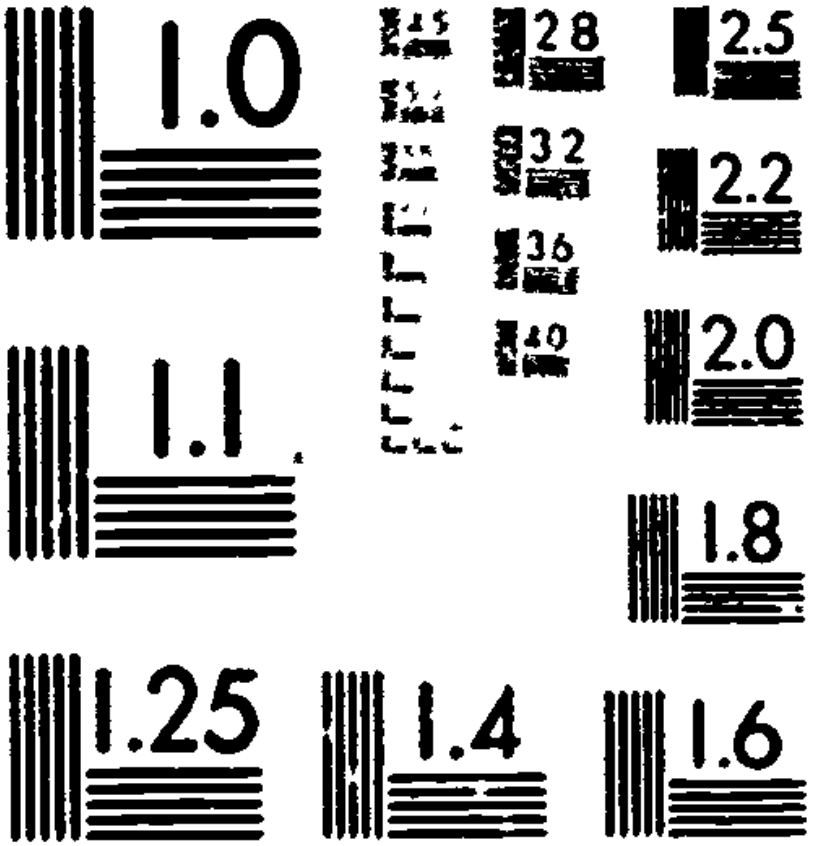

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ABSTRACT

The Michigan State Teacher Tenure Act is discussed, based on decisions of the Michigan Supreme and Appeals courts, and the opinions of the Attorney General. Designed to promote uniform interpretation of tenure legislation, topics deal with objectives, advantages, and disadvantages; probationary service; tenure rights; dismissal of tenured teachers; alternative legal protections; and miscellaneous provisions of the Michigan law. The complete text of the law, definitions, State Tenure Commission rules, and court opinions are appended. (Author/DW)

THE MICHIGAN TEACHER AND TENURE

A STUDY

of

THE MICHIGAN TEACHERS' TENURE ACT

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This booklet has been prepared in response to numerous requests for an up-to-date summary of interpretations regarding the tenure rights of Michigan Teachers. It is not a substitute for an attorney.

Single copy $1.70 plus shipping and handling charges. Order from University Bookstore, Eastern Michigan University, Ypsilanti, Michigan, 48197.

Preface

Every teacher, school administrator, and school board member will be confronted with the need for better understanding of the tenure rights of teachers. This little booklet is an attempt to provide complete and adequate information regarding the implementation of the Michigan Teachers' Tenure Act.

The need for a comprehensive discussion of teacher tenure in Michigan has been precipitated by the cases on the subjects which have come before the Tenure Commission and the Courts of the State in recent years. It is the writer's belief that more adequate information about tenure would have kept at least some of these cases from arising.

Much of the substance of this paper has been taken from the Michigan Teachers' Tenure Act, decisions of the Michigan Supreme and Appeals Courts, and opinions of the Attorney General of the State. It is designed to promote uniform interpretation of tenure legislation by using these references.

The author has taught courses in school law at Eastern Michigan University. This booklet is to be used to supplement class instruction and serve as a resource or reference for practicing teachers, school administrators and school board members.

A debt of gratitude is owed to those individuals who read the preliminary drafts and offered valuable assistance and advice. The writer wishes to thank Mrs. Sue William for editing and proof reading and Mrs. Diane Dufek and Miss Kris Girard for typing the early drafts and final manuscript.

Eastern Michigan University
January, 1972

H .eth Grinstead

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INTRODUCTION

Teacher tenure is essentially an employment security device under which the teacher attains a permanent status guaranteeing him against dismissal except for stated cause. It also provides certain procedural safeguards. Tenure systems are an attempt to minimize undesirable aspects of the employment relationship within which teachers work.

Although statutory tenure schemes vary in detail, their general patterns can be described briefly. The new teacher is on probation for a certain number of years, during which time he may be denied reemployment at the end of the school year, though dismissal during the year must be "for cause." If reemployed at the end of the probationary period, the teacher then holds his position without further election during efficiency and good behavior. He may be dismissed only "for cause," and only after notice accompanied by written charges, opportunity to be heard, and a board of education finding that the charges filed against him are true. The teacher has the right to counsel, and the board is authorized to subpoena witnesses for either side to give testimony under oath. The action of the board is usually subject to review by an administrative body or commission. Of course the teacher is entitled to judicial review, as provided by law.

DEVELOPMENT OF TENURE LEGISLATION

Teachers' tenure as a solution to job security in the profession was discussed as early as 1884 and paralleled the development of civil service. In 1883 the abuses existing by reason of the "spoils system" resulted in the first Civil Service Act, designed to curb the excessive turnover of government employees resulting from political changes in government. Tenure for teachers was interpreted to mean the application to civil service principles to the teaching profession. It was thought that teaching should be made independent of personal or political influence and freed from the spoils and patronage system.

In 1884 the National Education Association created a committee charged to study the question of tenure. The committee submitted a report recommending the establishment of tenure principles similar in substance to those applying to civil service employees. In 1886 Massachusetts enacted a teacher tenure law which permitted school districts to enter into contracts for periods longer than one year.

The National Education Association adopted a resolution in 1915 unequivocally favoring tenure legislation and re-

affirmed its position almost every year thereafter. In 1920 the Association issued its first report devoted exclusively to tenure, and in 1923 the Committee of One Hundred on Problems of Tenure was established. The first report of this committee, issued in 1924, brought to light the instability of the teaching profession. It reported that statewide turnover of teachers in 1923 ranged from four percent in Florida to 47 per cent in Wyoming, and that in many areas turnover was greater.[1]

The Michigan Supreme Court in Wilson v. Flint Board of Education, 361 Michigan 591 (1960), noted that the intention of the Michigan Tenure Act was to reduce turnover. Moreover, it was meant to prescribe rules of administrative action for school boards concerning discharge of teachers which would insure a greater degree of security to teachers. The courts quoted the following from the Michigan Law Review, which itemizes some of the evils practiced by school boards prior to the advent of tenure legislation:

> The large turnover in the profession was due in part to certain practices which were widespread throughout the country; among them may be noted discharge (1) because of political reasons, (2) because of nonresidence in the community, (3) in order to make places for friends and relatives of board members or influential citizens, (4) in order to break down resistance to reactionary school policies, and (5) in order to effect economies either by diminishing the number of teachers and increasing the amount of work assigned to those retained, or by creating vacancies to be filled by lower salaried, inexperienced employees. Of these practices the first was exceedingly influential in the growth of the tenure movement, some of the more notorious cases of political dismissal challenging the attention of the public to the injury to professional morale and efficiency resulting from the misuse of the control vested in the administrative agencies. The remedy for such abuses was sought in legislation designed to strip the school boards of their autocratic power and to prescribe for them rules of administrative action which would ensure a greater degree of security to their employees.[2]

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[1] "The Problem of Teacher Tenure," National Education Association Research Bulletin 145 (1924)

[2] Bertram H. Lebeis, "Teacher Tenure Legislation," 37 Michigan Law Review 430-440 (1939).

