STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KAREN A. GARRIS, ET AL., Charging Parties, v. LOS ANGELES COUNTY SUPERIOR COURT, Respondent.	Case No. LA-CE-44-C PERB Decision No. 2566-C June 12, 2018

Appearances: Law Offices of Joel W. Baruch by Joel W. Baruch, Christopher L. Gaspard, and Corey A. Hall, Attorneys, on behalf of Karen Garris, Madeline Clark, Patricia Conaty, John Panico, John Irwin, Genalin Riley, and Binh Nguyen; Atkinson, Andelson, Loya, Ruud & Romo by Nate J. Kowalski, Attorney, on behalf of Superior Court of California, County of Los Angeles.

Before Banks, Krantz, and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on Charging Parties'[1] exceptions to a proposed decision (attached) by an administrative law judge (ALJ). The ALJ dismissed the complaint, which alleged that the Los Angeles County Superior Court (Superior Court or Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act)[2] by: (1) laying off the Charging Parties because they were unrepresented by an employee organization; (2) entering into a November 17, 2007 side letter agreement with the American Federation of State, County and Municipal Employees, Local 910 (Local 910), which allegedly interfered with Charging

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[1] The Charging Parties are Karen Garris (Garris), Madeline Clark (Clark), Patricia Conaty (Conaty), John Panico (Panico), John Irwin (Irwin), Genalin Riley (Riley), and Binh Nguyen (Nguyen).

[2] The Trial Court Act is codified at Government Code section 71600 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Parties' rights to remain unrepresented; and (3) laying off Charging Parties for reasons that were not based on organizational necessity, in violation of Trial Court Act section 71652.

The Board itself has reviewed the administrative hearing record in its entirety and considered Charging Parties' exceptions, and the Court's response thereto. Based on this review, we conclude that the ALJ's factual findings are adequately supported by the evidentiary record and his conclusions of law are well reasoned and in accordance with applicable law.

Charging Parties' primary argument is that the ALJ applied the wrong test to their discrimination allegation. They point out (correctly) that this case involves discrimination between two groups of employees, not retaliation against an individual, and that our precedent prescribes the application of the discrimination test from *Campbell Municipal Employees Association v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*), rather than that from *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*). (See *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S (*DPA*).) Although Charging Parties have accurately interpreted our precedent, we take this opportunity, for reasons we explain below, to disapprove *DPA* and clarify the standards for stating a prima facie case under *Campbell* and *Novato*.

We therefore adopt the proposed decision as the decision of the Board itself as supplemented by the discussion below.[3]

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[3] Charging Parties have also requested oral argument. The Board typically denies such requests when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear as to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Arvin Union School District* (1983) PERB Decision No. 300.) Because these criteria are met here, we deny the request for oral argument.

SUMMARY OF FACTS

Before 2000, Los Angeles County had two trial courts, the Municipal Court and the Superior Court. The Municipal Court was a court of limited jurisdiction, handling matters such as criminal misdemeanors, unlawful detainer, small claims, and collections. The Superior Court was a court of general or unlimited jurisdiction.[4]

Charging Parties were originally hired as law clerks by the Municipal Court. Charging Parties provided support to their assigned judges by conducting legal research and drafting memoranda relating to matters on the judges' dockets. As Municipal Court employees, Charging Parties received "MegaFlex" benefits, a cafeteria plan that provided them with cash to purchase the level of benefits they desired and allowed them to keep any unspent monies.

In 2000, the Superior Court and the Municipal Court merged, in a process known as unification. Charging Parties at that time became employees of the Superior Court. The Court had three existing job classifications that performed duties similar to Charging Parties'—Research Attorney and two types of Law Clerk, those who have passed the California bar examination and those who have not. Research Attorney positions are permanent. Law Clerk positions are for two-year terms.

At or around the time of unification, Local 910 became the exclusive representative for a new bargaining unit consisting of Research Attorneys and Law Clerks. Former municipal court law clerks were not included in the new bargaining unit, and Charging Parties remained unrepresented. At some point, Local 910 and the Court discussed bringing former municipal court law clerks into the bargaining unit. The Court stated that doing so would require a

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[4] Both parties use the terms "general" and "unlimited" interchangeably to describe the jurisdiction of the Superior Court before 2000.

petition to be filed under the unit modification procedures in the Court's Employee Relations Policy.[5]

Following unification, the Court initially referred to Charging Parties as both "Law Clerk, MC" and "Research Attorney." Charging Parties received the same salary as Research Attorneys, but they did not have the same benefits. Charging Parties maintained their MegaFlex benefits and were provided the opportunity to enroll in a 401(k) retirement plan, both of which are only available to unrepresented employees. The employees represented by Local 910 received a different set of negotiated benefits.

In September 2005, the Court informed Charging Parties that their classification title was being changed to Judicial Law Clerk, which was only a title change and did not alter their salary or benefits.

As of 2013, four Charging Parties—Nguyen, Riley, Irwin, and Clark—had primarily been assigned to unlimited jurisdiction courtrooms since unification. The other three Charging Parties, and at least two other Judicial Law Clerks, had primarily been assigned to limited jurisdiction courtrooms.

July 2013 Layoffs

Following a severe reduction in state funding beginning in 2008-2009, the Court decided to restructure how it provided services to the public, resulting in the elimination of 1,386 positions since fiscal year 2009-2010. Of those positions, 511 were eliminated under the Court's Consolidation Plan following fiscal year 2012-2013. As part of that plan, the Court closed eight courthouses, and substantially reduced the number of limited jurisdiction courtrooms and the legal support provided to those courtrooms.

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[5] No evidence was presented that such a petition was ever filed.

The reduction in limited jurisdiction courtrooms and support services led the Court to eliminate the Judicial Law Clerk classification and assign Research Attorneys to perform the duties previously performed by the Judicial Law Clerks. Nicole Heeseman (Heeseman), a current Court Commissioner and Managing Research Attorney at the time of the layoffs, testified that the Judicial Law Clerk classification was eliminated because the Court determined that the Research Attorney classification was the more flexible classification of the two. All Research Attorneys could satisfactorily perform the primarily limited jurisdiction work of Judicial Law Clerks, but not all Judicial Law Clerks could satisfactorily perform the unlimited jurisdiction work of Research Attorneys. Heeseman also testified that the Court could not selectively retain those Judicial Law Clerks who had primarily worked in unlimited jurisdiction courtrooms, because layoffs within a classification were required to be conducted by seniority.

In total, the elimination of 511 positions in the Consolidation Plan resulted in the layoff of 177 employees, 22 of whom were unrepresented. While no employees represented by Local 910 were laid off, its bargaining unit was reduced by 20 positions when Law Clerk positions were not filled at the expiration of the incumbents' terms.

Several months before the layoff, the Court began negotiating the effects of the layoffs with the exclusive representatives of the affected bargaining units. During these negotiations, the Court did not discuss its decision to lay off employees or the status of Judicial Law Clerks. Kevin Norte (Norte), the Treasurer of Local 910, met with several Charging Parties and suggested that they consider joining the Local 910 bargaining unit so they could be a part of the negotiations regarding the effects of the layoff. No Charging Parties followed up with Norte about joining the represented unit.

On June 14, 2013, the Court informed the Judicial Law Clerks, including Charging Parties and two others, that their positions were being eliminated. Nguyen, Riley, Panico, Irwin, Clark, and Garris were informed that they would be laid off, while Conaty was informed that that she would be "reduced" into a clerical position she had previously held. Charging Parties appealed the Court's decision through the Court's internal appeal process, claiming that the decision violated the Trial Court Act and the Court's Personnel Policies and Procedures.

On June 28, 2013, Heeseman denied Charging Parties' appeals. Her denial letter to Riley, which is representative of her denials to the other Charging Parties, states in relevant part:

> Government Code section 71652 authorizes trial courts to layoff employees for organizational necessity. It also provides that "Employees shall be laid off on the basis of seniority of the employees *in the class of layoff*, in the absence of a mutual agreement between the trial court and a recognized employee organization providing for a different order of layoff." The Court's Layoff Policy provides for layoffs to be done by classification. Pursuant to that authority and the terms of the Layoff Policy, the Court identified classifications that would be curtailed consistent with the requirements of its Consolidation Plan. It identified the number of affected positions in each classification and implemented a layoff process that resulted in 177 employees being laid off, including you. One of the classifications that was eliminated in its entirety was Judicial Law Clerk.
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> In an effort to address an $85 million budget deficit, the judges approved a plan to consolidate and reorganize court operations to a level funded by its significantly reduced operating budget. Among other things, the Consolidation Plan concentrated limited jurisdiction courtrooms into fewer courthouses. As part of the reorganization of its legal services, the Court elected to discontinue providing legal support to the majority of the remaining limited jurisdiction courtrooms. That determination prompted the decision to eliminate the attorney classification whose primary function for the last 13 years has been to support limited jurisdiction courtrooms. That decision was not made in concert with any employee organization and was not informed by

> the represented status of the classification or by any intent to discriminate on the basis of age or any other status protected by law.
>
> [¶ . . . ¶]
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> In effecting the layoff of Judicial Law Clerks, the Court did not fail to credit your seniority. However, it did recognize that Judicial Law Clerks held a different position than Research Attorneys. The classification specifications for the two positions are different. The positions have different minimum requirements. The Judicial Law Clerk classification specifies that incumbents are primarily assigned to limited jurisdiction courts. The Research Attorneys are represented; Judicial Law Clerks are not. They receive different compensation levels and different benefits packages.
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> Moreover, Judicial Law Clerks were afforded the opportunity to convert to Research Attorneys when the latter classification elected to be represented. To retain what they perceived to be superior employment benefits, most incumbents elected to remain Judicial Law Clerks. In recognition of the differences between the two classifications, the Court sought to assign Research Attorneys to general jurisdiction courtrooms and to assign Judicial Law Clerks to limited jurisdiction assignments.

