STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AURORA LE MERE, Charging Party, v. UNITED TEACHERS LOS ANGELES, Respondent.	Case No. LA-CO-1654-E PERB Decision No. 2581 August 21, 2018

Appearances: Law Office of Douglas B. Spoors, by Douglas B. Spoors, Attorney, for Aurora Le Mere; Bush Gottlieb, by Jesús E. Quiñonez, Attorney, for United Teachers Los Angeles.

Before Banks, Winslow, and Shiners, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Aurora Le Mere (Le Mere) to an administrative law judge's (ALJ) proposed decision (attached). The complaint alleged that United Teachers Los Angeles (UTLA or Union) breached its duty of fair representation under the Educational Employment Relations Act (EERA)[1] by not filing a notice of appeal challenging Le Mere's seven-day suspension without pay.

The ALJ dismissed the complaint, concluding that no duty of fair representation arose because (1) UTLA did not have exclusive control over the appeal process since the collective bargaining agreement (CBA) between UTLA and Le Mere's employer, the Los Angeles Unified District (District), authorized either the Union or the affected employee to file a notice of appeal, and (2) UTLA did not make any promise or affirmation that it would file an appeal

[1] The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

on Le Mere's behalf. Additionally, the ALJ found that Le Mere failed to establish that UTLA's conduct was arbitrary, discriminatory, or taken in bad faith, and thus UTLA's, at most, negligent conduct did not violate its duty of fair representation.

The Board has reviewed the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions. Based on this review, we conclude that the ALJ's factual findings are supported by the record and that his conclusions of law are well reasoned and consistent with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, except as noted below, and as supplemented by the following discussion of one of Le Mere's exceptions.

DISCUSSION

EERA section 3544.9 imposes an obligation on the exclusive representative to fairly represent each and every employee in the bargaining unit. The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.)

Le Mere argues that UTLA breached its duty of fair representation by failing to file a notice of appeal challenging her seven-day suspension without pay. The applicable CBA between UTLA and the District provides different procedures for appealing discipline based on the nature of the discipline imposed. In cases where the discipline imposed includes a suspension without pay, the CBA specifies that:

> [a] notice of appeal to the office of the Cluster Administrator/ Division Head shall be delivered within three days (as defined in Article V, Section 6.0) of receipt of the form. Within three days after receipt of the employee's notice of appeal, the Region or Division Superintendent (or designee) shall hold an appeal meeting to discuss the matter, and shall by the end of the day

> following, announce a decision. The announcement shall be in person or by telephone, with an immediate confirming letter sent to the employee and representative, if any. Within two days after the above administrative appeal decision is announced, UTLA must, if it determines that the matter is to be appealed to arbitration, notify the District in writing of its intention. UTLA and the District shall select an arbitrator, and the dispute will then be calendared for expedited arbitration pursuant to Article V, Section 15.0. <u>If at any of the above steps the employee or UTLA does not appeal as provided above, the discipline shall be considered final</u>.

(Emphasis added.) As the ALJ correctly concluded, this CBA provision allows either the employee or UTLA to file the notice of appeal.

Le Mere contends that, notwithstanding the CBA language allowing an employee to file a notice of appeal, UTLA had a past practice of filing disciplinary appeals on behalf of bargaining unit employees, which created a duty to file the appeal in her case.

Critically, Le Mere cites no authority, nor have we found any, holding that a duty of fair representation may arise from a union's past practice with regard to handling grievances. A union's past practice with regard to grievance processing may be relevant to whether the union breached its duty of fair representation by deviating from that practice in a particular instance. (*Service Employees International Union Local 521 (Garcia)* (2018) PERB Decision No. 2575-M, pp. 14-15; *Hart District Teachers Association (Mercado and Bloch)* (2001) PERB Decision No. 1456, adopting proposed decision at p. 19.) But the duty of fair representation does not arise from the past practice itself.