The authority of school boards, in the absence of tenure legislation, to dismiss teachers almost at will was supported by the courts. The following case is illustrative. In 1916 sixty-eight Chicago teachers with ratings of "satisfactory" and with recommendations of the superintendent for reemployment, were dismissed without notice or hearing, and no charges were filed against them. In affirming the school board's action, the Illinois Supreme Court said:

> No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to employ or to re-employ any applicant for any reason whatever or for no reason at all...It is no infringement on the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of the trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action.[3]

Of course, injury to professional morale and efficiency resulted from misuse of the power such court decisions vested in local boards of education. It was obvious that tenure or permanent status could be acquired only through legislative statutes.

In 1939 tenure legislation of one sort or another was in force in 19 states and the District of Columbia. By 1959 more than three-fourths of the states had some kind of tenure legislation. Since October of 1970, a teacher tenure or fair dismissal law has been in effect state-wide in 37 states and Washington D.C. These laws are mandatory and apply to all school districts in the state without exception, although the provisions may vary according to size or class of school district. Seven states have tenure laws that apply to certain designated cities, counties, or school districts. Only five have no tenure laws whatsoever.[4]

Tenure legislation was adopted in Michigan in 1937, but was applicable to each local school district only upon approval by the electors. The Michigan Legislature made the Teachers' Tenure Act applicable to all districts effective August 28, 1964.

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[3] People ex rel. v. City Chicago, 278 Ill. 318, 116 N.E. 158 (1917).

[4] National Education Association Research Bulletin, Vol. 49, No. 1, March, 1971, pp. 17-18.

Tenure legislation changed the "common law right" of boards of education to dismiss teachers at pleasure, and substituted a permanent basis for contracting. Tenure statutes have consistently been upheld by the courts.

OBJECTIVES, ADVANTAGES AND DISADVANTAGES OF TENURE

The purposes of tenure legislation have been well stated by the Minnesota Supreme Court. Minnesota adopted tenure for its teachers in 1937. In 1939 one school district discharged its assistant superintendent and all teachers, effective at the close of the school year, on the grounds that it could not determine what their salaries would be because of a possible decrease in state aid. Commenting on the case, the Court said:

> The purpose of that (teacher tenure) act was to do away with the then existing chaotic conditions in respect to termination of teachers' contracts. Until then, in many cases teachers would be left in a state of uncertainty as to whether they would be re-elected for the ensuing year. In many instances this state of uncertainty ran over a period of months. The later in the year that a school board acted, the greater the teachers' disadvantage in finding vacancies elsewhere.[6]

The Michigan Supreme Court, in an opinion, cited the Michigan Teachers' Tenure Act as promoting the good order and welfare of the state and its school systems, by preventing removal of capable and experienced teachers at the perscnal whim of changing office holders.[7]

Tenure may be viewed as a desirable safeguard, since the tenured teacher is free from worry over renewal of his contract and can concentrate on teaching. Scholarship cannot flourish in an atmosphere of suspicion and mistrust. This added security for the teacher can help create an atmosphere conducive to academic freedom, since he can exercise leadership outside the classroom despite the unpopularity of his

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[6] Downing v. Independent School District No. 9, 207 Minn. 292, (1940).

[7] Rehberg v. Board of Education of Melvindale, Ecorse Township School District No. 11, 330 Mich 541, (1951)

individual views. He must be permitted to exercise this responsibility in an atmosphere of open inquiry, free from the inhibiting effects of misuse of the power to hire and fire. Tenure legislation sets up orderly and definite procedures by which undesirable people may be removed from the teaching profession. It allows for the maintenance of an adequate and competent teaching staff, free from arbitrary political and personal interference.

On the other hand, secure employment may attract the dull, less adventurous teacher, who desires a steady job rather than an opportunity for intellectual experimentation, inquiry and change. Some teachers, knowing that they can maintain a minimal output and still retain their jobs, may grow stale. Due to the short probationary period, both the teacher and the school district may suffer by a forced decision to grant or deny tenure before the teacher's capabilities have been demonstrated. The potential for psychological stress and teacher organization pressure or other pressures may deter some school administrators from initiating dismissal procedures. Finally, the time involved, plus the publicity and expense accompanying a full tenure dismissal hearing, may lead the school board to retain inferior teachers.

PROBATIONARY SERVICE

Almost all states having tenure laws require a probationary period before a teacher can acquire tenure status.

Certification Requirements for Probationary Teachers

The eligibility of teachers to accrue probationary credit toward fulfilling the Act's requirements or toward achieving tenure, depends upon the type of teaching certificate they possess. Section I, Article I defines the term "teacher" as used in the Act to:

> ...include all certificated persons employed for a full school year by any board of education or controlling board of any public educational institution. (emphasis added)[8]

Section II, Article I of the Act directs the State Board of Education to define the term "certificated."[9] The State Board decided to use one definition of the word "certificated" as it applies to the acquisition of probationary service credit, and another for the teacher's eligibility to acquire tenure.

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[8] Michigan Teachers' Tenure Act, Article I, Section 38.71.

[9] Michigan Teachers' Tenure Act, Article I, Section 38.72.

Administrative Rule 390.661 entitled "Certification of teachers under teachers' tenure act," Part a., applies to that portion of the Tenure Act setting forth the requirements of the "Probationary Period." Part a provides that:

> ...'certificated' as it refers to teachers shall include any teacher holding a Michigan certificate which is valid for the position to which he is assigned...[10]

Thus, it appears that a teacher holding a valid Michigan teachers' certificate of any type[11] may accrue credit toward fulfilling the probationary period, providing he works full-time. Service as a substitute or part-time teacher will not qualify him for tenure. However, "permanent substitutes" and part-time teachers working full-time, such as kindergarten teachers working one-half day, may count such service as regular full-time probationary service for tenure purposes. The certification requirements for achieving tenure are described in part b of the State Board rule. In general, they compel the teacher to hold a provisional certificate or better, with certain exceptions.[12]

The Probationary Period

Michigan statutes require that a beginning teacher complete a satisfactory probationary period of two years before attaining tenure status.[13] During this period he is on an annual contractual basis and is subject to non-renewal of his contract at the discretion of the board. The probationary period is "a period of proof" or "trial period". The teacher attains tenure when he has served on a regular full-time basis for two years, and then is appointed by the board to continue teaching in its schools.

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[10] Michigan State Board of Education Administrative Rule 390.661 a.

[11] Ibid. The rule excludes non-degree persons holding special certificates as teachers or teacher aides in training in experimental programs, from achieving credit for probationary service.

[12] Michigan State Board of Education Administrative Rule 390.661 b.