(Emphasis in original.) Heeseman testified that she referred to the two classifications' different representational status to highlight the different benefits packages they receive as a result of that difference. She believed that Judicial Law Clerks preferred the benefits that unrepresented employees received and that this preference informed their decision to remain unrepresented.

The statement in Heeseman's denial about the Judicial Law Clerks' prior opportunity to convert to Research Attorneys is a reference to a Side Letter Agreement in the 2007-2010 memorandum of understanding (MOU) between the Court and Local 910. The Side Letter Agreement states:

> The Court agrees that all current Judicial Law Clerk (formerly "Law Clerk, M.C.") positions that are outside of the scope of this

> bargaining unit shall not be filled once they become vacant. When these positions become vacant, if the incumbent is replaced, the replacement position shall be within the scope of the bargaining unit.
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> Note: The Court may continue to fill the two part-time positions for the limited jurisdiction Default Processing Unit, which both parties agree are currently outside of the bargaining unit.
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> Further Note: Any Judicial Law Clerk may opt into the bargaining unit within 90 days of the effective date of this MOU. Such opt in must be in writing and delivered to the Human Resources Director.

Charging Parties were not aware of the Side Letter Agreement until after they received Heeseman's denial. They were never informed of an opportunity to opt into the Local 910 bargaining unit or become Research Attorneys.

On July 24, 2013, Charging Parties as a group submitted a letter to the Court's Executive Committee challenging Heeseman's denial of their appeals and demanding that the Executive Committee reconsider their layoffs. On August 2, 2013, the Court rejected Charging Parties' challenge and deemed their layoffs to be final.

In August 2013, several Charging Parties asked Heeseman about a vacant Research Attorney position at the Court. She replied that former Judicial Law Clerks were ineligible for the position, which was restricted to either current Law Clerks who were notified in writing of eligibility, or former Law Clerks who had held the position for at least two years. The class specification for the Research Attorney position states that the incumbent must possess "[t]wo years of full-time experience as a Law Clerk for the Los Angeles Superior Court and [be] a member in good standing of the California State Bar." Heeseman testified that "Law Clerk" refers to the Law Clerks represented by Local 910 and not Judicial Law Clerks. While there was discussion among Court management about giving Judicial Law Clerks credit for purposes

of eligibility for the Research Attorney position, the Court decided it could not do so given the language in the class specification for the Research Attorney. However, there is some evidence that the Court has deviated from class specifications in the past. For example, in 2005 and 2006, it processed the applications of Riley and another Judicial Law Clerk, Marcelo D'Asero (D'Asero), for the position of Supervising Research Attorney, even though that position requires the incumbent to have at least one year of experience as a Research Attorney and neither Riley nor D'Asero had the requisite experience.[6]

DISCUSSION

I. Exceptions to Factual Findings

Two of Charging Parties' exceptions address the ALJ's findings of fact: (1) that "[u]nlike the former municipal court law clerks, Research Attorneys and Law Clerks are primarily assigned to unlimited jurisdiction courtrooms and work on more complex legal issues" (proposed decision, p. 4); and (2) that "[a]ll Research Attorneys could satisfactorily perform the work of Judicial Law Clerks, but not all Judicial Law Clerks could satisfactorily perform the work of Research Attorneys" (proposed decision, p. 5).

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[6] Heeseman, who conducted interviews for the vacancy in 2006, testified that the Court's human resources department was responsible for determining whether a candidate met the minimum qualifications.

The ALJ found that D'Asero was a Judicial Law Clerk whose application for Supervising Research Attorney was processed in 2005 contrary to the class specification. We do not adopt this finding. It appears from the record that this took place before the Judicial Law Clerk classification was created. D'Asero testified that until being promoted to Supervising Research Attorney in 2005, he understood his classification to be Law Clerk, MC, and that the term Judicial Law Clerk was not in use at the time.

In addition, the record is unclear as to the requirements of the Supervising Research Attorney classification at the time of D'Asero's application and promotion. The Supervising Research Attorney class specification admitted into the record was dated August 1, 2005, but the precise date of D'Asero's promotion in 2005 is not in the record.

In support of these exceptions, Charging Parties cite the testimony of D'Asero, who was a Supervising Research Attorney at the time of the layoffs and had supervised Riley, Conaty, and Stephen Spears (Spears), a Judicial Law Clerk who retired shortly before the layoffs and was not a party to this case. While D'Asero did testify that Riley, who had primarily worked in unlimited jurisdiction courtrooms, "performed up to what you would expect a Research Attorney to perform," D'Asero did not hold the same opinion of Conaty and Spears, who had primarily worked in limited jurisdiction courtrooms. D'Asero also testified that working in an unlimited jurisdiction courtroom was "significantly more complex" than working in a limited jurisdiction courtroom. Similarly, Theresa McGonigle, who had supervised Garris before the layoffs, testified that because Garris had worked only on limited jurisdiction matters throughout her career, she could not do the work of a Research Attorney.

Charging Parties also cite the fact that four of the Charging Parties had primarily worked in unlimited jurisdiction courtrooms since unification. But the same was not true of the other five Judicial Law Clerks at the time of the layoffs—the three other Charging Parties and the two Judicial Law Clerks who did not participate in this case. Because a majority of the Judicial Law Clerks had worked primarily in *limited* jurisdiction courtrooms, the ALJ's conclusion regarding the difference between the two classifications was correct.

Finally, Charging Parties claim that "the issue of qualifications was not at issue in this case." In support of this claim, they cite the Court's stipulation that it was not disputing the accuracy of Charging Parties' performance evaluations.[7] However, Charging Parties cite

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[7] Counsel for Charging Parties specifically proposed a stipulation "that there's no issue with the performance evaluations" and "that the Court is not going to take the position that the contents were wrong or they weren't as qualified as the narrative or comments in the evaluations." Counsel for the Court responded, "No, we're not contesting that," and that "[t]he documents [i.e., the performance evaluations] speak for themselves."

nothing in their performance evaluations that conflicts with the evidence that only some of the Judicial Law Clerks were performing and were capable of performing the higher level work expected of Research Attorneys.

In sum, the evidence supports the ALJ's factual findings that Research Attorneys and Law Clerks, unlike Judicial Law Clerks, primarily worked in unlimited jurisdiction assignments and on more complex legal issues, and could perform both unlimited jurisdiction and limited jurisdiction work. We therefore deny Charging Parties' exceptions to these findings.

II. Exceptions to Conclusions of Law

A. Discrimination

1. *Campbell* and *Novato*

Charging Parties except to the ALJ's application of *Novato*, *supra*, PERB Decision No. 210, to evaluate whether they established a prima facie case and whether the Court established its affirmative defense. They argue that because this case involves discrimination between two groups of employees, rather than individual retaliation, *DPA*, *supra*, PERB Decision No. 2106a-S, prescribes the application of the discrimination test from *Campbell*, *supra*, 131 Cal.App.3d 416. We reject this exception.

As a threshold matter, the most obvious explanation for the ALJ's failure to apply *Campbell* is that neither party suggested that he should do so. In their post-hearing brief to the ALJ, Charging Parties specifically argued that their case should be evaluated under *Novato*.

They made no reference to *DPA*, *Campbell*, or any test other than *Novato*.[8] The Court similarly argued that *Novato* supplied the appropriate test.

For this reason, we do not believe Charging Parties' exception is properly before us. Although the Board generally reviews exceptions to a proposed decision de novo (*City of Calexico* (2017) PERB Decision No. 2541-M, p. 1), it has previously declined to review an exception raising an issue that was not presented to the ALJ (*Colusa Unified School District* (1983) PERB Decision No. 296, p. 4 ["It is a well-established rule of administrative appellate procedure that a matter never raised before the trial judge is not properly reviewed by the appellate tribunal on appeal"]). In *Colusa Unified School District* (1983) PERB Decision No. 296a, p. 7, we explained the basis for such a rule:

> The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the heading of estoppel or waiver. . . . Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.

(See also *Whisman Elementary School District* (1991) PERB Decision No. 868, p. 20, fn. 8 [Board declined to consider issue raised for the first time in response to exceptions].)[9]

Charging Parties' conduct in this case goes beyond merely failing to raise their argument below. Not only did they neglect to ask the ALJ to apply *Campbell*, they affirmatively urged him to find in their favor based on *Novato*. Such conduct wastes the

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[8] We also find no reference to *DPA*, *Campbell*, or a "group discrimination" theory in the hearing record. Charging Parties waived their opening statement, and the parties submitted post-hearing briefs in lieu of closing statements.

