


## Do's and Don'ts of Contract Language

Joel Gerring  
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### Disclaimer

- The presenter is not engaging in dispensing legal or financial advice.
- Any individual or district interested in general and/or specific legal/financial protection should seek the counsel of an attorney and/or CPA.
- **Language is from actual contracts, but not identified by school.**




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### What are the Rules?



1. We don't know all of the answers!  
*"You may not know **what** to do, but you should know what **not** to do - move from there." (Ron Edmonds)*
2. All districts are not equal.
3. When in doubt - Refer to Rule #1.




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**PRO-TIP**

### Be the Drafter

- Drafting the initial language provides better control.
- While ambiguities are often construed against the drafter, this is offset by the fact that union language is often far too effusive and forces the sides to “walk it back” over a much greater distance.




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### Take Note of Operative Language

Hone in on language that contains *should, must, shall, may*, etc.

- **Shall/Must** = Usually means no discretion
- **Should** = Expected action, but not mandatory in every circumstance
- **May** = Implies discretion, but context may narrow the amount of discretion

**Make operative language consistent throughout the agreement and add definitions or bargaining notes to provide guidance.**




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**DID YOU KNOW?**

### Language Forums

- **MASTER LABOR AGREEMENT**  
For long-lasting provisions, i.e. fundamental aspects such as working conditions, duties, obligations, etc.
- **MEMORANDUM OF AGREEMENT (MOA)**  
For short-term or time-limited provisions. Clauses that will be up for review and possibly discontinued once certain goals are met.




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**DID YOU KNOW?**

### Language Forums

- **MEMORANDUM OF UNDERSTANDING (MOU)**  
For interpreting/clarifying specific provisions within the Master Labor Agreement or to recount conceptual understandings of a clause.
- **APPENDICES**  
Can be included at the end of a Master Labor Agreement, MOA, MOU in order to clarify references to complex provisions via diagrams, graphics, third party quotes, etc.




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**DID YOU KNOW?**

### Language Forums

- **BOARD POLICIES**  
Utilized when a particular issue falls exclusively within the discretion of the school board.
- **ADMINISTRATIVE REGULATION**  
Utilized when the issue is procedural in nature and the employer is not required to bargain over the issue prior to implementation.
- **DIRECTIVES/DIRECTIVE MEMOS**  
Used when the supervisor has determined the correct course of action for employees to take and there is no bargaining obligation.




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### Prohibited Subjects MCL 423.215(3)(...)

- Placement (Ionia Decision) (Section j)
- Layoff/Recall (Section k)
- Evaluation (Section l) ← New and "improved" law!
- Discipline (Section m)
- Site-Based Decision Committees (Section e)
- Distance Learning (Section h)




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### General Topics of Contracts

- Introduction
- Ratification
- Recognition
- ~~Agency Shop/ Dues~~
- Teacher Rights
- Board Rights
- Hours
- Loads & Assignments
- Vacancies & Transfers - ?
- Teaching Conditions
- Leaves
- Mentors
- ~~Evaluation~~
- Insurance
- Salary
- Protection of Teachers
- Grievance
- ~~Discipline~~
- Early Retirement Incentives
- ~~SIP~~
- ~~Distance Learning~~
- Tuition Reimbursement
- Extra-Duty
- Miscellaneous




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### PERA - MCL 423.215 (17)

A bargaining representative or an education association shall not veto a collective bargaining agreement between a public school employer and a bargaining unit of employees of the public school system to obtain a condition and shall not enter into, ratify, or approve an agreement with the members of the bargaining unit, or be delegated to a bargaining representative or an education association or conditioned on approval by a bargaining representative or an education association.

**BOTTOM LINE:**  
It's up to your local association, not the MEA.




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### Ratification



Do not "backdate" to date of last expiration. Use the date that the parties completed all ratification votes; i.e. expired June 30, but no ratification until October.

**Alternative:**  
This agreement effective as of the 5<sup>th</sup> day of October, 2014, between the Board of Education of the Smithville Public Schools, hereinafter "Board", and the Smithville Education Association, hereinafter called the "Association".