[13] Michigan Teachers' Tenure Act, Article II, Section 38.81.

Teaching service in other states[14] or in non-public schools will not fulfill any portion of the probationary period requirement. Any teacher who previously taught in a Michigan school district and failed to achieve tenure, must serve a two-year probationary period when going to another district. Probationary service "credit" is not transferable from one district to another.

While the Michigan Teachers' Tenure Act provides for tenure status following two years of satisfactory service, it does not state that the two years of employment must be consecutive years. Neither the Michigan courts nor the Attorney General has commented on this question, but it is reasonable to assume that the years making up the probationary period must be served consecutively, as well as immediately preceding the date on which tenure is claimed. Consequently, it is doubtful that a teacher could resign his position after one year of service, teach in another district, then return to the district where he first taught and claim that his first year of employment fulfilled part of his probationary period. Probationary service which is interrupted by military service, a leave of absence, or a sabbatical leave could probably be counted.

Quite often after a teacher completes a satisfactory two-year probationary period and is eligible to achieve tenure status, he resigns and accepts a position in another school district. The question is unresolved as to whether the teacher should be required to complete a two-year probationary period in the new district, or is eligible for immediate tenure status. It is clear that if a teacher's two-year probationary period has been unsatisfactory and his contract has not been renewed, he cannot transfer to another district and be eligible for tenure.

A teacher acquires tenure in a school district rather than in a particular school building, grade level, department, or program. It is not necessary to serve the two probational years in the same school building or under the same building administrator.

For probationary teachers employed to start teaching at the beginning of the school year on a one-year contract, the question of defining the first probationary year is generally quite simple; it is the same as the "school year". But some teachers are employed to commence work at a time other than the opening day of school. For example, many schools employ a few new teachers to start teaching at the end of the first semester, or about February 1. For these teachers computation of the first and second year of probation is more difficult.

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[14]Tenure status achieved in other states is not transferable to Michigan.

If a new teacher is employed to begin teaching on February 1, 1972, his first year of probationary service ends January 31, 1973. His second year of probation starts February 1, 1973 and ends January 31, 1974. One Opinion of the Attorney General supports this interpretation:

> It is our opinion that the completion of an equivalent of two complete school years of service, not necessarily calendar years, is prerequisite to tenure under the Michigan Teacher Tenure Act.

and further:

> While the Tenure Act, Article II, does not make express provision for credit of fractions of school years toward the completion of the two year probationary period of a beginning teacher, neither does the act expressly require the completion of the two complete, consecutive and regular school years. The probationary period implies that a beginning teacher is 'on trial' during the first two years of employment in respect to his being granted tenure. This is the prescribed length of time given to the board within which to determine the teacher's fitness and capabilities and to decide whether he merits continuous tenure in the district. We think that the period should not be extended through interpretation beyond the statutory requirement.
>
> In view of this situation, it is our opinion that the teacher in question who was employed on December 1, 1947, would have completed the two probationary school years of service on December 1, 1949.[15]

School administrators and teachers should exercise care in computing probationary years. The sixty-day notice requirements for non-renewal of contract, discussed later in this section, must be considered in relation to the end of the teacher's probationary year(s) rather than the end of the school year, if the teacher began work in mid-year. For example, a Michigan teacher started teaching January 29, 1968 and was notified in a letter dated March 26, 1970 that her services would be discontinued at the end of the 1969-70 school year. The Teacher Tenure Commission held that the notice was not timely and ordered the teacher reinstated with tenure.[16]

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[15]Opinion of the Michigan Attorney General, No. 1126, March 17, 1950.

[16]Cavalier v. Warren Woods Board of Education, Michigan Teacher Tenure Commission, Docket No. 70-18.

The Third Year of Probation

Michigan statutes provide that a third year of probation may be granted to a probationary teacher. This is contingent upon written notice to the Tenure Commission[17] of a properly authenticated copy of the board resolution imposing a third year of probation. This provision was established for the teacher who has not fully satisfied the board, but may have shown promise. The third year of probation extends the "trial period" from two to three years, and is considered to be for the benefit of the teacher.[18]

Educators have raised the question as to whether a board of education may ever "require" a teacher to serve a third year of probation, since the language in the statute uses the word "grant", which implies that the third year of probation must be requested by the teacher. It is doubtful that the Legislature intended that teachers could be placed on a third year of probation only if they submitted a request to the school board.

The Michigan Supreme Court has indicated that a board can "require" a teacher to serve a third year of service in the district on a probationary status, if he decides to continue his employment in the district.[19] Under this interpretation, a board of education would state to the teacher, in effect, "You have served two years of probationary service in the district. We are not fully satisfied with your work, but believe you show promise of becoming a good teacher. Therefore, we are requiring you to serve a third year of probationary service rather than granting you tenure." This interpretation more adequately expresses the meaning of the statute.

A board of education, by policy, cannot require all probationary teachers to serve a third year of probation. This matter was settled by the Michigan Supreme Court. In April, 1954, the board of education of Flint adopted a policy "requiring" three years of probation for all new teachers in the Flint school system. A teacher employed by the board as a probationary teacher was given a probationary contract for the school year 1956-57. No written statement as to the character of her work was furnished her at the conclusion of the school year. The same procedure was followed for the second year; again she was given no written notification whatever as to the quality of her work, whether satisfactory or otherwise.

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[17] Michigan Teachers' Tenure Act, Article VII, Section 38.82.

[18] Wilson v. Flint Board of Education, 361 Mich 691, (1960).

[19] Ibid.

Early in 1958, she and all other second-year probationary teachers remaining under contract were placed upon a third-year probationary status by order of the board, and the State Tenure Commission was so notified. About one year later, on March 12, 1959, the superintendent informed the teacher that he "could not conscientiously recommend (her) for a tenure contract," and on March 24 she was notified of her discharge, effective June 12, 1959, at the end of the third year of the probationary period prescribed by the board.

A hearing before the board was held and the teacher was later notified of the board's adverse decision. She appealed to the State Tenure Commission. The decision of the Tenure Commission was appealed. The Michigan Supreme Court, in reviewing the case, said:

> We have made reference heretofore to the "policy" of the board to "require" 3 years of probation for a beginning teacher. But the State, also, has a policy as to beginning teachers expressed in the teachers' tenure act. That policy is that the probationary period shall be not 3 years, but 2. "No teacher," says the statute, "shall be required to serve more than 1 probationary period," such period having been heretofore defined as 2 years' duration. It is true that a board may "grant" a third year of probation to a teacher, but the language of the grant (as opposed to that of a requirement) makes clear that the third year is for the benefit of the teacher, who may not have satisfied the board fully but who may have shown promise nonetheless. Nowhere in such language is there any foundation for saying that a board may require, in all cases, 3 years of probation...[20]

It appears well settled that a board of education cannot adopt a policy requiring all probationary teacher in the district to serve a third year of probation. Boards of education may grant individual teachers a third year of probation. Furthermore, unless a probationary teacher is given a written statement at least sixty days before the close of the second year as to whether his work is satisfactory, he may not be dismissed at the end of his third year in the district, even though the board intended the third year to be probationary and had so informed the Tenure Commission.[21] The board of education must notify the

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[20] Ibid.

[21] Ibid.