[9] The National Labor Relations Board's (NLRB) rules governing exceptions to a proposed decision are substantively similar to our own. (Compare PERB Reg. 32300, subd. (a), with 29 C.F.R. § 102.46(a).) Like PERB, the NLRB rejects as "untimely" arguments not made to the ALJ. (See, e.g., *Mercy Health Partners* (2012) 358 NLRB 566, 569, fn. 1; *Midwestern Pers. Services, Inc.* (2000) 331 NLRB 348, 348, fn. 1.)

parties' time and resources, and deprives the Board of the benefits of the ALJ's expertise. Under these circumstances, we would be entirely justified in declining to consider this exception on its merits. Nevertheless, Charging Parties' argument raises an important issue concerning the appropriate test for analyzing discrimination and retaliation allegations, specifically whether *DPA*, *supra*, PERB Decision No. 2106a-S, correctly prescribed *Campbell* for group discrimination cases and *Novato* for individual retaliation cases. We address that issue here.

In *DPA*, *supra*, PERB Decision No. 2106a-S, the Board attempted to sort out the various standards of proof that apply to allegations of interference and discrimination under our statutes, tracing them to their roots in federal case law interpreting the National Labor Relations Act (NLRA). In particular, the Board explained that the *Novato* test, which requires the Charging Party to prove the employer's unlawful motive as part of its prima facie case "applies in cases where an employer is alleged to have taken an adverse action against an individual employee because of the employee's participation in protected activity." (*Id.* at p. 14.) On the other hand, the Board explained that *Campbell*, which does not require proof of unlawful motive, "applies in cases where an employer is alleged to have discriminated between two groups of employees because one of the groups participated in protected activity." (*Id.* at p. 15.)

Upon review of *Campbell* and its federal law antecedents, we find *DPA*'s characterization of *Campbell* as applying to discrimination between groups of employees and *Novato* as applying to individual retaliation too simplistic. *Campbell* relied on *NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26 (*Great Dane*), which concluded that an employer unlawfully discriminated against striking employees when it granted accrued vacation pay to

nonstrikers but denied it to strikers. Finding that this was “discrimination in its simplest form,” the Supreme Court explained, “The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity.” (*Id.* at p. 32.) Based on *Great Dane*, *Campbell* adopted the following test:

> If an employer’s discriminatory conduct is “‘inherently destructive’ of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.” [Citations.]
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> . . . “[I]f the adverse effect of the discriminatory conduct on employee rights is ‘comparatively slight,’ an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.”

(*Campbell*, *supra*, 131 Cal.App.3d at pp. 423-424, emphasis in original.)

Thus, a prima facie case is established under *Campbell* by “discrimination in its simplest form,” i.e., employer conduct that is facially or inherently discriminatory, such that the employer’s unlawful motive can be inferred without specific evidence.

This type of discrimination may manifest where an employer provides pay or benefits or other working conditions based on union membership or other protected activity. Examples of this type of discrimination include granting superseniority to strike replacement workers while denying the benefit to strikers (*NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221); granting vacation benefits to non-strikers and those returning from a strike, but not to those who continued to strike (*Great Dane*, *supra*, 388 U.S. 26); disciplining union leaders more severely than rank-and-file members (*Metropolitan Edison v. NLRB* (1983) 460 U.S. 693);

granting superior benefits to non-union members (*DPA*, *supra*, PERB Decision No. 2106a-S, pp. 17-18); or to union members (*City of San Diego* (2005) PERB Decision No. 1738-M, overruled on other grounds by *DPA*, *supra*, PERB Decision No. 2106a-S).

Inherent discrimination may also manifest in changes in employer policy taken in response to protected activity where the operative comparison is not between two different groups of employees, but between an employer's policies before and after the exercise of protected rights. *Campbell* itself exemplifies this type of sequential discrimination. In that case the employer reneged on an agreement for retroactive pay for a certain period for employees represented by the union after that union had invoked impasse procedures. (See also *Los Angeles County Employees Assn. v. County of Los Angeles* (1985) 168 Cal.App.3d 683, 688-689.)

Therefore, contrary to the Charging Parties' argument, the applicability of *Campbell* does not turn on whether a group of employees has been adversely affected by the employer's act, but on whether that act was facially or inherently discriminatory. We hereby disapprove *DPA*, *supra*, PERB Decision No. 2106a-S, to the extent it held otherwise.

Applying *Campbell* to the facts of this case, we do not find that the Court's layoff of the Judicial Law Clerks was facially or inherently discriminatory. Unlike in *Great Dane*, *supra*, 388 U.S. 26, and other cases where the employer's conduct was found facially discriminatory, the Judicial Law Clerks were distinguishable from Research Attorneys primarily by factors unrelated to their participation in protected activity. The Judicial Law Clerks were not similarly situated to the Research Attorneys, who had the skill and experience to serve in both limited and unlimited jurisdiction courts. Although some Judicial Law Clerks

had the skills to serve in the more complex unlimited jurisdiction courts, the majority did not.[10] Moreover, the Court had determined to reduce the number of limited jurisdiction courts. There is nothing inherently discriminatory about laying off employees who perform work the employer has chosen to discontinue. Although Charging Parties claim that the Court's justification for the layoffs was pretextual, this is properly analyzed under *Novato*, not *Campbell*.

But even if the primary difference between the Judicial Law Clerks and the Research Attorneys had been their represented status, we still do not believe unlawful motive could be presumed under *Campbell*. The possibility of obtaining better treatment as organized, represented employees is implicit in any collective bargaining scheme. That is precisely the point of collective bargaining. "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions." (*NLRB v. Allis-Chalmers Mfg. Co.* (1967) 388 U.S. 175, 180.) It cannot be assumed that an employer that treats represented employees better than unrepresented employees does so to punish unrepresented employees and encourage them to organize. The more logical inference is that the employer is yielding to the bargaining power of its represented employees. As the Supreme Court has explained: "When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. . . . But . . . the only encouragement or discouragement of union membership banned by the Act is

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[10] Charging Parties do not dispute Heeseman's explanation of why the Court could not selectively retain those Judicial Law Clerks capable of performing the more demanding work of Research Attorneys, viz., that the Court was required to conduct layoffs on the basis of seniority within a classification.

that which is ‘accomplished by discrimination.’” (*Local 357, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB.* (1961) 365 U.S. 667, 675-676.) Therefore, the mere fact that the Court decided to layoff unrepresented Judicial Law Clerks and not represented Research Attorneys, does not bring this case within the ambit of *Campbell*.

Because there are no grounds for drawing an inference of unlawful motive based solely on the nature of the Court’s conduct in this case, it is appropriate to evaluate Charging Parties’ case under *Novato*, not *Campbell*.

2. *Novato*

Charging Parties also except to the ALJ’s *Novato* analysis, arguing that he overlooked direct evidence of unlawful motive, and incorrectly found that the Court met its burden of establishing that it would have laid off Charging Parties regardless of their protected activity. We reject both exceptions.

a. Evidence of Unlawful Motive

Charging Parties claim Heeseman provided direct evidence of motive in her letters denying Charging Parties’ appeals of the layoff decisions, by identifying Charging Parties’ unrepresented status and their decision to remain unrepresented as “grounds for layoff.” While Heeseman did mention these facts in her letters, they were not provided as grounds for layoff. Rather, they were responsive to Charging Parties’ argument that the Court failed to credit their seniority by retaining Research Attorneys with less seniority. By way of explaining that “Judicial Law Clerks held a different position than Research Attorneys,” Heeseman listed several differences between the Judicial Law Clerk and Research Attorney classifications, including their minimum qualifications, benefits, and representational status. Thus, we agree

with the ALJ that Heeseman's letters cannot be reasonably read to demonstrate that the Court made its decision because Charging Parties were unrepresented.

Charging Parties also claim Heeseman's testimony contained evidence of unlawful motive. They note that Heeseman's denial letters mention their unrepresented status, and they deride Heeseman's attempts to explain those statements at hearing as "after-the-fact" and "nonsensical." But the ALJ observed that "Heeseman credibly testified that the reference to Charging Parties' unrepresented status was made to highlight the fact that they receive different benefits from Research Attorneys based on the difference in representational status" (proposed decision, p. 14), and we defer to an ALJ's factual findings that incorporate credibility determinations, absent evidence to support overturning such determinations (*Los Angeles Unified School District* (2016) PERB Decision No. 2479, p. 13). While testimony that is evasive, exaggerated, inconsistent, or inherently unbelievable may be deemed not credible (*id.* at p. 16), Heeseman's testimony does not fall within any of these categories.[11] Rather, Heeseman testified consistently that the classifications differed mainly in their duties and abilities, and that she had referred to the differences in representation status and benefits to further illustrate that Judicial Law Clerks and Research Attorneys were in different classifications.