Le Mere instead relies on cases where courts have looked to contracting parties' post-execution conduct to interpret the meaning of the contract.[2] Those cases are easily

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[2] Specifically, Le Mere cites *Crestview Cemetery Association v. Dieden* (1960) 54 Cal.2d 744, *Kennecott Corporation v. Union Oil Company* (1987) 196 Cal.App.3d 1179, *Salton Bay Marine, Incorporated v. Imperial Irrigation District* (1985) 172 Cal.App.3d 914,

distinguished because Le Mere was not a party to the CBA between UTLA and the District. Furthermore, to the extent Le Mere claims that UTLA's alleged practice of filing disciplinary appeals on behalf of other employees created an implied contract to do so in her case, such a contract would be separate from the CBA and thus not subject to the duty of fair representation. Consequently, a claim that the Union breached an implied contract is outside PERB's jurisdiction. (*National Education Association-Jurupa (Norman)* (2014) PERB Decision No. 2371, pp. 12-13.)

Additionally, we do not adopt the proposed decision's statement that "if the union does not have exclusive control over the grievance process, a union may be liable for failing to file a timely grievance, if it communicated to the member that it would 'take care of it' or failed to follow through on a promise to the member and then arbitrarily did not do so." (Proposed Decision, p. 11.) In support of this statement, the ALJ cited the proposed decision in *Amalgamated Transit Union, Local 1704 (Buck)* (2007) PERB Decision No. 1898-M (*Buck*). In that case, the Board did not explicitly disavow the cited portion of the proposed decision, but nevertheless concluded that the union owed Buck a duty of fair representation because it had exclusive control over his contractually based remedy. We therefore do not read *Buck* as departing from the well-settled rule that a union's failure to file a grievance does not breach the duty of fair representation when the union lacks exclusive control over the grievance process. (See, e.g., *Beaumont Teachers Association/CTA (Grace)* (2012) PERB Decision No. 2260,

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and *Spott Electrical Company v. Industrial Indemnity Company* (1973) 30 Cal.App.3d 797. As Le Mere points out, these decisions all state that the parties' conduct after the contract is executed but before a controversy arises helps determine what the contract means. We do not disagree with this statement of the law, but it is not pertinent here because Le Mere was not a party to the CBA.

adopting dismissal letter at pp. 2-3; *Service Employees International Union, Local 99 (Arteaga)* (2008) PERB Decision No. 1991, adopting dismissal letter at p. 3.)

Because we conclude that no duty of fair representation arose in this case, we find it unnecessary to address Le Mere's other exceptions, which concern the ALJ's finding that UTLA's conduct was not arbitrary, discriminatory, or undertaken in bad faith.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CO-1654-E are hereby DISMISSED.

Members Banks and Winslow joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

AURORA LE MERE,

Charging Party,

v.

UNITED TEACHERS LOS ANGELES,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CO-1654-E

PROPOSED DECISION
(June 22, 2016)

Appearances: Douglas B. Spoors, Attorney, for Aurora Le Mere; Bush Gottlieb, by Jesus E. Quinonez, Attorney, for United Teachers Los Angeles.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

In this case, a public school employee alleges that their exclusive representative breached its duty of fair representation set forth in the Educational Employment Relations Act (EERA)[1] by failing to file an appeal of a disciplinary suspension. The exclusive representative denies any violation of EERA.

PROCEDURAL HISTORY

On May 11, 2015, Charging Party Aurora Le Mere (Le Mere) filed an unfair practice charge with the Public Employment Relations Board (PERB) against Respondent United Teachers Los Angeles (UTLA). On January 11, 2016, the PERB Office of the General Counsel issued a complaint alleging that UTLA violated EERA section 3543.6, subdivision (b), by failing to file an appeal of a disciplinary suspension.

On February 4, 2016, UTLA filed an answer denying any violation of EERA.

[1] EERA is codified at Government Code section 3540 et seq.

On February 5, 2016, the parties participated in an informal settlement conference, but the matter was not resolved.

On or about April 28, 2016, UTLA filed a motion to dismiss the complaint as UTLA did not have exclusive control over the appeal process of disciplinary suspensions and therefore did not owe a duty of fair representation to Le Mere. On May 5, 2016, Le Mere filed its opposition to the motion and contended, inter alia, that UTLA's answer should be struck as untimely. On May 9, 2016, UTLA filed its reply to the opposition contending that its answer was timely pursuant to PERB Regulation 32130, subdivision (c).[2] On May 13, 2016, the Administrative Law Judge denied the motion to dismiss without prejudice and denied the motion to strike the answer as untimely.