Tenure Commission by submitting a written, properly authenticated copy of its official action in imposing a third year of probation. In the absence of such notice, the teacher will attain tenure upon completion of the two-year probationary period.[22]

Evaluation of Probationary Teachers

The Michigan Teachers' Tenure Act requires that, "At least sixty days before the close of the school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory."[23] It is important to note that it is the board of education which must provide the "definite written statement" regarding the teacher's work. An administrator's evaluation, given without the board's knowledge and approval, would not meet the requirement of the statute even if the evaluation reflected favorably upon the teacher. Neither would a verbal communication fulfill the requirement of the statute; even if the teacher had attended the board meeting where the decision was made to notify him the provisions of the law would not be fulfilled. But the written statement need not contain either the specific words, "satisfactory" or "unsatisfactory."[24]

The decision to provide a probationary teacher with a written statement explicitely evaluating his teaching must be made through a resolution written into the board minutes. The decision must be made at a legal meeting and approved by a majority of the full board membership.

The provision that the written statement be provided the teacher "At least sixty days prior to the close of the school year..." will be strictly interpreted by the courts. One delivered fifty-nine days before the close of the school year would not be adequate.

The approved statement of the board as to whether the teacher's work has been satisfactory or unsatisfactory should be mailed to the teacher's home address by certified or registered

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[22]Opinion of the Michigan Attorney General, No. 2992, August 12, 1957.

[23]Michigan Teacher's Tenure Act, Article VII, Sect. 38.83. The term "school year" is defined in Michigan Teachers' Tenure Act, Article I, Section 5.

[24]Other words or phrases having like meanings may be substituted.

mail (return receipt, addressee only) or a telegram (report delivery). The school district has the burden to prove that it has actually given the statement to the teacher within the legally required time limit.

Effect of Board's Failure to Notify a Probationary Teacher of an Evaluation of his Work Within the Time Limit

If a board of education fails to provide a probationary teacher with a written statement as to whether his work is satisfactory, its failure to do so "...shall be considered as conclusive evidence that the teacher's work is satisfactory..."[25] Failure of the board to so notify the teacher at the end of his first year's service constitutes an automatic granting of a second year of probationary service.[26] If the board of education fails to notify the teacher that his work is unsatisfactory at the close of the second year of probationary service, tenure will be automatically granted.[27] When a board of education failed to follow the statutes, the Michigan Supreme Court said:

> We have noted that the teacher was given no written statement before the close of the first or second school years as to whether or not her work was satisfactory. In this situation the statute is clear: such failure, it provides, "shall be considered as conclusive evidence" that the work is satisfactory. The result of the above is that the teacher has satisfactorily completed the probationary period, is entitled to the status of tenure, and may not be dismissed save for reasonable and just cause..."[28]

We may state as a general rule, that if a properly certified probationary teacher in his first year of service is not provided with a definite written statement of evaluation from the board of education regarding his work, he is entitled to a probationary contract for the ensuing school year. If the probationary teacher in his second year of service does not receive from the board of education, a statement evaluating his teaching, he will automatically be classified as a tenured teacher. He cannot be deprived of tenure status because of inaction by the board of education, or even because of the nonexistence of a written

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[25]Michigan Teachers' Tenure Act, Article VII, Section 38.83.

[26]Wilson v. Flint Board of Education, 361 Mich 691 (1960).

[27]Munro v. Elk Rapids Schools, 385 Mich 618 (1971) in which the Michigan Supreme Court reversed an earlier decision in Munro v. Elk Rapids Schools, 383 Mich 661 (1970).

[28]Wilson v. Flint Board of Education, 361 Mich 691 (1960) reaffirmed in Munro v. Elk Rapids Schools 385 Mich 618 (1971).

tenure contract.[29] Furthermore, a board cannot refuse to reemploy a teacher, even if it sends him a nonrenewal of contract notice 60 days prior to the close of the school year, unless it has provided him with a statement that his work is unsatisfactory.[30]

If a board of education decided not to reemploy a third-year probationary teacher for the ensuing school year, it must provide him with a definite written statement sixty days before the close of the school year that his work has been unsatisfactory.

In usual practice, boards of education will notify by certified mail or telegram only those teachers whose work has been deemed unsatisfactory. Since teachers would be reemployed automatically if the board failed to notify them of an evaluation of their work, verbal notification, regular mail, or a letter placed in the teachers' school mailbox would suffice for notifying those evaluated as satisfactory.

Non-reemployment of a Probationary Teacher

The Michigan Teachers' Tenure Act requires that "...any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified in writing at least sixty days before the close of the school year that his services will be discontinued."[31] The sixty-day limitation is for the benefit of the teacher and the board; it provides additional time for the teacher to obtain new employment and for the board to secure a replacement.[32] The decision not to reemploy a probationary teacher must be made at a legally called public meeting of the board. The board must also provide the definite written statement of nonrenewal although administrative personnel may execute the action.

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[29]Opinion of the Michigan Attorney General, No. 3297, October 15, 1958. Michigan School Code, Section 340.560 requires that contracts with teachers shall be in writing. But if a teacher is entitled by the Teachers' Tenure Act to tenure status, the board could not deprive him of a position by refusing to issue an individual teacher's contract.

[30]Munro v. Elk Rapids Schools 385 Mich 618 (1971). Fucinari v. Deaborn Board of Education, 32 Mich App 108 (1971).

[31]Michigan Teachers' Tenure Act, Article II, Section 38.83. An oral notice from the teacher's principal would not satisfy the provision of this statute. Weckerly v. Mona Shores Board of Education 28 Mich App 243 (1970).

[32]Weckerly v. Mona Shores Board of Education 28 Mich App 243 (1970).

When a Michigan school board at an "executive session" directed its personnel director to send the sixty-day notice letter "if" the school administrators still viewed the plaintiff's performance as unsatisfactory, the action of the board was held not to be in sufficient compliance with the statute. Final action, it was ruled, can be taken by a school board only in a public meeting, not in an executive session. In the same case the court ruled that a school board, at a public meeting, could not legally ratify the personnel director's notice of termination when the board meeting was held less than sixty days prior to the close of the school year.[33]

The Teacher Tenure Act is silent as to the manner of sending the written notice of nonrenewal from the board to the teacher. Commenting on this point the court stated:

> The written notice could have been hand delivered, mailed by regular mail or mailed as certified or registered mail; any one of these methods would have been acceptable under the statutory language. Certified or registered mail would give the board concise and ready proof of delivery of the written notice.[34]

The technique of counting the sixty required days may be ascertained from one of the court's decisions. In this particular case, the last day of the school year was June 7 and the court stated that "...the sixtieth day before the close of that school year was April 9, 1968." The court concluded that a certified letter mailed on April 8, 1968 satisfied the sixty-day requirement, even though the teacher did not have the written notice in hand until fifty-six days before the end of the school year.[35]

The majority vote of the full membership of the board is required for non-reemployment.[36] Notice should be sent to the teacher's home address, and a return receipt obtained indicating

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[33]Fucinari v. Dearborn Board of Education, 32 Mich App 108 (L971).

[34]Weckerly v. Mona Shores Board of Education 28 Mich App 243 (1970).

[35]Ibid.

[36]Michigan School Code, Section 340.561. Unless the statutes specify otherwise, all board decisions are made by majority vote of the full membership of the board. If full membership of a board is seven, a majority vote would be four. If only five members are in attendance, four favorable votes of the five would be required to adopt a resolution.

that the teacher has received the notice within the required time period--at least sixty days before the close of the school year.