Charging Parties also claim there was direct evidence of unlawful motive in the Court's refusal to consider hiring the laid off Judicial Law Clerks for the vacant Research Attorney positions that were advertised shortly after the layoff. Heeseman informed Charging Parties

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[11] Charging Parties criticize Heeseman for providing a "long explanation of MegaFlex benefits," after identifying those benefits as one of the distinctions between Judicial Law Clerks and Research Attorneys. She did so, however, only in response to the following open-ended question from Charging Parties' attorney: "Can you expand on that. What do you mean?"

that they were ineligible to apply for the positions, which were restricted to current or former employees in the Law Clerk classification. Heeseman's response, however, related only to the vacant Research Attorney positions, not to the Court's layoff decision. It therefore supplies no evidence of the Court's motives for laying off Charging Parties. The ALJ did, however, find that it provides circumstantial evidence of unlawful motive,[12] a finding the Court has not excepted to and is not before us. (PERB Regulation 32300, subd. (c).) Because the ALJ did find a prima facie case, we next consider the ALJ's finding that the Court met its burden of proving that it would have laid off the Judicial Law Clerks regardless of their protected activity.

b. The Court's Burden

We also agree with the ALJ's conclusion that the Court met its burden of showing it would have laid off Charging Parties regardless of their protected conduct. As the ALJ noted, the Court was required to establish that it had an alternative non-discriminatory reason for laying off Charging Parties, and that it acted because of this alternative non-discriminatory reason and not because of Charging Parties protected activity. (See *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 8.) In conducting this analysis, we weigh the evidence supporting the employer's justification for the adverse action against the evidence of the unlawful motive. (*Rocklin Unified School District* (2014) PERB Decision No. 2376, p.

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[12] Specifically, the ALJ found this to be "disparate treatment," given that Charging Parties had been referred to as Research Attorneys until 2005 and the Court had previously allowed Judicial Law Clerks to interview for positions that were restricted to Research Attorneys.

14.) "When evaluating the employer's justification, the question is whether the justification was 'honestly invoked and was in fact the cause of the action.'" (*Ibid.*)[13]

Here, the ALJ found that the Court's decision to restructure was "born of financial necessity," that the Court reduced limited jurisdiction courtrooms as part of its restructuring, and that it therefore decided to eliminate "the entire Judicial Law Clerk classification, whose primary job duties were to provide support to limited jurisdiction courtrooms." (Proposed decision, p. 16.) The ALJ acknowledged that:

> [w]hile there were a handful of Judicial Law Clerks who the Court deemed to perform at the level of a Research Attorney, the testimony of the Court's management employees made it clear that there was a perception among Court managers that Judicial Law Clerks, as a class, performed work that was inferior or less challenging than Research Attorneys and Law Clerks. This perception led the Court to form the belief that the classification was less flexible than the Research Attorney and Law Clerk classifications. On that belief, the decision was made to eliminate the entire Judicial Law Clerk classification and shift their duties (to the extent they still existed) to Research Attorneys and Law Clerks.

(Proposed decision, pp. 16-17.)

None of Charging Parties' arguments against the ALJ's conclusion are persuasive. Charging Parties question the Court's financial justification by citing the facts that the Court "opted to spare [from layoff] no less than 27 law clerks . . . with less than 2.5 years of experience" and began hiring Research Attorneys within two months of the layoff of the Judicial Law Clerks. (Exceptions, pp. 28-29.) However, the Court elected not to fill 20 Law

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[13] To the extent Charging Parties—as demonstrated by their dogged attempts to establish direct evidence of unlawful motive—believe direct evidence is necessarily stronger or more persuasive than circumstantial evidence, we reject that proposition. Because direct evidence of unlawful motive is rarely available, it is black letter law that an allegation of discrimination may be proven solely on the basis of circumstantial evidence. (See, e.g., *Omnitrans* (2010) PERB Decision No. 2121-M, p. 10.)

Clerk positions after their terms expired, and Heeseman testified that the decision to hire additional Research Attorneys was "likely" because the Court had lost Research Attorneys through attrition. There is no evidence that the Court created new Research Attorney positions to replace the laid-off Judicial Law Clerks. On these facts, we cannot conclude that the Court's claim of financial necessity was fabricated.

Charging Parties also argue that the distinction between Judicial Law Clerks and Research Attorneys was pretextual. As explained above, however, we have affirmed the ALJ's findings that although *some* Judicial Law Clerks primarily worked on unlimited jurisdiction matters, a majority of Judicial Law Clerks did not. Moreover, there was evidence that one Judicial Law Clerk performed at the same level as a Research Attorney, but there was specific testimony that three others did not. Therefore, the distinction between the two classifications was not pretextual.

Charging Parties further point out that since the layoff of Judicial Law Clerks, the Court has had four Research Attorneys handling limited jurisdiction matters, one of them doing so full-time and the other three handling both limited and unlimited jurisdiction matters. According to Heeseman's uncontradicted testimony, the Court initially planned to assign only one Research Attorney to these limited jurisdiction matters following the layoff, but it later decided to provide additional support to handle backlogs that had developed. The Court's failure to anticipate the need for more limited jurisdiction support would not necessarily undermine its justification for laying off the Judicial Law Clerks. However, even if the Court had reason to suspect this need would arise, the fact remains that the layoff allowed the Court to use more flexible Research Attorneys to provide support for both limited and unlimited

jurisdiction matters. The Court never claimed it was eliminating the work entirely, only that it preferred to retain the more flexible Research Attorney classification.

Charging Parties' final argument against the Court's justification for the layoffs is that the Court has never laid off a Local 910-represented employee. Based on this fact, Charging Parties conclude that the Court would not have laid them off if they had been represented by Local 910. We are not persuaded. In light of the Court's financial distress and its resulting decision to reduce the number of limited jurisdiction courtrooms, it is more likely than not that the Judicial Law Clerks would have been laid off even if they had been represented by Local 910, all else being equal. As the ALJ noted, the overwhelming majority of laid off employees were represented. Charging Parties have cited no evidence that Local 910 influenced the Court's decision to spare Local 910 employees or to lay off the Judicial Law Clerks. The only evidence is to the contrary; Heeseman testified that she had met with Local 910 to "describe[e] the layoff process to them," but that the layoff of Judicial Law Clerks was never discussed with Local 910.[14]

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[14] Charging Parties argue that Heeseman "passed on the opportunity to deny" that Charging Parties would have been spared from layoff if they were represented by Local 910. Charging Parties' attorney asked Heeseman, "Would they have been laid off if they would have been part of the union?" Heeseman responded, "I don't know."

We are not persuaded that this response undermines the Court's affirmative defense. If Charging Parties had been represented by Local 910, the circumstances surrounding the 2013 layoff may have been quite different. For instance, it is not clear whether Charging Parties would have become Research Attorneys, or whether they would have remained Judicial Law Clerks; the side letter agreement was silent on this issue. Moreover, the Court would have had an obligation to meet and confer with Local 910 over the effects of any proposed layoff. Such negotiations "may include the exclusive representative's robust efforts to persuade the employer that layoffs can be avoided. Those efforts may include economic concessions, or other ideas for cost-savings, or the presentation of facts that demonstrate the layoff is not necessary or need not be as deep as management proposes." (*Salinas Valley Memorial Healthcare System* (2015) PERB Decision No. 2433-M, p. 10.) The Court had no such

We therefore conclude that the Court met its burden under *Novato* to prove that it would have laid off the Judicial Law Clerks regardless of their exercise of protected rights. The Court demonstrated that it had and acted because of a non-discriminatory reason, namely the fact that Research Attorneys and Law Clerks had greater flexibility than Judicial Law Clerks.

3. Discriminatory Refusal-to-Hire

Charging Parties argue that the ALJ erred by failing to consider the allegation, included in their unfair practice charge but omitted from the complaint, that the Court refused to consider hiring Riley and Nguyen for the Research Attorney position in August 2013. Once again, the most likely explanation for the ALJ's failure to consider this allegation is Charging Parties' failure to raise it in their post-hearing brief. Although Charging Parties claimed that the facts underlying this allegation supplied circumstantial evidence of unlawful motive regarding the layoff decision, they did not argue that it was a separate violation of the Trial Court Act. Because Charging Parties failed to raise this argument to the ALJ, we decline to consider it. (*Colusa Unified School District*, *supra*, PERB Decision No. 296, p. 4.)

B. Interference

Charging Parties except to the ALJ's conclusion that the side letter between the Court and Local 910 did not interfere with Charging Parties' rights to remain unrepresented. We reject each of the arguments in support of this exception.

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obligation before laying off unrepresented employees such as Charging Parties. (*Alameda County Medical Center* (2004) PERB Decision No. 1620-M, p. 2.)

Therefore, we are unable to draw any meaningful conclusion from Heeseman's agnostic response to Charging Parties' incomplete hypothetical question.