Formal hearing was held on May 17, 2016. As a remedy, Le Mere was seeking loss of wages from the seven-day suspension, loss of retroactive pay increases, loss of retirement contribution and reimbursement of union dues for a nine-month period.[3] The matter was submitted for proposed decision with the receipt of the last closing brief on June 17, 2016.

FINDINGS OF FACT

Le Mere is a public school employee within the meaning of EERA section 3540.1, subdivision (j). At all relevant times, she worked as a teacher at Harbor Teacher Preparation Academy (Harbor Academy) in the Los Angeles Unified School District (District).

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[2] PERB Regulations are codified at the California Code of Regulations, title 8, section 31001, et seq. PERB Regulation 32130, subdivision (c), provides for an additional five day extension of time to file a responsive document when the original document was served by mail within the State of California.

[3] During the hearing, Le Mere attempted to introduce a list of specific monetary amounts as evidence of her specific losses incurred as a result of UTLA failing to file an appeal on her behalf. The ALJ stated that the specifics of these monetary losses will be resolved at the compliance stage of these proceedings, if a violation is found. (PERB Regulation 32980, subd. (a).)

UTLA is an exclusive representative within the meaning of EERA section 3540.1, subdivision (e), of certificated employees within the District, including Le Mere. Carl Joseph (Joseph) is employed by UTLA as an area representative and is assigned to represent certificated employees at HTPA. Rocco Miceli (Miceli) is another UTLA area representative.

Collective Bargaining Agreement Between UTLA and the District

UTLA and the District were parties to a collective bargaining agreement (CBA) governing the period of time in dispute.[4] The CBA contained the following relevant provisions:

> Article V. Grievance Procedure
>
> [¶ . . . ¶]
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> 11.0 Request for Arbitration: If the grievance is not settled in Step Two, UTLA, with the concurrence of the grievant, may submit the matter to arbitration . . .
>
> [¶ . . . ¶]
>
> Article X. Evaluation and Discipline
>
> 11.0 Notices of Unsatisfactory Service or Act, and Suspension

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[4] The CBA in effect was the 2008-2011 CBA. A tentative successor agreement was signed by both parties on April 17, 2015, and was adopted/ratified by the parties. Article V, Section 11 and Article X, Section 11 were not changed by the successor agreement. Article XXXII, Section 1 of the 2008-2011 CBA provided in part that:

> "This Agreement shall remain in full force and effect, pursuant to its terms, to and including June 30, 2011 and thereafter shall remain in effect on a day-to-day basis until terminated by either party upon ten (10) days' written notice."

(Emphasis added.)

No evidence was provided that either party provided the requisite ten days written notice to terminate the CBA after June 30, 2011. As such, the Article and Sections of the CBA in question remained in effect when the seven-day suspension was served on Le Mere.

> a. Employees may be disciplined for cause. Such discipline may include Notices of Unsatisfactory Service or Act and/or suspension from duties without pay for up to fifteen working days, as authorized by Senate Bill 813. When any suspension without pay is imposed, the salary effects of that suspension shall not be implemented until the suspension has become final as provided in this section. Also, for a suspension of more than three days, the fourth and succeeding days of suspension shall not be implemented until the suspension has become final as provided in this section. If the discipline is based upon incompetence, the observation, records and assistance provisions of Section 5.0 apply.
>
> [¶ . . . ¶]
>
> h. Notices of Unsatisfactory Service or Act are grievable under Article V. However, if the discipline imposed includes a suspension without pay, and if the employee wishes to obtain review of the decision, <u>a notice of appeal to the office of the Cluster Administrator/Division Head shall be delivered within three days</u>[5] (as defined in Article V, Section 6.0) of receipt of the form. Within three days after receipt of the employee's notice of appeal, the Region or Division Superintendent (or designee) shall hold an appeal meeting to discuss the matter, and shall by the end of the day following, announce a decision. The announcement shall be in person or by telephone, with an immediate confirming letter sent to the employee and representative, if any. Within two days after the above administrative appeal decision is announced, UTLA must, if it determines that the matter is to be appealed to arbitration, notify the District in writing of its intention. UTLA and the District shall select an arbitrator, and the dispute will then be calendared for expedited arbitration pursuant to Article V, Section 15.0. <u>If at any of the above steps the employee or UTLA does not appeal as provided above, the discipline shall be considered final</u>.