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## Recognition



### What about non-teachers?

- “The Board hereby recognizes the Association as the exclusive bargaining representative to the extent required by Act 379 of the Public Acts of 1965 for the purpose of collective bargaining in respect to rates of pay, wages, hours, and conditions of employment for all members of the bargaining unit.”
- This includes guidance counselors, librarians, etc.




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## How do We Handle Prohibiteds for Non-teachers?

- Try to convince their team that all members of the bargaining unit should have the same rights.

If they won't go for that...

- Create an Appendix, with an MOU, of Prohibited language that applies to non-teachers only. BE EXPLICIT.
- Don't simply leave the language in the main document with “disclaimers.”




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## Teacher Rights

*The Board and the Association recognize that the ability of pupils to progress and mature academically is a combined result of school, home, economic, and social environment.*

~~Therefore, teachers alone cannot be held accountable for the academic achievement of the pupil in the classroom.~~

### But Consider This...

“Accountable for academic achievement” is an evaluation standard – PSB. First sentence becomes irrelevant.




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### Teacher Rights

*Academic freedom shall be guaranteed to teachers. Independent study and investigation at the presentation and interpretation of the facts and ideas in all branches of learning will be encouraged, provided that controversial topics are handled in such a manner as to present opposing points of view.*

**But Consider This...**  
Can we define "academic freedom?" This is a Policy issue.



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**PRO-TIP**

### Avoid Restating the Law

Referring to a law can help provide context and help explain the purpose and intent of a particular clause, but such provisions can also lead arbitrators to assign meaning to the language that was not intended by the parties. Just give the statutory cite.



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### Board Rights

The Board reserves the right, subject only to the limitations of this agreement, to:

- Manage and control its business affairs.
- Direct the working forces and affairs of the district.
- Draft and adopt reasonable rules and regulations.
- Determine financial policies & adopt budgets.
- Hire, promote, suspend and discharge employees, transfer employees, assign work or duties to employees, determine the qualifications of employees.



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### Hours

*The parties agree to schedule 175 days of student instruction. (180 next year.)*

**Alternative:**  
The parties agree to schedule the number of days necessary to qualify for full state aid.



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### Hours

*In the event that scheduled days/hours are canceled and need to be made up to qualify for full state aid, the makeup time shall not be scheduled until the parties have had an opportunity to negotiate the amended calendar.*

**Alternative:**  
In the event that scheduled days/hours are canceled and need to be made up to qualify for full state aid, the makeup time shall be scheduled at the conclusion of the school year, or at an otherwise mutually agreeable time. Teachers shall not receive any additional compensation for the added time.



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### Loads & Assignments

**Prohibited (mostly)**  
*(j) Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit.*

*If a teacher is assigned to a class outside of their field of academic preparation, a written agreement shall be signed by the teacher involved and the administration.*

**Alternative:**  
If a teacher is assigned to a class outside of their field of academic preparation, **it shall only be with the full written authorization of the MDE.**



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### Vacancies & Transfers

**Prohibited (mostly)**

*(j) Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit.*

**State...**

Teachers shall have the right to apply for any position that may be open.



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### Teaching Conditions

*In the event that the class size limits are exceeded, a teacher shall be compensated for the excess on a basis of XX dollars per day per student in excess of the limit.*

**Alternative:**

In the event that the class size limits are exceeded, the Board determines the best strategy to address remedial action. This may include, but is not limited to hiring additional instructional staff as may be necessary, the use of classroom instructional aides, or in some cases, compensation to the classroom teacher in the amount of \$ X.

The argument for class size limitations is that large numbers negatively impact instruction. If that is indeed the case, then the appropriate strategy is to provide additional instructional support. Accepting the notion that additional compensation solves the problem, negates the original argument.



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### Teaching Conditions

*Every effort shall be made by the Board to minimize clerical tasks.*

**Alternative:**

The Board shall provide access to district clerical personnel, to be scheduled by the building administrator.