First, Charging Parties argue that the ALJ applied the wrong test to their interference allegation: *Novato*, *supra*, PERB Decision No. 210, instead of *Carlsbad Unified School District* (1979) PERB Decision No. 89. In fact, the ALJ did not refer to either of those cases in analyzing the interference allegation. He instead quoted the test for interference from *Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807 (*Tulare*), a case arising under the Meyers-Milias-Brown Act (MMBA).[15] This was required by Trial Court Act section 71639.3, which directs the Board to interpret the language of article 3 of the Trial Court Act in accordance with judicial interpretations of the same language of the MMBA.[16] As we have noted, *Tulare* is the only published appellate decision on the issue of interference under the MMBA. (*DPA*, *supra*, PERB Decision No. 2106a-S, p. 9.) Therefore, the ALJ correctly applied *Tulare*.[17]

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[15] The MMBA is codified at Government Code section 3500 et seq.

[16] MMBA section 3506 provides that "[p]ublic agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." Trial Court Act section 71635.1 provides that "[t]rial courts and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against court employees because of their exercise of their rights under Section 71631."

[17] In any event, the only arguable difference between *Tulare* and *Carlsbad* is that *Tulare* suggests that employees must have engaged in protected activity before the employer took action that "tends to interfere with, restrain, or coerce employees in the exercise of those activities" (*Tulare*, *supra*, 167 Cal.App.3d at p. 807, citing *Fun Striders, Inc. v. NLRB* (9th Cir. 1981) 686 F.2d 659, 661), whereas *Carlsbad* requires only a showing "that the employer's conduct tends to or does result in some harm to employee rights" (*Carlsbad*, *supra*, PERB Decision No. 89, p. 10), without regard to whether employees first engaged in protected activity.

Although *Tulare* cites one federal case appearing to require prior protected activity, ample authority supports *Carlsbad*'s broader formulation of the interference test. (See, e.g., *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, 802 [affirming that a rule prohibiting solicitation of union membership interferes with employee rights under the NLRA in violation of NLRA section 8(a)(1); *Guardsmark, LLC v. NLRB* (D.C. Cir. 2007) 475 F.3d 369, 374 ["To

Charging Parties next argue that the ALJ incorrectly relied on *County of Riverside* (2010) PERB Decision No. 2119-M in noting that Charging Parties were unaware of the side letter's existence. Charging Parties do not dispute that they were unaware of the side letter, but argue that it nevertheless interfered with their rights because it involved the "negotiation of material terms and conditions of Charging Parties' employment with another bargaining group

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determine whether a work rule violates NLRA section 8(a)(1), the Board considers '"whether the rule[] would reasonably tend to chill employees in the exercise' of their statutory rights"]; *Yoshi's Japanese Rest., Inc.* (2000) 330 NLRB 1339, 1347, fn. 3; *Am. Freightways Co., Inc.* (1959) 124 NLRB 146, 147, citing *NLRB v. Illinois Tool Works* (7th Cir. 1946) 153 F.2d 811, 814 ["The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act"].)

While the Board is required to apply *Tulare* in interference cases under the MMBA (§§ 3509, subd. (b), 3510, subd. (a)) and the Trial Court Act (§ 71639.3), we must also attempt when possible to harmonize the various statutes under our jurisdiction (*Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090 [by vesting PERB with jurisdiction over the MMBA, the Legislature intended "a coherent and harmonious system of public employment relations laws"].) We have previously attempted to harmonize *Tulare* and *Carlsbad*. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, p. 22.)

A strict application of *Tulare*'s interference test under the MMBA and Trial Court Act would make those statutes an anomaly by permitting an employer to promulgate work rules or threats aimed at deterring protected activity *before* its employees exercise their rights. This type of conduct is prohibited under the other statutes within our jurisdiction. (See, e.g., *Los Angeles Community College District* (2014) PERB Decision No. 2404, p. 9 ["To prove interference, a charging party need not establish that the [work] rule was promulgated in response to protected activity. The relevant question is whether the employer rule *would tend to chill* employees in the exercise of their protected rights" (emphasis in original)]; *Rio Hondo Community College District* (1983) PERB Decision No. 292, pp. 13-14 [employer unlawfully threatened to suspend union's statutory rights if it engaged in a strike].)

Given that our precedent is consistent with federal law, and that *Tulare* also relied on federal law, *Tulare* and *Carlsbad* may not be inconsistent with each other. But we need not definitively resolve this issue here, because the ALJ concluded that Charging Parties did engage in protected activity, but failed to present evidence that the Court's conduct "had any effect on [Charging Parties] right to remain unrepresented." (Proposed decision, p. 11.) We are unable to discern how the result would have been different had the ALJ applied *Carlsbad* rather than *Tulare*.

and the failure of the employer . . . to notify Charging Parties of those changes." According to Charging Parties, the side letter "literally eliminated Charging Parties' sham classification and replaced them with members of the bargaining group" and resulted in Charging Parties "no longer gain[ing] seniority" and "los[ing] seniority by attrition." Charging Parties conclude that "[i]f Charging Parties were a union, there is no doubt this would have been considered interference," citing *Alameda County Management Employees Assn. v. Superior Court* (2011) 195 Cal.App.4th 325 (*ACMEA*) and *Victor Valley Community College District* (2003) PERB Decision No. 1543 (*Victor Valley*).

We reject this argument. It ignores the substantive differences between the rights of employees and those of employee organizations under the Trial Court Act.[18] The side letter agreement undoubtedly reduced the collective strength of Charging Parties' job classification by reducing the size of the classification through attrition (*Solano County Community College District* (1982) PERB Decision No. 219, p. 9), and, perhaps, left Charging Parties more vulnerable to layoff as a result. But Charging Parties, as individual employees, had no right to meet and confer with the Court over their terms and conditions of employment. (*Alameda County Medical Center* (2004) PERB Decision No. 1620-M, p. 2.) For this reason, *ACMEA*, *supra*, 195 Cal.App.4th 325, in which the employer violated its duty to meet-and-confer with a recognized employee organization, is inapposite.

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[18] The Trial Court Act gives employees "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations"; "the right to refuse to join or participate in the activities of employee organizations"; and "the right to represent themselves individually in their employment relations with the trial court." (§ 71631.) Recognized employee organizations, on the other hand, have the rights "to represent their members in their employment relations with trial courts as to matters covered by this article" (§ 71633), as well as to "meet and confer in good faith [with the trial court] regarding wages, hours, and other terms and conditions of employment within the scope of representation" (§ 71634.2, subd. (a)).

Victor Valley, *supra*, PERB Decision No. 1543, is also inapposite. In that case, the employer violated its duty of neutrality by agreeing to place a group of unrepresented employees in a represented bargaining unit, knowing that a different union was actively attempting to organize them. Here, however, there was no competing union seeking to represent the Judicial Law Clerks, nor any other evidence that the Court was favoring one side in the midst of an organizing contest between multiple unions.

Charging Parties also argue that the Court interfered with their rights by failing to notify them of the side letter agreement and then referring to their decision not to join Local 910's bargaining unit when responding to their appeals of the layoff decision. This argument relies on the same strained reading of Heeseman's letter that we have already rejected. Contrary to Charging Parties' claim, Heeseman did not use Charging Parties' unrepresented status or their decision not to join the bargaining unit against them; she merely recounted these facts as evidence that Judicial Law Clerk and Research Attorney were distinct classifications.

We also agree with the ALJ in his determination that even if the Charging Parties had known about the Side Letter in November 2007, it created no incentive or disincentive for them to remain unrepresented because there was no benefit being offered to join Local 910 or to refrain from doing so. (See proposed decision, pp. 11-13.)

Therefore, we affirm the ALJ's conclusion that the side letter agreement itself and the Court's failure to notify Charging Parties of its existence did not interfere with Charging Parties' rights.

C. Violation of the Trial Court Act, section 71652.

Charging Parties' final exception concerns the ALJ's conclusion that the Board lacks jurisdiction over section 71652, which appears in article 5 of the Trial Court Act.[19] We deny this exception.

As we have noted, "[t]he Trial Court Act, unlike the [MMBA] or [the Educational Employment Relations Act[20]], is both a collective bargaining law and an employment rights statute." (*Sonoma County Superior Court* (2017) PERB Decision No. 2532-C, p. 22.) Article 3 of the Trial Court Act contains its labor relations provisions. It sets forth, among other things, the rights of employees to be represented by and participate in the activities of employee organizations, and the rights of employee organizations to represent their members and meet and confer with trial courts over wages, hours, and other terms and conditions of employment. Article 3 also includes section 71639.1, which establishes the powers and duties of the Board. As relevant here, that section provides:

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[19] Section 71652 of the Trial Court Act provides:

> (a) A trial court employee may be laid off based on the organizational necessity of the court. Each trial court shall develop, subject to meet and confer in good faith, personnel rules regarding procedures for layoffs for organizational necessity. Employees shall be laid off on the basis of seniority of the employees in the class of layoff, in the absence of a mutual agreement between the trial court and a recognized employee organization providing for a different order of layoff.
>
> (b) For purposes of this section, a "layoff for organizational necessity" means a termination based on the needs or resources of the court, including, but not limited to, a reorganization or reduction in force or lack of funds.

[20] The Educational Employment Relations Act (EERA) is codified at Government Code section 3540 et seq.

> A complaint alleging any violation *of this article* or of any rules and regulations adopted by a trial court pursuant to Section 71636 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes *of this article*, shall be a matter within the exclusive jurisdiction of the board. . . . The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations *of this article* and Section 71639.3.