(Emphasis added.)

<u>Le Mere's Employment History with the District</u>

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[5] Standard grievances filed pursuant to Article V must be filed within 15 days of the offending occurrence. (Article V, section 8.0.)

Le Mere began working for the District during the 2002-2003 school year and has a teaching credential in English. Le Mere had had a number of UTLA area representatives represent her in the past. Over the years of her employment with the District, she was involved in five to ten grievances. All, but one, of those grievances were resolved.

Le Mere began her employment with Harbor Academy during the 2013-2014 school year. Principal Jan Murata (Principal Murata) is currently the principal of Harbor Academy.

Le Mere filed a grievance against the District during the 2014-2015 school year because she was not being provided a duty-free lunch. She remembers consulting with her private attorney, Douglas Spoors (Spoors), about the matter. The grievance was not resolved.

UTLA Area Representative Joseph[6] first met Spoors in March 2014, at a grievance step conference when Le Mere informed Joseph that Spoors would be handling the matter. Joseph surrendered his information to Spoors and then left the site.

Le Mere's Seven-Day Suspension and Request for Appeal

On Tuesday, April 21, 2015, Le Mere and Spoors met with Principal Murata and District Staff Relations Officer Juan Alfayate (Alfayete). Le Mere believed that they were to meet concerning her 2014-2015 Stull evaluation and Spoors came prepared to question Principal Murata about it. To Le Mere's and Spoors's surprise, Principal Murata also used the meeting to issue Le Mere a Notice of Unsatisfactory Service and a Notice of Suspension for

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[6] Joseph had also been an attorney for 35 years at the time of the hearing. In the 2014-2015 school year, Joseph oversaw the processing of 200 grievance by UTLA. Of these instances, Joseph was not aware of a single situation where UTLA declined representation to one of its teachers.

seven working days. During the meeting, Le Mere asked Alfayete what the length of time she had to file an appeal, and he responded that he believed she had 14 days.[7]

The Notice of Unsatisfactory Service cover sheet indicated that Le Mere was observed in the classroom on the dates of October 8, and 18, November 21, and December 16, and 17, 2013; March 17, and 31, August 27, September 26, October 13, and November 10, 2014; and January 28, 2015. In those sections of the notice where Principal Murata was asked to set forth the reasons for taking the action and the steps taken to help the employee improved, it stated "see attached." The Notice of Suspension similarly stated "see attached" as the reasons for the suspension. Neither party submitted the attachments to the notices during the hearing, however, Le Mere described it as two to three inches thick. Le Mere believed that the suspension was based, in part, upon some of the same documents as the below standard Stull evaluation which she received for the 2013-2014 school year.[8] She stated that the March 17, 2014 observations was inaccurate as Le Mere was absent on that day and the observer evaluated the wrong teacher. Le Mere believed other documents to be false and inaccurate. The notices did not set forth the time frames for appeal.

On April 21, 2015, at approximately 1:01 p.m., Le Mere sent an email entitled, "Msg #1, Filing [Grievance] on Notice of Suspension" to Joseph and Miceli stating that Principal Murata issued her a Notice of Suspension and she was not sure whether Joseph or Miceli was the right person to file a grievance on the matter, but that she wanted the grievance

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[7] Alfayete did not testify. Le Mere's hearsay testimony on this matter is only admitted to show her state of mind. (Evid. Code, § 1250.)