School officials should be certain that the notice informing the probationary teacher that his contract will not be renewed is mailed to the appropriate address. When a school board mailed a non-renewal notice to a second-year probationary teacher's previous year's address and he did not receive it, and the school officials knew the teacher was no longer living at the location to which they sent the letter, it was held that the teacher never received the letter. The teacher was ordered reinstated in his position with tenure.[37]

A probationary teacher who has been properly notified that his work is unsatisfactory, and that he will not be reemployed for the ensuing year, is not entitled to a hearing before the board of education[38] unless provided for in the teachers' master agreement. Michigan statutes do not permit the right of appeal to the Tenure Commission from the action of school authorities in notifying a probationary teacher that he is not to be reemployed.[39] However, if there is a question as to whether the teacher has probationary or tenure status, the teacher may appeal to the Tenure Commission. If the Commission determines that the teacher is a probationary teacher, it would have no jurisdiction on additional questions.

Effect of Board's Failure to Notify a Probationary Teacher of Nonrenewal of His Contract Within the Time Limit

A teacher in his first year of employment who has not been properly notified sixty days before the end of the school year

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[37]Karabetsos v. School District of City of East Detroit, 17 Mich App 10 (1969).

[38]Orr v. Trinter et al., No. 20721, U.S. Court of Appeals, Sixth Circuit, June 16, 1971. A number of cases have been heard in the Federal Courts on the question of whether a non-tenured teacher's constitutional rights have been violated when, without being given any reason, hearing or other procedural due process rights, he is not reemployed. Decisions emanating from the District and Appeals Courts are split. The Supreme Court has not decided the question, but recently granted certiorari in a case in this field: Sinderman v. Perry, 430 F.2d 939; certiorari granted 403 U.S. 917.

[39]Michigan Teachers' Tenure Act, Article II, Section 38.84; Fucinari v. Dearborn Board of Education, 32 Mich App 108 (1971).

that his services will be discontinued, is entitled to employment for another year. If the teacher is in his second year of employment, he is entitled to tenure at the completion of the second year, provided the board of education does not grant a third year of probation upon notification to the Tenure Commission.[40]

Non-reemployed Probationary Teacher and Evaluation Statement

The board of education, if it decides to not reemploy a probationary teacher, must at some time sixty days before the close of the school year furnish the teacher with a written statement that his teaching has been unsatisfactory.[41] The written evaluation of the teacher's work may or may not accompany the nonrenewal notice, at the discretion of the board of education. The law does not specifically state that the evaluation notice be included in the nonrenewal notice.[42] The better practice, however, would be to include the statement of unsatisfactory work and the nonrenewal notice in the same letter.

It was not the Legislature's intent to permit the arbitrary dismissal of probationary teachers by a controlling board. It must be concluded that the sixty-day notice of non-reemployment cannot be used without cause, but must have some connection with whether or not the teacher's services were satisfactory. If the controlling board could dismiss a probationary teacher arbitrarily without any consideration as to satisfactory or unsatisfactory work, then by giving sixty days' notice it could prevent any teacher, even one evaluated satisfactory, from acquiring tenure.[43]

In the notice to the probationary teacher that his work is unsatisfactory, the board of education is not required to spell out its reasons, list the specific causes for nonrenewal, or particularize the basis for its unsatisfactory evaluation. It is neither arbitrary nor capricious to refuse to reemploy a probationary teacher without giving specific reasons for that decision, except that his work is unsatisfactory. The very reason for the probationary period is to give the board a chance to evaluate the teacher without making a commitment to rehire him. Had the Legislature intended that a board of education

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[40]Opinion of Michigan Attorney General, No. 3297, October 15, 1958.

[41]Michigan Teachers' Tenure Act Article III, Section 38.83.

[42]Ibid

[43]Munro v. Elk Rapids Schools 385 Mich 618 (1971).

should be required to set forth the details of why the work was unsatisfactory, it could have, and would have, done so. The board need only state in clear and certain language that the work was unsatisfactory. A decision not to grant tenure is implied in the nonrenewal notice. While the foregoing may fulfill the requirements of the Tenure Act, it is the writer's opinion that the teacher's supervisor should hold a private conference with the teacher and state the reasons for termination of the teacher's services. In fact, the teacher ought to be provided with a written explanation, in some detail, of the reasons for nonretention as a matter of professional courtesy. Additionally, in view of the uncertainty of future court decisions in this area, school boards should state their reasons for nonrenewal. Good administrative practice requires that the judgment of nonrenewal be based on fact and reasoned analysis.

Dismissal of a Probationary Teacher During the School Year

The services of a teacher during the probationary period are usually on the basis of an annual contract, and dismissal during the school year may be for "reasonable and just cause" only. The teacher is entitled to procedural due process of law.[44] The basic procedures recommended for dismissing probationary teachers in mid-year are generally those required for dismissal of tenured teachers.

A probationary teacher has no statutory right to appeal a mid-year dismissal to the Tenure Commission;[45] but he may appeal to the circuit court as provided by the state constitution and the statutes:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings, and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.[46]

and:

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[44]Lucia v. Duggan, 303 F. Supp. 112 (1969).

[45]Michigan Teachers' Tenure Act, Article II, Section 38.84.

[46]Constitution 1963, Article 6, Section 28.

> An appeal shall lie from any order, decision or opinion of any state board, commission or agency, authorized under the laws of this state to promulgate rules and regulations from which an appeal or other judicial review has not heretofore been provided by law, to the circuit court of the county of which the appellant is a resident...[47]

The court has the authority to review the transcript of the hearing held before the board of education, to assure that the teacher was granted a fair hearing. When appeal from the board decision is made to the court, the court does not review the evidence, weigh it, and enter judgment. The court will not take additional testimony nor submit the question to a jury. The court's major purpose will be to determine whether the board of education "...acted corruptly, in bad faith, or in a clear abuse of its powers..."[48] If the board of education acts within its scope of authority, and its action is neither unreasonable or arbitrary, there is no basis for judicial interference.

Termination of services before the end of the contract period is not a breach of contract, if the dismissal was justified. But if the teacher's dismissal cannot be sustained in the court, the school board has illegally revoked the contract, and is subject to an action to collect damages.

The case of Caddell v. Ecorse Board of Education provides an excellent legal example for dismissal of a teacher during the term of his contract. The probationary teacher, Caddell, was suspended for violating school rules and regulations. At a hearing about six weeks later he was dismissed, and his contract was terminated for being absent from duty without reporting his absences, for being tardy, and for falsifying sign-in times. The circuit court and the court of appeals found adequate grounds had been given for the dismissal, and the board had acted within the scope of its authority.[49]

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[47]C.L.S. 1961, Section 600.631.

[48]Finch v. School District, 225 Mich 674 (1924).

[49]Caddell v. Ecorse Board of Education, 17 Mich App 632, N.W. 2d (1969).

Resignation of a Probationary Teacher at the End of Second Year

Sometimes a second year probationary teacher resigns his position in a school district sixty days or more prior to the end of the school year, effective at the close of the school year. He does so either upon his own initiative or at the request of the school district. If the board of education has not given timely notice to the resigning teacher, that his work is unsatisfactory and that his contract will not be renewed, a question arises regarding the tenure status of the teacher when employed by another district. It appears possible that such a teacher could be regarded as a tenured teacher, and if employed in another district he must be granted tenure or be required to serve only one year on a probationary basis. However, this question has not been resolved by the Attorney General or the courts.