(Trial Court Act, § 71639.1, subd. (c), emphasis added.) As we have long recognized, the Board "has only such jurisdiction and powers as have been conferred on it by statute." (*Central Contra Costa Transit Authority* (2012) PERB Decision No. 2263-M, p. 6, citing *North Orange County Regional Occupational Program* (1990) PERB Decision No. 857.) Nothing in the Trial Court Act can be read to give the Board jurisdiction to enforce article 5 of the statute.[21]

Charging Parties cite PERB Regulation 32606, subdivision (g), which makes it an unfair practice for a trial court to "[i]n any other way violate the Trial Court Act or any local rule adopted pursuant to Government Code section 71636." Although our regulations elsewhere define "Trial Court Act" to include the entire statute, not just article 3 (PERB Regulation 32032), the Board "cannot expand the scope of its authority beyond what has been authorized by the enabling statute" (*Regents of the University of California* (2016) PERB Order No. Ad-434-H, p. 9; see also *Graham v. State Bd. of Control* (1995) 33 Cal.App.4th 253, 260). Therefore, to the extent PERB Regulation 32606, subdivision (g), defines any violation of the Trial Court Act as an unfair practice, we regard this as a drafting error. (Cf. *Szold v.*

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[21] In *Lake County Superior Court* (2005) PERB Decision No. 1782-C, the Board determined that it did not have jurisdiction over alleged violations of section 71655, which also appears within article 5 of the Trial Court Act. The Board's reasoning in that case was that section 71655 specifically makes violations subject to review by petition for writ of mandate under Code of Civil Procedure section 1094.5. The Board specifically reserved the question of whether its jurisdiction is limited to alleged violations of article 3.

Medical Bd. of California (2005) 127 Cal.App.4th 591, 598 [courts "interpret statutes so as to avoid giving effect to drafting errors"].)[22] It does not give us jurisdiction over other articles of the Trial Court Act.

Accordingly, we agree with the ALJ that we do not have jurisdiction over alleged violations of article 5 of the Trial Court Act, including section 71652.[23]

ORDER

The unfair practice charge and complaint in Case No. LA-CE-44-C are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Banks and Krantz joined in this Decision.

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[22] Indeed, a different regulation acknowledges the limits of our Trial Court Act jurisdiction: PERB Regulation 32602, subdivision (a), specifies what shall be processed as "unfair practice charges"—notably including violations of article 3, but omitting the other articles of the Trial Court Act. That subdivision provides:

> Alleged violations of the EERA, Ralph C. Dills Act, HEERA, MMBA, TEERA, *Article 3 of the Trial Court Act*, the Court Interpreter Act, and alleged violations of local rules adopted pursuant to the MMBA, Trial Court Act or Court Interpreter Act, shall be processed as unfair practice charges.

(PERB Reg. 32602, subd. (a), emphasis added.) This supports our conclusion that PERB Regulation 32606, subdivision (g), contains a drafting error.

[23] The conclusion that we do not have jurisdiction over alleged violations of article 5 in no way prevents us from interpreting that article (and other provisions of the Trial Court Act) when necessary to resolve alleged violations of article 3. Rather, those provisions over which we lack jurisdiction are part of the landscape of "external law" that we may interpret when deciding questions that do fall within our jurisdiction. (See *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 583.)

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

KAREN A. GARRIS, ET AL., Charging Party, v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-44-C PROPOSED DECISION (March 30, 2016)

Appearances: Law Offices of Joel W. Baruch by Christopher L. Gaspard, Attorney, on behalf of Karen Garris, Madeline Clark, Patricia Conaty, John Panico, John Irwin, Genalin Riley, and Binh Nguyen; Atkinson, Andelson, Loya, Ruud & Romo by Nate J. Kowalski, Attorney, on behalf of Superior Court of California, County of Los Angeles

Before Kent Morizawa, Administrative Law Judge.

In this case, several trial court employees allege that a trial court violated the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] by interfering with their rights under the Trial Court Act, retaliating against them for engaging in protected activity, and laying them off for reasons unrelated to organizational necessity. The trial court denies any violation.

PROCEDURAL HISTORY

On November 15, 2013, Charging Parties Karen Garris, Madeline Clark, Patricia Conaty, John Panico, John Irwin, Genalin Riley, Binh Nguyen, and Elizabeth Ann Turner filed an unfair practice charge against Respondent Superior Court of California, County of Los Angeles (Court) alleging the Court violated the Trial Court Act by: (1) failing to acknowledge

[1] The Trial Court Act is codified at Government Code section 71600 et seq.

Charging Parties' seniority; (2) laying them off in retaliation for engaging in protected activity; (3) laying them off for reasons that were not based on organizational necessity; (4) entering into a side letter agreement that interfered with their rights under the Trial Court Act; (5) failing to meet and confer with them in good faith; and (6) failing to give them notice of a unilateral change to the terms and conditions of employment. On January 26, 2015, the Charging Parties withdrew the allegations regarding the Court's failure to acknowledge their seniority, its refusal to meet and confer in good faith, and its failure to give notice of a unilateral change to the terms and conditions of employment.

On April 9, 2015, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging the Court violated Trial Court Act sections 71631, 71635.1, and 71652, and PERB Regulation[2] 32606, subdivision (a), when it: (1) entered into a November 17, 2007 side letter agreement with the American Federation of State, County and Municipal Employees, Local 910 (Local 910); (2) laid off Charging Parties in retaliation for engaging in protected activity; and (3) laid off Charging Parties for reasons that were not based on organizational necessity.

On April 23, 2015, the Court answered the complaint denying any violation of the Trial Court Act or PERB Regulations and setting forth its affirmative defenses. The parties participated in an informal settlement conference on May 27, 2015, but the matter was not resolved.

On September 14, 2015, the Court filed a motion for summary judgment on the basis that the allegation regarding the November 17, 2007 side letter agreement was barred by the statute of limitations, Charging Parties were not laid off for an unlawful retaliatory reason, and

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the allegation that Charging Parties' layoffs were not based on organizational necessity is outside PERB's jurisdiction under the Trial Court Act.

On October 5, 2015, Turner withdrew from the unfair practice charge, and the case was dismissed as to her.[3]

On October 6, 2015, the Court's motion for summary judgment was denied, and formal hearing was held on October 12-15, 2015. The matter was submitted for a proposed decision with the filing of closing briefs on February 1, 2016.

FINDINGS OF FACT

Parties

Charging Parties are trial court employees within the meaning of Trial Court Act section 71601, subdivision (*l*)(1).

The Court is a trial court within the meaning of Trial Court Act section 71601, subdivision (k), and PERB Regulation 32033, subdivision (a).

Background

Charging Parties were initially hired as law clerks by the Los Angeles municipal courts. They provided support to their assigned judges by conducting legal research and drafting memoranda relating to the matters on the judges' dockets, which consisted primarily of limited jurisdiction matters. As municipal court employees, Charging Parties received "MegaFlex" benefits, a cafeteria plan that provided them with cash to purchase the level of benefits they desired and allowed them to keep any unspent monies.

In 2000, Charging Parties became employees of the Court when the Los Angeles municipal courts merged with the Court in a process known as unification. The Court has three

[3] Any further reference in the proposed decision to Charging Parties refers only to Garris, Clark, Conaty, Panico, Irwin, Riley, and Nguyen.

job classifications that perform similar duties as Charging Parties—Research Attorney and two types of Law Clerk, those who have passed the California bar examination and those who have not. Research Attorney positions are permanent whereas Law Clerk positions are temporary not to exceed two years. Unlike the former municipal court law clerks, Research Attorneys and Law Clerks are primarily assigned to unlimited jurisdiction courtrooms and work on more complex legal issues.

At or around the time of unification, Local 910 became the exclusive representative for a new bargaining unit consisting of Research Attorneys and Law Clerks. Former municipal court law clerks were not included in the new bargaining unit, and Charging Parties remained unrepresented. When Local 910 and the Court discussed bringing former municipal court law clerks into the bargaining unit, the Court stated that doing so would require a petition to be filed under the unit modification procedures in the Court's Employee Relations Policy.

Following unification, the Court initially referred to Charging Parties as both "Law Clerk, MC" and "Research Attorney." While a handful of Charging Parties were assigned to unlimited jurisdiction courtrooms, most remained in limited jurisdiction assignments. Charging Parties received the same salary as Research Attorneys, but they did not have the same benefits. Charging Parties maintained their MegaFlex benefits and were provided the opportunity to enroll in a 401(k) retirement plan, both of which are only available to unrepresented employees. The employees represented by Local 910 received a different set of negotiated benefits.

In 2005, the Court informed Charging Parties that their classification title was being changed to Judicial Law Clerk. The Court stated the change was only a title change and did not result in any change to their salary or benefits.