[8] According to Le Mere, UTLA filed a grievance on her behalf as a result of her below standard 2013-2014 Stull evaluation and had gone through the Step One and Two grievance conferences, but the grievance had not yet been approved yet by the UTLA Grievance Review Committee for arbitration.

filed as soon as possible. She asked them to call or email her as soon as possible if they had any question regarding the "particulars."[9] She asked them to let her know when the grievance was filed. Joseph testified that he never received this email and reviewed his email account before testifying to ensure whether he had received this email from Le Mere. Le Mere provided no evidence that Joseph responded to this email.[10]

On April 21, 2015, at approximately 1:07 p.m., Le Mere sent another email to Joseph and Miceli entitled, "Urgent – Msg. #2 Filing Grievance on Below Standard STULL for 2014-2015." Again, Le Mere expressed that she was unsure which of the two UTLA representatives would file a grievance for her, but she wanted a grievance to be filed on the below standard Stull evaluation which she received that day. She wanted the grievance to be filed without delay and to be provided a copy of it. She stated that she could be contacted by telephone or email, if they had any questions of her.[11]

On April 21, 2015, at approximately 6:13 p.m., Le Mere sent another email to Joseph entitled, "your filing of the two new grievances and the [Grievance Review Committee]" stating that Miceli had told her that Joseph was the one responsible for filing both of her grievances and for representing her before the UTLA Grievance Review Committee. She

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[9] During these occasions, Le Mere never spoke with Joseph in person or by telephone. She either communicated by email or by leaving telephone messages.

[10] Joseph's testimony is credited that he did not receive this first email. The record shows that Joseph responded to all of Le Mere's email and there was no mention in Joseph's emails about the suspension until Le Mere mentioned it in an April 23, 2015 email which was sent at approximately 4:47 p.m. Joseph never responded to this April 21, 2015 email sent at 1:01 p.m.

[11] During the hearing, Le Mere testified that she understood that the CBA had a shorter deadline for filing an appeal from a disciplinary suspension than the deadline for filing a grievance on a Stull evaluation, however, she did not know that an appeal had to be filed within three days. Le Mere only knew that the suspension was a very "serious and urgent" matter.

instructed Joseph to the file the two new grievances immediately. She further told Joseph that he should contact her if he had any questions.

On April 22, 2015, at approximately 11:40 a.m., Joseph emailed Le Mere and asked her what her grievances concerned and to forward all information to him immediately. Joseph asked whether Le Mere wanted UTLA to represent her or her private attorney. Le Mere testified that she faxed these documents to Joseph that day, but did not provide a confirmation of such a fax at the hearing. Joseph countered that he never received this information from Le Mere.

On April 23, 2015, at approximately 1:44 p.m., Joseph responded to the "Msg. #2" email of LeMere regarding the below standard Stull evaluation of 2014-2015 by stating that her attorney should file the necessary documents.

On April 23, 2015, at approximately 4:47 p.m., Le Mere responded to Joseph's email stating that she and her attorney would like Joseph to handle the Step One grievance hearings. She explained that the two grievances were concerning the seven-day suspension, for which she would "mail" a copy to Joseph, and the below standard Stull evaluation for 2014-15. Le Mere further promised that she would send a copy of the Stull evaluation and her rebuttals provided to "Dr. Robert Bravo." She explained her issues which she had with the October 29, 2014 first formal observation and a November 12, 2014 observation where the observer did not remain in the class during the entire period, and that the observer failed to allow Le Mere to select a time, date and period for the third observation which took place in

March 2015, for which the evaluation was performed on an elective class.[12] Le Mere closed the email stating that Joseph should file both grievances immediately.

On Friday, April 24, 2015, at approximately 6:55 p.m., Joseph responded to Le Mere by stating that he noticed in her email that she received a suspension. He asked her to forward the notice of suspension to him as there was a three-day time frame to file the appeal. Joseph testified that at the time he sent this email he was unsure whether Le Mere or her attorney had filed an appeal. Le Mere testified that she did not receive the email.

On Monday, April 27, 2015, at approximately 12:53 p.m. Le Mere sent pdf copies of the cover pages of the two notices to Joseph. At 4:53 p.m., Joseph responded that it was too late to file an appeal on the suspension.

UTLA did not file an appeal for Le Mere. Le Mere's suspension took effect up until June 4, 2015. June 5, 2015 was the last day of the academic school year.