TENURE RIGHTS

Once a teacher has gained tenure status, his dismissal must follow procedures prescribed by statute. These procedures are discussed in the following section of this study.

Certification Requirements for Tenured Teachers

In Section 1 of the Tenure Act the Legislature defined the word teacher to "...include all certificated persons employed by any board of education..."[50] and in Section 2 directed the State Board of Education to define the term "certificated."[51] The State Board of Education has provided one definition for probationary teacher certification and another for tenured teacher.[52] According to the definition of certification, tenured faculty must hold an elementary or secondary provisional, or permanent, certificate; or they must hold a bachelor's degree with a life certificate. A teacher holding a special certificate may qualify, providing he annually completes six semester hours of additional credit toward the provisional certificate. Additional minor requirements are provided.

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[50]Michigan Teachers' Tenure Act, Article 1, Section 38.71.

[51]Michigan Teachers' Tenure Act, Article 1, Section 38.72.

[52]State Department of Education, Rules and Regulations R 390.661.

Dismissal of a Tenured Teacher

The Michigan Teachers' Tenure Act provides that a tenured teacher may be dismissed only "for reasonable and just cause." When statutes, such as those in Michigan, are silent with respect to what constitutes "reasonable and just cause," the power to determine such questions rests with the school board, subject to review by the Tenure Commission if the teacher is on tenure. The courts hold the following causes to be sufficient grounds for dismissal: insubordination or violation of the rules and regulations of the school board; lack of cooperation; incompetence; negligence in discharge of, or inattention to, duty; immorality; chronic absenteeism; and refusal to comply with a master agreement requirement that non-union teachers pay an agency shop fee.

Procedures for discharge of a tenured teacher are provided in Article IV of the Michigan Teachers' Tenure Act. There may be no material deviation from these procedures.

A tenured teacher may be dismissed only after written charges have been filed and furnished the teacher. The charges against the teacher must be in writing, signed by the person making the charges (usually the teacher's principal, supervisor, or superintendent), and must be filed with the controlling board. The board of education has the sole authority to decide whether to proceed upon the charges. If the board decides to proceed, the teacher must be furnished a written statement of the charges. The written charges should be as specific as possible for it is difficult to defend oneself against general charges. If the charges are too indefinite the teacher has a right to demand additional information in order to prepare his defense.

If the charges concern the character of the teacher's professional services, they must be filed at least sixty days before the close of the school year.[53]

Because a teacher can be dismissed only for cause and after a hearing, the notice cannot be one of dismissal. It should be a statement of the charges against the teacher with a notice of contemplated dismissal.

The board of education has the authority to suspend a teacher from active performance of duty until a decision about his future status has been reached. However, the tenure teacher's salary continues during the suspension period and terminates only when the board of education decides to release the teacher, or when the teacher resigns.[54] Should the teacher appeal the board's decision to discharge him and the board is ordered to reinstate him, it might be required to pay the teacher during the entire period he did not teach.

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[53]Michigan Teachers' Tenure Act, Article IV, Section 38.102.

[54]Michigan Teachers' Tenure Act, Article IV, Section 38.103.

Notification should be given through mail addressed to the teacher's home address and a return receipt received by the board. Notice of the charges by "word of mouth" would not constitute legal notice. Even if the teacher attended the board meeting at which the decision was made to send the teacher the written charges, his attendance would not constitute legal notice. The actual notice, when given, must be written. But, if a teacher is handed a copy of the written charges he cannot refuse it and later claim that no notice was given. The charges may be amended later if the teacher is given ample time to prepare to meet the new allegation.

The teacher must be given notice of date and opportunity for a hearing.[55] If the teacher requests a hearing, the board must grant it. If the hearing is denied, the teacher may appeal to the Tenure Commission. But a hearing is not automatic; it follows at the request of the teacher. The request must be definite. If a teacher receives a copy of the written charges and does not request a hearing, the board may decide on the dismissal without injustice to the teacher. The teacher has "slept on his rights."

The hearing must take place not less than thirty nor more than forty-five days after the filing of charges, if the teacher elects to proceed with the hearing.

The Tenure Act specifies how the hearing shall be conducted before the controlling board of education. A full verbatim stenographic record of the proceedings is required, and the affected teacher must be furnished a certified copy of the transcript of the hearing within ten days following the hearing. The school board is required to produce evidence at tenure hearings, and the burden of proving unfitness rests with the board.[56] The hearing must be confined to the charges in the notice or to the amended charges properly introduced. Evidence regarding matters not included in the notice cannot be introduced. The teacher cannot be dismissed on allegations not included in the original or amended notice.

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[55]Michigan Teachers' Tenure Act, Article IV, Section 38.102.

[56]The fact that the board acts in an adjudicating, as well as an investigating capacity does not constitute an improper procedure. The board can also conduct an investigation preceding the hearing. It may seem inconsistent that a school board should be both prosecutor and jury, but the practice is always upheld by the courts. Even previous bias of a board member is insufficient cause to prove that the hearing was unfair. The involvement of the school board in a teacher dismissal hearing has been questioned, and alternative methods of adjudicating teacher dismissals have been proposed. For example, see Wisconsin Law Review Volume 1971, No. 1, p 354, "Constitutional Law--Due Process--Fairness of a Hearing Before a School Board on Nonrenewal of a Teacher's Contract."

The controlling board has the power to subpoena witness on its own motion or at the request of the teacher. If any person refuses to appear, the controlling board may petition the circuit court in the county, requesting the court to issue its subpoena to appear before the board to testify. Failure to obey the court subpoena may result in a contempt citation.

The hearing gives the teacher opportunity to cross-examine the witnesses and produce his own witnesses. The accused teacher has the right to be represented by legal counsel at the hearing. The hearing may be public or private, at the option of the teacher. If the hearing is public, it must be held in a room adequate to accommodate the teacher's friends.[57] If the hearing is private, it remains private throughout the hearing and decision process until a final decision is reached.[58]

The board must render a decision within fifteen days after the conclusion of the hearing. The decision must be stated in writing and a copy provided the teacher within five days after the decision is reached. An adverse judicial determination by a majority vote of the full membership of the board of education is an essential precedent to the teacher's dismissal.[59]

Appeal of Board of Education Decision to the Tenure Commission

The Michigan Teachers' Tenure Act provides for appeal of the school board's decision to the Tenure Commission.[60] The appeal must be made within thirty days after the board's decision,[61] and the Tenure Commission is required to hold a hearing within sixty days after the date of appeal. The Tenure Commission will not allow a teacher the right to an appeal if he fails to comply with the thirty day limit, since the purpose of the limitation is to dispose of an appeal when the evidence

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[57] Rehberg v. Board of Education of Melvindale, Ecorse Tp. School District No. 11, 345 Mich 731 (1956).

[58] Opinion of the Michigan Attorney General No. 3296, September 1, 1959.

[59] Michigan Teachers' Tenure Act, Article IV, Section 38.104 (b)

[60] Michigan Teachers' Tenure Act, Article VI, Section 38.121.