July 2013 Layoffs

Beginning in fiscal year 2008-2009, the California court system faced unprecedented statewide reductions in permanent funding totaling over $1 billion. In response, the Court was forced to drastically restructured how it provided services to the public, resulting in the elimination of 1,386 positions since fiscal year 2009-2010. Of that total, 511 positions were eliminated as part of the Court's Consolidation Plan following fiscal year 2012-2013. That plan resulted in the closure of eight courthouses as well as a substantial reduction in the number of limited jurisdiction courtrooms and the legal support provided to those courtrooms. The reduction in limited jurisdiction courtrooms and support services led the Court to eliminate the entire Judicial Law Clerk classification and assign Research Attorneys to perform the duties previously performed by the Judicial Law Clerks. Nicole Heeseman, a current Court Commissioner and Managing Research Attorney at the time of the layoffs, testified that the Judicial Law Clerk classification was eliminated because the Court determined that the Research Attorney classification was the more flexible classification of the two. All Research Attorneys could satisfactorily perform the work of Judicial Law Clerks, but not all Judicial Law Clerks could satisfactorily perform the work of Research Attorneys. The elimination of 511 positions in the Consolidation Plan resulted in the layoff of 177 employees, 22 of whom were unrepresented, and the balance of whom were represented. While no employees represented by Local 910 were laid off, its bargaining unit was reduced by 20 positions when Law Clerk positions were not backfilled at the expiration of the incumbents' terms.

Several months prior to the layoff, the Court began negotiating the effects of the layoffs with the exclusive representatives of the affected bargaining units. During these negotiations, the Court did not discuss the decision to lay off employees or the status of Judicial Law Clerks.

Kevin Norte, the Treasurer of Local 910, met with several Charging Parties and suggested that they consider joining the Local 910 bargaining unit so they could be a part of the negotiations regarding the effects of the layoff. No Charging Parties followed up with Norte about organizing.

On June 14, 2013, the Court informed Nguyen, Riley, Panico, Irwin, Clark, and Garris that their positions were being eliminated and that they would be laid off. On the same date, the Court informed Conaty that her position was being eliminated and that she would be "reduced" into a previously held position as an Administrative Assistant II. Charging Parties appealed the Court's decision to eliminate their positions on the basis that the decision violated the Trial Court Act and the Court's Personnel Policies and Procedures.

On or about June 28, 2013, Heeseman denied Charging Parties' appeals. Her denial to Riley is representative of her denials to the other Charging Parties and states in relevant part:

> Government Code section 71652 authorizes trial courts to layoff employees for organizational necessity. It also provides that "Employees shall be laid off on the basis of seniority of the employees *in the class of layoff*, in the absence of a mutual agreement between the trial court and a recognized employee organization providing for a different order of layoff." The Court's Layoff Policy provides for layoffs to be done by classification. Pursuant to that authority and the terms of the Layoff Policy, the Court identified classifications that would be curtailed consistent with the requirements of its Consolidation Plan. It identified the number of affected positions in each classification and implemented a layoff process that resulted in 177 employees being laid off, including you. One of the classifications that was eliminated in its entirety was Judicial Law Clerk. [Emphasis in original.]
>
> In an effort to address an $85 million budget deficit, the judges approved a plan to consolidate and reorganize court operations to a level funded by its significantly reduced operating budget. Among other things, the Consolidation Plan concentrated limited jurisdiction courtrooms into fewer courthouses. As part of the reorganization of its legal services, the Court elected to

> discontinue providing legal support to the majority of the remaining limited jurisdiction courtrooms. That determination prompted the decision to eliminate the attorney classification whose primary function for the last 13 years has been to support limited jurisdiction courtrooms. That decision was not made in concert with any employee organization and was not informed by the represented status of the classification or by any intent to discriminate on the basis of age or any other status protected by law.
>
> [* * *]
>
> In effecting the layoff of Judicial Law Clerks, the Court did not fail to credit your seniority. However, it did recognize that Judicial Law Clerks held a different position than Research Attorneys. The classification specifications for the two positions are different. The positions have different minimum requirements. The Judicial Law Clerk classification specifies that incumbents are primarily assigned to limited jurisdiction courts. The Research Attorneys are represented; Judicial Law Clerks are not. They receive different compensation and different benefits packages.
>
> Moreover, Judicial Law Clerks were afforded the opportunity to convert to Research Attorneys when the latter classification elected to be represented. To retain what they perceived to be superior employment benefits, most incumbents elected to remain Judicial Law Clerks. In recognition of the differences between the two classifications, the Court sought to assign Research Attorneys to general jurisdiction courtrooms and to assign Judicial Law Clerks to limited jurisdiction assignments.

Heeseman testified that she referenced the fact that Research Attorneys are represented and Judicial Law Clerks are not in order to highlight the different benefits packages they receive as a result of that difference. It was her belief that Judicial Law Clerks preferred the benefits that unrepresented employees received and that this preference informed their decision to remain unrepresented.

The statement in Heeseman's denial about the Judicial Law Clerks' prior opportunity to convert to Research Attorneys is a reference to a Side Letter Agreement in the 2007-2010 MOU between the Court and Local 910. The Side Letter Agreement states:

> The Court agrees that all current Judicial Law Clerk (formerly "Law Clerk, M.C.") positions that are outside of the scope of this bargaining unit shall not be filled once they become vacant. When these positions become vacant, if the incumbent is replaced, the replacement position shall be within the scope of the bargaining unit.
>
> Note: The Court may continue to fill the two part-time positions for the limited jurisdiction Default Processing Unit, which both parties agree are currently outside of the bargaining unit.
>
> Further Note: Any Judicial Law Clerk may opt into the bargaining unit within 90 days of the effective date of this MOU. Such opt in must be in writing and delivered to the Human Resources Director.

Charging Parties were not aware of the existence of the Side Letter Agreement until after they received Heeseman's denial. At no time were they provided an opportunity to opt into the Local 910 bargaining unit. The Court and Local 910 did not take any steps to inform Charging Parties of the terms of the Side Letter Agreement, and the record does not reflect that any Judicial Law Clerks availed themselves of the opportunity to opt into the bargaining unit.

On July 24, 2013, Charging Parties submitted a collectively-prepared letter to the Court's Executive Committee challenging Heeseman's denial of their appeals and demanding that the Executive Committee reconsider their layoffs. On August 2, 2013, the Court rejected the Charging Parties' challenge and deemed their layoffs to be final.

In August 2013, several Charging Parties inquired with Heeseman about a vacant Research Attorney position at the Court. She replied that former Judicial Law Clerks were ineligible for the position, which is restricted to either current employees who hold the Law

Clerk classification and are notified in writing of eligibility, or former employees who have held the Law Clerk classification for more than a total of two years. The class specification for the Research Attorney position states that the incumbent must possess "Two years of full-time experience as a Law Clerk for the Los Angeles Superior Court and [be] a member in good standing of the California State Bar." Heeseman testified that "Law Clerk" refers to the Law Clerks represented by Local 910 and not Judicial Law Clerks. While there was discussion about giving Judicial Law Clerks credit for purposes of eligibility for the Research Attorney position, it was ultimately decided that the Court could not do so given the language in the class specification for the Research Attorney. However, in the past, the Court has deviated from class specifications to accommodate applicants. For example, it processed the applications of Riley and another Judicial Law Clerk, Marcelo D'Asero, for the position of Supervising Research Attorney even though that position requires the incumbent to have at least one year of experience as Research Attorney and neither Riley nor D'Asero had the requisite experience.

ISSUES

1. Did the Court's November 17, 2007 Side Letter Agreement with Local 910 interfere with Charging Parties' rights under the Trial Court Act?

2. Did the Court lay off Charging Parties in retaliation for engaging in protected activity?

3. Does PERB have jurisdiction over a claim arising under Trial Court Act section 71652?

CONCLUSIONS OF LAW

Interference

The test for whether a respondent has interfered with the rights of employees under the Meyers-Milias-Brown Act (MMBA)[4] does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons. (*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

When interpreting the Trial Court Act, it is appropriate to take guidance from cases interpreting the MMBA and other California labor relations statutes with parallel provisions. (Government Code section 71639.3; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

In its closing brief, the Court argues that Charging Parties did not establish the first prong of the test for interference because their mere status as unrepresented employees, without any affirmative action in furtherance of that status, is insufficient to constitute protected activity. The argument is moot since the Court admitted in its answer that Charging Parties' unrepresented status was sufficient to constitute the exercise of protected activity. Paragraph 3 of the complaint states:

> Charging Parties exercised rights guaranteed by the Trial Court Employment Protection and Governance Act by being unrepresented.

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[4] The MMBA is codified at Government Code section 3500 et seq.

In its answer to the complaint, the Court admits each and every allegation in Paragraph 3. The admission of facts in a pleading serves as a waiver of proof of the facts admitted and has the effect of removing the matter from controversy. (*County of San Luis Obispo* (2015) PERB Decision No. 2427-M; see also *Regents of the University of California* (2012) PERB Decision No. 2302-H, proposed decision at p. 15, citing *Pinewood Investors v. City of Oxnard* (1982) 133 Cal.App.3d 1030, 1035 [other citations omitted].) Accordingly, the Court's admission is sufficient by itself to establish that Charging Parties' status as unrepresented employees constituted protected activity.