Le Mere worked the first day of the 2015-16 academic school year and then her physician removed her from the workplace due to a medical condition.[13] She eventually retired from employment with the District effective December 1, 2015.

ISSUE

Did UTLA breach the duty of fair representation when it did not file an appeal of Le Mere's disciplinary suspension?

CONCLUSIONS OF LAW

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[12] Le Mere put forward very little evidence that she would have prevailed on the merits of the appeal if the Notice of Suspension had been appealed, especially in light that the actual charges were not made part of this record and the supporting documentation was two to three inches thick. She would not have been granted any make who remedies because of this, even if a violation were found. (*Amalgamated Transit Union, Local 1704 (Buck)* (2007) PERB Decision No. 1898-M, adopted ALJ decision, p. 16; *United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453, adopted ALJ decision, p. 55.)

[13] Le Mere testified that her medical condition has affected her memory.

Duty of Fair Representation

EERA section 3544.9 requires that "[t]he employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit." The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citations omitted.]

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or <u>inaction</u> was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

PERB has held that merely negligent acts, such as missing grievance filing deadlines, do not breach the duty of fair representation. (*Beaumont Teachers Association/CTA (Grace)* (2012) PERB Decision No. 2260 [citing *Flowers*, *supra*, PERB Decision No. 2079-M; *United Teachers-Los Angeles* (1992) PERB Decision No. 944].) With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation in "cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also *Robesky v. Quantas Empire Airways, Ltd.* (9th Cir. 1978) 573 F.2d 1082.)

However, if the CBA gives the employee the right to file or present the grievance without the aid of the union, the union's failure to file a grievance does not breach the duty of fair representation owed to the member. (*Beaumont Teachers Association/CTA (Grace)*, *supra*, PERB Decision No. 2260; *Service Employees International Union, Local 99 (Arteaga)* (2008) PERB Decision No. 1991.) A member has the concomitant responsibility to read the CBA, learn of her right to file a grievance, and take the necessary steps to do so. (*College of the Canyons Faculty Association (Lynn)* (2004) PERB Decision No. 1706, p. 9.) In juxtaposition to this, if the union does not have exclusive control over the grievance process, a union may be liable for failing to file a timely grievance, if it communicated to the member that it would "take care of it" or failed to follow through on a promise to the member and then arbitrarily did not do so. (*Amalgamated Transit Union, Local 1704 (Buck)* (2007) PERB Decision No. 1898-M (*ATU*), adopted ALJ decision, p. 12.)

In this case, it is clear that the CBA does not give UTLA exclusive control over the initial stages of the appeal process. Either the employee or UTLA can file the notice of appeal in the three-day appeal process. While Joseph may not have received the initial email requesting UTLA to file the grievance on the Notice of Suspension, by April 23, 2015 at 4:47 p.m. (the end of the second day of appeal), Le Mere made it clear to Joseph that she had received a Notice of Suspension that she wanted appealed. Joseph had not received the Notice of Suspension before that date and the emails do not reflect a communication that she faxed the notice to Joseph, but that she would "mail" it to him. Joseph did not respond until April 24, 2015 at 6:55 p.m. after the deadline had expired. In a sense, although Le Mere gave directions to Joseph, Joseph never stated that he would file the grievance on her behalf as in *ATU*, regardless of whether UTLA had a history of representing its teachers on grievances. Clearly, Le Mere could have pursued the appeal on her own and her attorney was present on the day that it was delivered. As UTLA did not have exclusive control over this process and Joseph did not make any promise or affirmation that it would file the appeal, no breach of the duty of fair representation can be found as Joseph's failure to file an appeal. Moreover, the record indicates that Joseph's conduct, at most, constituted only mere negligence and no evidence of bad faith, discriminatory or arbitrary conduct was demonstrated. Therefore, the allegation that UTLA violated EERA section 3543.6, subdivision (b), for failing to file an appeal of a disciplinary suspension on behalf of Le Mere is dismissed.

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-CO-1654-E, *Aurora Le Mere v. United Teachers Los Angeles*, are hereby DISMISSED.

Right to Appeal

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
E-FILE: PERBe-file.Appeals@perb.ca.gov

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 or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(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, 32091 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).)