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### Leaves

*Each teacher shall be credited with 15 days of annual leave time for use when the employee or a member of the immediate family is ill or has a medical appointment for which school time must be utilized.*

**Alternative:**

Each teacher shall be credited with one day for each month worked, for use when the employee or a member of the immediate family is ill or has a medical appointment for which school time must be utilized.

*(define immediate family)*



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### Leaves

*Teachers shall be credited with 4 days annually for personal business, not to be deducted from sick leave. Unused days shall be compensated at the daily substitute rate.*

**Alternative:**

Teachers shall be credited with 4 days annually for personal business, to be deducted from sick leave. Personal business shall be defined to be business of a personal nature that cannot be conducted at times other than when school is in session.

Personal business time may not be used to extend a vacation period (cannot be used immediately preceding or following a school vacation period).



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### Leaves

*These days shall not be used for other employment, or vacation/recreational activities. Personal business leave is to be used to attend to urgent matters that require the personal attention of the teacher and cannot be attended to outside of the work day.*

Who determines ..... other employment?  
recreational activities?  
urgent matters?  
requires personal attention?



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### Leaves

A teacher may request an unpaid leave of absence for a specified time. Such request shall be in writing and shall be approved by the Board. The period of time shall be unpaid, but insurance benefits shall continue for the remainder of the school year.

**Alternative:** A teacher may request an unpaid leave of absence for a specified time. Such requests shall be in writing and **may** be approved by the Board. The period of time shall be unpaid and without any additional benefits. Board approval/disapproval shall not be the subject of any grievance. FMLA may apply.



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### Leaves

Upon retirement, teachers shall be compensated for any unused sick leave days.

Such compensation shall be at the rate of 50% of the teachers current per diem rate (annual salary ÷ number of teacher days) times the number of unused days (maximum of 120). i.e. (.50 X \$60,000/180 X 120days)= \$20,000.

- But Consider This...**
- Correct Percentage?
  - Number of days?
  - What is "per diem?"
  - Consider flat rate.



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### Evaluation

**Prohibited:**

(1) Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system adopted under section 1249 of the revised school code, 1976 PA 451, MCL 380.1249, or under 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions concerning the content of a performance evaluation of an employee under those provisions of law, or the impact of those decisions on an individual employee or the bargaining unit.



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## Mentors

*The Board and the Association agree the relationship shall be confidential and shall not, in any fashion, be a matter included in the evaluation of the Mentor Teacher or Mentee.*

*Evaluation standard - delete*

**Alternative:**

The Mentor Teacher and Mentee shall, at the end of each semester, submit to the principal, a log of activities/areas of accomplishment that have been addressed in the preceding months.



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## Insurance

*The Board will provide to the employee MESSA(s) Choices II with a 10/20 drug card for the contract period for the employee's entire family.*

**Alternative:**

The Board will contribute to the premium no more than the state established cap amounts for health insurance for a twelve (12) month period for the bargaining unit member and family. As of September 16, 2015 the full year annual cost limitations are:

- Family - \$16,342.66
- two party - \$12,531.75
- Single - \$5,992.30

Any cost greater than the Board's contribution shall be subject to payroll deduction. In the second year of the contract (2016-17), the Board reserves the right to impose the statutory limits for health care rates (hard cap).



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**PRO-TIP**

### Don't Use "Provide" re: Insurance

- Unless self-insured, districts PURCHASE health insurance by contributing a portion of the premium cost, they do not PROVIDE it.
- Arbitrators have been known to apply the term "provide" very literally!



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### Protection of Teachers

*Any and all complaints made against a teacher shall be called to the teacher's attention within 5 days. Failure to do so shall prohibit the use of the complaint ~~or any related material in any disciplinary process, or be included in the teacher's personnel file.~~*

**Alternative:**  
"Action taken upon any complaint by a parent of a student directed toward a teacher, and/or any notice thereof to be included in said teacher's personnel file shall be subject to Bullard-Plawecki, Michigan Act 397 of 1978." [Consult attorney.](#)

**Discipline – PSB**



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### Agency Shop/Dues

- **See PA 53**
- **No Dues deductions**
- **No Agency Shop**



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### Grievance

*A grievance shall be defined to be an alleged violation of the terms of this Agreement, or any other policy, rule, regulation or decision made by the Board or its agents.*

**Alternative:**  
A grievance shall be defined to be an alleged violation of the terms of this Agreement.



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**PRO-TIP**

### Avoid “me too” Clauses

- Try not to have contracts which confer rights to one bargaining unit based upon what another bargaining unit negotiates.
- The future is too cloudy to make guarantees.
- Costs between bargaining units can vary dramatically.