[61] Failure of the teacher to appeal the decision of the controlling board within thirty days forecloses the teacher's right of appeal. Opinion of the Michigan Attorney General, No. 3372, June 9, 1959.

is fresh. However, failure of the Commission to hold a hearing within the sixty day limit does not deprive the teacher of his right to a hearing.[62] The cost of a hearing before the Tenure Commission may not be assessed against the parties involved.[63]

The Teacher Tenure Commission

The purpose of the establishment of a Tenure Commission to which an aggrieved teacher may appeal is to speed up decisions and foster economy, since court actions are prolonged and sometimes expensive. There is also the advantage of placing the responsibility for decisions in professional controversies in the hands of educationally rather than legally trained persons. The procedure is usually simplified, with technical rules of judicial process relaxed or ignored.

The State Tenure Commission consists of five members: two are classroom instructors on tenure,[64] one a member of a board of education, one not a member of a board of education or a teacher, and one a superintendent of schools.

One member serves as chairman and one as secretary. The Superintendent of Public Instruction is ex-officio secretary of the Commission, and a member of the Attorney General's staff serves as legal counsel. Not more than one member of the Tenure Commission may be appointed from any one school district. Commission members are appointed by the Governor for five-year terms. Members are paid on a per diem basis while hearing a case,[65] and are reimbursed for necessary expenses.[66] However, commission members may not be paid expenses for attending local school board and teacher association meetings to explain the rules and regulations applicable to the tenure act.

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[62]Opinion of the Michigan Attorney General, No. 2406, January 13, 1956.

[63]Opinion of the Michigan Attorney General, No. 987, 1949-50.

[64]A person who serves as a full-time counselor to students but does not perform any direct classroom instruction in any subject area, cannot serve as a classroom instructor member of the State Tenure Commission. Opinion of the Michigan Attorney General, No. 4459, October 12, 1965.

[65]Members of the Tenure Commission are paid on the basis of calendar days while hearing cases. The phrase "while hearing cases" may include reading transcripts and visitation of premises. Opinion of the Michigan Attorney General No. 3614, February 7, 1962.

[66]Opinion of the Michigan Attorney General, No. 4114, March 22, 1963.

Commission members elect one of their number to serve as chairman. The Commission determines its own rules and regulations for the conduct of its affairs. The Commission meets in Lansing at least twice each year, at such times as they determine, and other times and places as deemed appropriate by the Commission.

All records of the Commission are kept in the office of the Superintendent of Public Instruction. The records are public information, including the written decisions. Expenses of the Commission are defrayed from an annual legislative appropriation.

The right of appeal to the Tenure Commission establishes a safeguard against the arbitrary and unreasonable dismissal of teachers. The Commission must review and consider the record made by the controlling board, and may take additional testimony as in its discretion may be required. After hearing new testimony together with testimony presented to the school board, the Commission may make an independent finding of facts and enter an order accordingly.[67] The Commission has the authority to uphold or reverse the decision of the local board of education.[68]

Appeal of Teacher Tenure Commission Decisions

If a tenure teacher whose contract has been terminated by a board has appealed to the Tenure Commission and the board's action has been upheld, he may appeal to the circuit court if he believes there has been a breach in the legal process. In an appeal from a Tenure Commission's decision the Michigan Supreme Court said that its:

> ...only function is to determine from the record whether proof received by the controlling board, or the commission, or both supports finding on which the commission has decided for or against the appealing teacher.[69]

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[67]Rehberg v. Board of Education of Melvindale, Ecorse Tp. School District No. 11, 345 Mich 731 (1956); Long v. Board of Education, 350 Mich 324 (1957).

[68]The Tenure Commission or its chairman has no authority to hand down opinions or advice on tenure questions except by way of an official opinion when a school board's decision has been appealed. It does not act in an advisory capacity. Opinion of the Michigan Attorney General, No 2987, May 23, 1957.

[69]Long v. Board of Education, District No. 1, Fractional, Royal Oak Tp. and City of Oak Park, 350 Mich 324 (1957).

In The Courts and the Public Schools, Newton Edwards has provided an excellent explanation of the meaning of appeal and the role of the court. (The words "Tenure Commission" could be interchanged with "board of education" in the following statement):

> When an appeal is taken to the court by an aggrieved teacher, the court will, as a rule, make a determination of three things: (1) Did the board of education have jurisdiction, that is, did it act within its scope of authority? (2) Did the board follow the procedures prescribed by statute? and (3) Did the board have some reasonable basis for its action? The courts will not permit a board to dismiss a teacher for some illegal cause. They will require a board to follow the statutory mode of dismissal, as, for example, the giving of notice and the holding of a hearing. What the court will not do is to reweigh evidence in order to determine its credibleness or where the preponderance lies. It will examine the evidence only to determine whether the board acted reasonably or arbitrarily. And if the evidence is such that reasonable men might disagree with respect to the conclusion to be drawn from it, the action of the board will be sustained. The board's finding will be overruled only when it has acted arbitrarily, unreasonably, and without any substantial basis of fact.[70]

The board of education also has the right to appeal a decision of the Tenure Commission to the court.

Courts cannot inquire into the motives of the board and/or the Tenure Commission, and cannot say whether testimony of one witness should be believed rather than that of another. If a board of education or the Tenure Commission do not abuse their discretion by acting arbitrarily, corruptly, capriciously, or upon insufficient charges, and their findings are based upon competent relevant evidence, their acts are final and not subject to review by the courts.

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[70] Newton Edwards, The Courts and the Public Schools. University of Chicago Press, 1955. p. 504.

In the absence of a court appeal, the orders of the Tenure Commission are conclusive and final. The Tenure Commission has no authority to compel compliance with its orders. However, the Commission may enforce its orders through application to a proper court for a writ of mandamus against the board of education.[71]

DISMISSAL OF TENURE TEACHERS
A PROFESSIONAL POINT OF VIEW

The information presented in this booklet has not been intended to convey to teachers, administrators, or school board members that every teacher dismissal is professionally correct if it is legally correct. Educators should look beyond the strict interpretation of the law for fully adequate dismissal procedures. The NEA Committee on Tenure and Academic Freedom has prepared an important statement which embodies a professional approach appropriate to the dismissal of teachers:

FAIR DISMISSAL PROCEDURES FOR A SCHOOL SYSTEM

Every board of education should have a written policy for fair dismissal. The policy should be democratically drawn up, known to every employee and respected by both employer and employee. It should apply to both beginning and experienced teachers.

Fair dismissal practices mean: (1) That an employing board may with justice dismiss or not re-employ school personnel; (2) that employees may be dismissed or not be re-employed only after fair practices have been followed.

Fair dismissal practices should be followed regardless of the length of employment or the existence or absence of statutory requirements.

Fair dismissal practices would include the following:
-When any action or other matter appears to exist which may possibly result in the future dismissal of an employee, the situation should be brought promptly to the attention of the employee involved.
-Every helpful effort should be made, especially by those in an administrative or supervisory relationship, to aid the employee to correct whatever appears to be cause for potential dismissal.

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[71]Opinion of the Michigan Attorney General, No. 3406, September 29, 1960.

-Except in extremely serious circumstances, the employee should be given sufficient time for improvement.
-Any charges of undesirable traits or practices should be bona fide, verifiable, and clearly stated to the employee in writing. These charges should be based upon reports made by supervisors and administrators concerning the employee's ability to perform his duties. The information in these reports should be made known to the employee. Terminology such as "for the good of the school," "disloyal," or "he knows why" should be avoided. Any employee thus charged should have a fair opportunity to explain or otherwise defend himself.

