick's hiring recommendations or that they were accepted by him without independent review or analysis. The fact that Thompson hired the clerk at the high-end of the salary guide indicates to me that Fitzpatrick's recommendation to hire the clerk at the low end of the guide was rejected; it was not adopted without Thompson's independent review and analysis, therefore Fitzpatrick did not make an effective recommendation.

Likewise, the post-election evidence of her involvement in disciplinary matters was confined to the Thurber termination. The termination decision was made by the mayor and two attorneys. Thurber's termination letter was signed by the mayor, business administrator and judge, not Fitzpatrick. Even if Fitzpatrick had opposed Thurber's termination, the group's decision to terminate would have superceded her opposition. Moreover, the City did not refute Fitzpatrick's testimony that the termination decision was made before her input was sought. Under these circumstances, Fitzpatrick's response that she did not want to get involved and would "go with the flow" does not constitute an effective recommendation (Findings of Fact nos. 18 and 19).

In sum, Fitzpatrick appears to exercise diffuse and minimal authority in hiring and disciplinary decisions. While she may be directed to coordinate and attend interviews and make recommendations to Thompson, he, as the ultimate decision-maker, may

accept or reject her recommendations. I find that the type of input she has is too attenuated to be indicative of supervisory authority. See Atlantic Cty. Bd. of Social Serv., P.E.R.C. No. 90-21, 15 NJPER 594 (¶20243 1989) (Commission held that professional employees' collective interviewing of job applicants does not rise to the level of an effective recommendation).

The post-election evidence of Fitzpatrick's future involvement in budget matters and performance evaluations (Findings of Fact nos. 21 and 22) is simply too speculative at this time to confer supervisory status or conclude there is an impermissible conflict of interest. Rockaway Tp.

Specifically as to conflict of interest, Edgewater, Ringwood and Neptune City are compelling cases. In each, municipal court administrators were included in units with deputy court administrators. I see no reason to reach a different result here. Fitzpatrick's proposed power to evaluate may indicate the existence of a conflict of interest if she is primarily responsible for evaluating subordinates and where the evaluations are instrumental in making significant personnel decisions. Emerson Bd. of Ed., D.R. No. 82-13, 7 NJPER 571 (¶12255 1981). The scope of her power, however, is still unclear and the performance evaluation program is apparently evolving. Moreover, as already demonstrated in the areas of hiring and discipline, it does not appear that even if Fitzpatrick conducted performance evaluations and made recommendations for personnel actions thereon, that her recommendations would be effective.

Fitzpatrick's decisions regarding overtime, call-out assignments and general work-product supervision (Findings of Fact nos. 14 and 23) are indicia of her role as lead employee, not as a supervisor. See Edgewater. In my view, these duties do not currently give rise to an impermissible conflict of interest. West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971).13/

I find that even based on post-election considerations, Municipal Court Administrator Fitzpatrick is not a statutory supervisor, thus the challenge to her ballot should be denied.

RECOMMENDED ORDER

I recommend that the Director of Representation take the following administrative action:

A. deny the City's and CWA's challenge to the ballot;

B. open the ballot forthwith;

C. count the ballot;

D. amend the Tally of Ballots accordingly; and,

E. issue an appropriate certification.

Kevin M. St.Onge
Hearing Officer

Dated: September 21, 2001
Trenton, New Jersey

13/ Once the municipal court administrator's role is more clearly defined in this post-court director era, the City or majority representative may file a clarification of unit petition. See generally, Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977); Jamesburg Bd. of Ed., D.R. No. 2002-2, __ NJPER ___ (¶_____ 2001).