**These are magnets for grievances**




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### Arbitration

- Vague language invites arbitration.
- Arbitrators have broad powers.
- Need contract language to limit the power/scope of authority of the arbitrator.
- The arbitrator shall have no authority/power to rule on matters for which there is an alternative dispute forum.
- The arbitrator shall have no authority/power to rule on matters \_\_\_\_\_.




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### Discipline

**Prohibited (mostly)**

*(m) For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under section 1 of article IV of 1937 (Ex Sess) PA 4, MCL 38.101.*




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### Discipline

*The Association shall accept responsibility to deal with ethical problems in accordance with the terms of such Code of Ethics of the Education Profession.*

**Alternative:**  
If a teacher is to be disciplined or reprimanded by the Board or its agents, he shall be entitled to have a representative of the Association present, subject to the provisions of their federal Weingarten Rights. NLRB v. J. Weingarten, Inc. 420, US 251.



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**PRO-TIP**

### Early Retirement Incentive

- Meant to create an *incentive* for employees to retire at an earlier date than normal.
- If an ERI plan is in the contract language, employees can count on it being there.
- In short, it is not an incentive! It is a guaranteed benefit.



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### School Improvement

**Membership on SIP Committee is prohibited.**  
*(c) The composition of school improvement committees established under section 1277 of the revised school code, 1976 PA 451, MCL 380.1277.*



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### Distance Learning

**Prohibited:**  
*(h) Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.*




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### Tuition Reimbursement

*The Board shall reimburse teachers at the rate of XXXX for any and all coursework taken following attainment of their Bachelor's Degree. All work must be completed on an approved program leading to an advanced degree **or** in the teacher's major field of work.*

*Graduate credit courses of the candidate's own choice may be counted. They do not have to be in a planned program.*

**Alternative:**  
 The Board shall reimburse teachers at the rate of XXXX for any and all coursework taken following attainment of their Bachelor's Degree. All work must be completed on an approved program leading to an advanced degree in the teacher's major field of work, or meeting standards for continuing certification in the appropriate educational field.




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**PRO-TIP**

### Past Practices

- Language that seems very clear may be declared ambiguous by a third party.
- Past Practice will be considered in order to provide context and an interpretation.
- If a contract is going to include language that deliberately diverges from past practices, indicate such in the contract.  
**"Notwithstanding previous practices..."**




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### Substitutes

Subs are not regular and not part of the bargaining unit. Districts with language relative to subs should have the language reviewed for legal compliance and consider removing it.



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### Seniority Lists

“The administration shall, no later than October 1, submit the seniority list to the Association to review the information for accuracy. The Association shall have 30 days to review the information and call any discrepancies to the attention of the Administration for possible correction(s). After the 30 days, the list shall be considered to be accurate and final.”



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### Harassment

Modern Board Policy addresses harassment in general and provides the appropriate process to report, investigate and address harassment issues. It is recommended to review such language and seek to eliminate unenforceable protections, deferring to Board Policy.



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### Acceptable Use Policy

Districts are required to have a Board-adopted acceptable use policy for internet access and use. However, such a policy is best not included as contract language.



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### Dock Time

Dock time is “unpaid time off.” Contracts do not address “dock time,” even though employees presume that it exists. The Board can consider an unpaid leave pursuant to language that may allow for the Board to do so. However, teachers are not allowed to simply be absent and claim “dock time.” Any time off without pay should only be with Board approval after considering a written request.



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### Questions?

Joel Gerring

[jgerring@masb.org](mailto:jgerring@masb.org)

517-327-5922



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