While Charging Parties established that their unrepresented status constituted protected activity, they did not establish that the Side Letter Agreement had any effect on their right to remain unrepresented. Since Charging Parties were unaware of the existence of the Side Letter Agreement until well after its expiration, it could not have had any effect on their decision to stay unrepresented. (See *County of Riverside* (2010) PERB Decision No. 2119-M [employer's statement to union officers that would have constituted unlawful interference with employee rights was not because the employees did not hear the statement].) Even if Charging Parties had been aware of the Side Letter Agreement in November 2007, it created no incentive or disincentive for them to remain unrepresented since there is no concrete benefit being offered to those who stay unrepresented or to those who join the Local 910 bargaining unit. The Court's decision not to fill vacant Judicial Law Clerk positions had no impact on Charging Parties since they were incumbents, and their assertion that the decision to reduce the number of Judicial Law Clerks through attrition impacted their seniority is unsupported by the record. Charging Parties maintained their seniority during their entire time with the Court, and the

Court credited them with their prior service at the Los Angeles municipal courts in calculating seniority with the Court.

Charging Parties assert that the Side Letter Agreement made it more likely that they would be laid off because it reduced the total number of Judicial Law Clerks, which in turn had the effect of incentivizing joining the Local 910 bargaining unit. Any connection between the Side Letter Agreement and Charging Parties' layoffs is tenuous and assumes the Court's decision to eliminate the entire Judicial Law Clerk classification was influenced or made easier because there were fewer incumbents in the classification. The record does not reflect that the number of incumbents in the Judicial Law Clerk classification played a part in the Court's decision to eliminate the classification. That decision was made as a result of a structural reorganization to how the Court provided limited jurisdiction services and was part of a larger plan that eliminated 511 positions, many of which were represented by a union. Whether there were 11 Judicial Law Clerks as there were in 2013 or 17 Judicial Law Clerks as there were at the time of unification, it is more likely than not that the Court would have eliminated the entire classification as part of the Consolidation Plan based on the reduction in limited jurisdiction courtrooms and legal support provided to those courtrooms.

In addition to having no impact on Charging Parties' right to remain unrepresented, the Side Letter Agreement had no impact on their right to join the bargaining unit represented by Local 910. If anything, the opt-in provision would have facilitated the exercise of this right had Charging Parties known of its existence. Even without the opt-in provision, they maintained the ability to join the Local 910 bargaining unit through the unit modification procedure in the Court's Employee Relations Policy.

Based on the above, Charging Parties did not establish a prima facie case for unlawful interference. The thrust of their argument is that the Side Letter Agreement in 2007 led to their layoff in 2013. However, it would be speculative at best to tie the two together, and there is insufficient evidence to support their claim that the Side Letter Agreement impeded their right to remain unrepresented or their right to join the bargaining unit represented by Local 910. Accordingly, their claim for unlawful interference is dismissed.

Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 71635.1 and PERB Regulation 32606, subdivision (a), the charging party must show that: (1) the employee exercised rights under the Trial Court Act; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

As discussed above, the Court has admitted that Charging Parties engaged in protected activity by being unrepresented. The parties do not dispute that the Court knew of Charging

Parties' unrepresented status or that the Court took adverse action against Charging Parties by laying them off. The only disputed factor in the retaliation analysis is nexus. Charging Parties assert that there is direct evidence of nexus because Heeseman references Charging Parties' unrepresented status in her denial of their appeals. However, while Heeseman makes the distinction between Judicial Law Clerks and Research Attorneys, she does not explicitly state that Charging Parties were laid off because of their unrepresented status. Heeseman credibly testified that the reference to Charging Parties' unrepresented status was made to highlight the fact that they receive different benefits from Research Attorneys based on the difference in representational status.

While there is no direct evidence of nexus between Charging Parties' protected status and their layoffs, there is circumstantial evidence. To begin with, the timing element is met since Charging Parties remained unrepresented at all times prior to their layoff. Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's

cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

In this case, circumstantial evidence of nexus exists based on the Court's disparate treatment of Charging Parties with regard to the vacant Research Attorney position in August 2013. The record is clear that for several years after unification, the Court consistently referred to and treated Charging Parties as Research Attorneys, with several actually performing the same duties as Research Attorneys in unlimited jurisdiction courtrooms. Heeseman's refusal to consider experienced individuals, such as Riley and Nguyen, for the vacant Research Attorney position on the basis that they had never served as Law Clerks was pretextual. The fact that Judicial Law Clerks were not Law Clerks is a technicality that could have been worked around since the Court has made exceptions in the past based on a similar type of technicality.

Based on the above, Charging Parties established a prima facie case for retaliation.

<u>Employer's Burden</u>

Once the charging party establishes a prima facie case for retaliation, the burden of proof shifts to the respondent to show that the adverse action occurred for reasons unrelated to

the protected activity. (*Novato*, *supra*, PERB Decision No. 210; *Martori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083, 1089, *enf'd on other grounds* (1st Cir. 1981) 662 F.2d 899, *cert. denied* (1982) 455 U.S. 989.) In cases where an adverse action appears to have been motivated by both protected and unprotected conduct, the issue is whether the adverse action would have occurred "but for" the protected acts. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C.) This requires the employer to establish that it had an alternative non-discriminatory reason for the challenged action and that it acted because of this alternative non-discriminatory reason and not because of the employer's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337.) Stated another way, the respondent must prove by a preponderance of the evidence that the challenged action would have occurred in the absence of the employee's protected activity. (*Ibid*.)

The Court met its burden to show that it would have laid off Charging Parties even in the absence of their protected activity. There is ample evidence to support a finding that the Court's decision to eliminate the Judicial Law Clerk classification was born of financial necessity. The 2008-2009 financial crisis spurred a drastic restructuring of the Court's operations, part of which included the 2012-2013 Consolidation Plan that resulted in the closure of eight courthouses and a corresponding reduction in limited jurisdiction courtrooms. As part of that reduction, the Court determined it would eliminate the entire Judicial Law Clerk classification, whose primary job duties were to provide support to limited jurisdiction courtrooms. While there were a handful of Judicial Law Clerks who the Court deemed to perform at the level of a Research Attorney, the testimony of the Court's management employees made it clear that there was a perception among Court managers that Judicial Law

Clerks, as a class, performed work that was inferior or less challenging than Research Attorneys and Law Clerks. This perception led the Court to form the belief that the classification was less flexible than the Research Attorney and Law Clerk classifications. On that belief, the decision was made to eliminate the entire Judicial Law Clerk classification and shift their duties (to the extent they still existed) to Research Attorneys and Law Clerks. This decision would have occurred regardless of whether Charging Parties were unrepresented or not. In fact, the overwhelming majority of laid off employees were represented.

Based on the above, the Court has met its burden to show it would have laid off Charging Parties even in the absence of their protected activity, and their claim for unlawful retaliation is dismissed.

Violation of Trial Court Act section 71652

The Court argues that under *Lake County Superior Court* (2005) PERB Decision No. 1782-C (*Lake County*), the Board has no jurisdiction over any claim arising under Article 5 of the Trial Court Act. In *Lake County*, a trial court employee filed an unfair practice charge alleging that the trial court violated Article 5 of the Trial Court Act when effectuating her termination and thereby denied her procedural due process. (*Ibid.*) The Board dismissed her charge, noting that Trial Court Act section 71655, subdivision (b), specifically vests the courts, not PERB, with the power to review alleged due process violations in connection with disciplinary decisions. (*Ibid.*) In doing so, the Board limited its holding to procedural due process violations under Article 5 and declined to rule on whether it had jurisdiction over the remaining provisions of Article 5, including Trial Court Act section 71652. (*Ibid.*)

Given its narrow holding, *Lake County* is not dispositive to this case. However, its reasoning may be applied. The Trial Court Act was enacted to do more than just govern labor

relations between trial courts and their employees. It was broad legislation enacted to "establish a new trial court employee personnel system, as specified, governing, among other things, the authority to hire trial court personnel, and to regulate their classification and compensation, labor relations, personnel selections and advancement, employment protection, retirement, and personnel file." (Legis. Counsel's Dig., Sen. Bill No. 2140, Ch. 1010 (1999-2000 Reg. Sess.)). Trial Court Act section 71639.1, subdivision (b), sets forth the powers and duties of the Board under the Trial Court Act as follows:

> The powers and duties of the board described in [Government Code] Section 3541.3 shall also apply, as appropriate, to this article and shall include the authority as set forth in subdivisions (c) and (d). Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a trial court has no rule. [Emphasis added.]

The plain language of this statute encapsulates the Legislature's desire to limit PERB's jurisdiction to claims arising under Article 3 of the Trial Court Act, which governs labor relations. Nothing in the Trial Court Act or its legislative history indicates that the legislature sought to expand PERB's jurisdiction to include oversight over matters that are traditionally outside of its ambit, such as employee layoffs unrelated to the commission of unfair labor practices. It would be incongruent for the Legislature to grant PERB this type of authority over trial court employees and no other public employees, especially in the absence of any clear language evidencing its intent to do so. Accordingly, I find that PERB lacks jurisdiction over Charging Parties' claim arising under Trial Court Act 71652, and the claim is dismissed on that basis.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-44-C, *Karen A. Garris, et al. v. Superior Court of California, County of Los Angeles*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)