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## MEMORANDUM

TO: Dr. Ken Wallace, Superintendent  
Maine Township High School District 207

FROM: Todd Faulkner  
Franczek Radelet P.C.

DATE: December 2, 2009

RE: Negotiation of Salary Freeze with the MTA

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In your memorandum of November 5, 2009, to the President of the Maine Teachers Association (“MTA”), you stated that the Board of Education had authorized you to advise the MTA of the following:

As part of a total reduction plan to cut expenditures by \$15 million dollars in the FY 2011 budget, the Board intends to reduce teaching staff by 75 full-time positions for the 2010-2011 school year for a saving of approximately \$5 million dollars. We estimate that by freezing the base of the salary schedule for the 2010-2011 and 2011-2012 school years, we could save approximately 55 teaching jobs from being eliminated. If a freeze is not achieved, each one percent subtracted from the current two year total base increase of 6.7% (3.2% in 2011; 3.5% in 2012) saves approximately 8.5 teaching positions. In addition, the Board intends to cut a minimum of 10 teaching assistant positions prior to the 2010-2011 school year. The Board is required by law to pass a resolution outlining the Reduction in Force, and that will take place at the December Board meeting.

We understand there is a concern among MTA members that agreeing to negotiate over a freeze would leave the Board free to unilaterally impose salary schedule reductions if an agreement were not reached with the MTA and that there is no assurance that teaching and teaching assistant positions will be saved even if agreement is reached on a freeze or cost of living reduction. This simply is not the case. The Board can not impose changes to the contract unilaterally if an agreement is not reached; further, the board is willing to agree in writing that if no agreement is reached on items within the contract, the current terms would stand. Any concessions



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that are made on salary for teachers or teacher assistants would be quantified in writing directly to saving teacher and teaching assistant positions.

The MTA concerns expressed in your November 5 memorandum are unfounded for the reasons discussed below. In considering these reasons, please keep in mind that the 2007-2012 collective bargaining agreement between the Board and the MTA (the "Contract") does not contain any provision for re-opening the Contract and any agreement reached on modification of salaries provided for in the Contract would be the result of voluntary negotiations during the term ("mid-term") of the Contract.

The parties to a collective bargaining agreement do not incur traditional bargaining obligations by meeting and discussing proposals for a midterm modification of the agreement. See, e.g., Connecticut Light & Power Co., 271 NLRB 766 (1984); Herman Bros., Inc., 273 NLRB 124 fn. 1 (1984), enfd., 780 F.2d 1015 (3d Cir. 1985). Rather, only where there is a specific, contractual reopener provision that addresses the subject under negotiation may the parties resort to the prerogatives normally available to them during bargaining – namely, to strike, to lock out, and to implement final proposals after impasse has been reached. Southern California Edison Co., 295 NLRB 203 (1989).

In short, an employer cannot make any unilateral changes midterm, *even if the parties have bargained to impasse*, unless the subject of negotiations is covered by a reopener clause in the collective bargaining agreement. Connecticut Light & Power Co., 271 NLRB 766 (1984); Speedrack, Inc., 293 NLRB 1054 (1989); Hydrologics, Inc., 293 NLRB 1060 (1989). In the absence of a contractual reopener on wages – which does not exist in the Contract between the Board and the MTA – the Board cannot unilaterally implement any change to wages midterm. Connecticut Light & Power Co., 271 NLRB 766 (1984). As a result, if negotiations between the Board and the MTA do not result in an agreement to reduce scheduled salary increases, the existing salary schedule remains in effect and the Board cannot lawfully impose any unilateral change during the term of the Contract.

In order to further allay the Union's concerns in this respect, the Board has expressed its willingness to negotiate an agreement that would govern the terms of the parties' mid-term negotiations with respect to the salary schedule. As part of this agreement, the Board would agree to limit its ability to unilaterally implement its final proposal on wages should the parties reach impasse. The NLRB has, in fact, contemplated such an agreement. See, e.g., Speedrack, Inc., 293 NLRB 1054 (1989); Hydrologics, Inc., 293 NLRB 1060 (1989). These cases arose in the context of mid-term negotiations pursuant to a contractual reopener clause, but the NLRB's holding remains directly relevant -- during negotiations pursuant to a contractual reopener clause, both parties remain free to engage in economic action in support of their demands; however, the parties are free to limit those rights and "constrain themselves." Id. Thus, the NLRB recognizes the ability of the parties to contract away their rights to engage in economic



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self-help and express a “contrary intent.” In other words, the employer can agree to restrict its right to unilateral implementation after impasse, or the parties can restrict the use of economic weapons, and such an agreement is controlling even where there is a contractual reopener clause. Id. Of course, these principles would apply even more strongly where the Board/MTA Contract does not have a reopener clause.

The Board is willing to enter into an agreement which recognizes existing law and expressly limits its ability to make unilateral changes should the parties fail to reach an agreement on the salary schedule. The validity of this agreement is expressly contemplated by the principles of traditional labor law and collective bargaining, and would control the parties’ negotiations. Speedrack, Inc., 293 NLRB 1054 (1989); Hydrologics, Inc., 293 NLRB 1060 (1989).

Mid-term negotiations for the expressly stated, limited and specific purpose of discussing modifications to scheduled salary increases provide the Board and the MTA a unique opportunity to address the current adverse financial circumstances. In our view, the law is well settled that, in the absence of a specific contractual reopener provision, the Contract would remain in effect throughout the negotiations between the Board and the MTA and, should impasse be reached, the Board would not be free to unilaterally implement changes to the salary schedules. The Board could agree to bolster these legal principles by specifically agreeing to an express restriction on its right to make unilateral changes. This is consistent with labor law principles and removes any legitimate legal basis for the MTA to decline to enter into negotiations to modify the salary provisions of the Contract.

I suggest you provide the MTA with a copy of this memorandum with the request that it be reviewed by an IEA attorney to determine the extent to which the IEA agrees or disagrees with the opinions we have expressed and, if there is disagreement, to identify the reasons why.

JTF/ltb