In general, every effort should be made by all concerned to make dismissals as infrequent as possible and to make unfair dismissals impossible.

Simple ethics and human fairness transcend any law or absence of legal provision. "Against such there is no law."[72]

Michigan teachers' acquired rights of collective bargaining have had significant influence upon the development of school personnel policies. Many contracts between school boards and their teachers' organizations reflect policies which go beyond the legal requirements of teachers' tenure rights. Boards of education and teachers' organizations have developed policies related to retention and dismissal of teachers and have reached agreement on clear, definite policies to cover many foreseeable situations, particularly transfer and assignment, and reduction of staff procedures.

Role of the School Administrator in Teacher Dismissals

Every building principal, and other administrators responsible for personnel supervision, should maintain an up-to-date personnel file for each member of the professional staff under their direction. The file should contain a transcript of all undergraduate and graduate credits; proof of certification; a record of employment showing salary, positions held, grades or subjects taught, and number of years employed, including employment in other districts; a record of the days he has missed because of illness or personal leave and of his accumulated sick leave, if the district has a sick leave policy; meetings, workshops, seminars, institutes, etc. attended; membership in professional organizations and offices held;

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[72] Fair Dismissal Procedures for a School System, Commission of Professional Rights and Responsibilities, National Education Association, 1965.

honors or special recognitions received; committee assignments; records of conferences held with the teacher about his professional work; and evaluation reports. This list is not intended to be exhaustive; other important items related to the professional profile of the teacher might well be included in the file. The teacher has the right to place items in his own file, and he should always be permitted access to review its contents.

The personnel file should be viewed as positive in nature, primarily because its contents will be used to the teacher's advantage far more often than to his detriment. The contents are invaluable to a new administrator in becoming acquainted with his staff, or to any administrator in making assignments, in considering personnel for promotion or salary increases, in evaluating personnel for special program assignments (e.g. internships, federally sponsored workshops or institutes, etc.), or in providing information for recommending personnel for positions in other school systems or for advanced training programs at universities.

The wise administrator will obtain as much professionally related information about his teachers as he can assemble and have it readily accessible. Teachers know that a good administrator keeps adequate and complete personnel records and does not rely on memory for information about his staff.

A building administrator, or some other designated person, should hold several "individual" conferences each school year with every teacher under his direction, about the teacher's professional work. A written record of the conference should be made and dated; one copy should be given the teacher and another placed in his personnel file. In a very large majority of cases these conference records will be positive in that they will reflect credit upon the teacher and show proof of the teacher's professional competency and advancement.

Occasionally it will be necessary to hold conferences with a teacher whose work has been judged inadequate. Conference records should include clear statements as to the nature and extent of the teacher's inadequacies, what is reasonably expected of the teacher, and the administrator's and supervisor's recommendations for improvement. Follow-up conferences should be held with the teacher. The administrator is professionally obligated to counsel him on several occasions and to provide guidance and assistance. A written record of each conference should be made, stating the purpose of the conference and recommendations for improving the work of the teacher. Again, one copy should be given to the teacher and another retained in his file. Evidence of "constructive evaluation" should appear in the teacher's personnel file.

If the responsible administrator, after making all reasonable attempts to assist in the teacher's professional improvement, judges it would be in the best interests of the educational program of the school district to dismiss the teacher, the administrator should be able to document the written charges against the teacher. He should be able to cite and describe specific situations which reflect upon the professional incompetency of the teacher. The administrator will need to refer to written conference records to show that the inadequacies have been brought to the teacher's attention, that a reasonable effort has been made to help the teacher correct any deficiencies, and that the teacher nevertheless failed to improve.

A statement such as, "I remember one day last fall, about the middle of the first semester, I talked with Mr. Jones about some of his problems," will not fulfill the administrator's professional or legal responsibilities at a hearing to discharge a teacher. But carefully prepared and dated records of each conference, as well as recorded observations of the teacher's work, will enable the administrator to be much more certain of his statements and to substantiate any charges he may make. Many of the reasons for discharge are subtle and difficult to demonstrate or even articulate, but are still very necessary. A school administrator should never attempt to discharge a teacher on a mere pretext which is not the moving cause for the nonretention, when the real reason is constitutionally nonpermissible. If the real reason is a violation of the teacher's basic constitutional rights, and the reason advanced is a sham, the school administrator can be personally liable for damages.[73]

The role of the administrator in the dismissal of a teacher is crucial. It is usually his responsibility to prepare and file the charges with the board of education for their consideration, and to present definite and irrefutable evidence at the hearing to substantiate the charges. He is under the highest professional obligation to present honest, complete, and accurate evidence. There can be no doubt that a teacher's professional reputation is damaged by nonrenewal or dismissal, and it may well bring an end to his professional career.

Role of the Board of Education in Teacher Dismissals

Most of the legal provisions for dismissing teachers are discussed in other sections of this paper. Statutes, court

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[73] 42 U.S.C. Section 1983 (1964).

interpretations, and Attorney General's Opinions offer excellent procedural guidelines for the school board to follow in deciding whether to retain or dismiss a tenure teacher.

Whenever a controlling board dismisses a tenured teacher, it faces the possibility of an appeal of the decision to the Tenure Commission. The ultimate outcome of the board's decision is in doubt until the teacher decides not to appeal, decides to appeal, or until the Tenure Commission renders a decision. If the Commission reverses the board and orders the teacher reinstated, the school district can appeal the Commission's order to the court or reinstate the teacher. If the teacher is reinstated, the school district may be obligated to pay the teacher any money he might have earned had he acutally taught.

Because of the possible professional damage to the teacher and the financial risk involved to the school district, a board of education should enter into dismissal proceedings of a tenure teacher with caution and only upon strong recommendations of its chief administrative officer, the person filing the charges, and legal counsel. The board members should expect that the teacher will appeal a dismissal action and the board should be prepared to defend its decision before the Tenure Commission.

Tenure laws do not prevent the dismissal of incompetent teachers, the procedures to follow, however, are complex. The teacher may muster support from inside and outside the schools. Students frequently become involved. It becomes a public issue. A school administrator may be reluctant to face a dismissal proceeding because he may be put in the position of defendant during cross-examination. The school board must lend its fullest support to a school administrator who assumes the burden of facing a dismissal proceeding of an incompetent or immoral teacher.

It can be reasonably expected from a review of past cases that the Tenure Commission will uphold the dismissal of a teacher, provided that what is expected of the teacher has been communicated to him, and that there is irrefutable evidence to show he has been sufficiently warned of his inadequacies and given professional assistance to improve his teaching. The school board's policy should set forth clearly the board's expectations of its teachers. This may be accomplished by a well written Teachers' Handbook or master agreement.

Each school board should adopt a uniform set of written objective evaluation guidelines for use in evaluating professional competency of its certificated personnel. In developing and adopting written evaluation procedures, the school board should avail itself of the advice of certificated instructional personnel. The guidelines adopted should include at least:

1. Establishment of standards of expected student progress in each area of study and of techniques for assessment of the progress.

2. Assessment of certificated personnel competence as it relates to established standards.

3. Assessment of other duties normally required to be performed by certificated employees as adjunct to their regular assignments.

4. Establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment.

Each school board should provide follow-up counseling of teachers whose competency is not up to standard and assist the teacher to improve. The teacher evaluated should be given an opportunity to append written statements of their views about their evaluation to the evaluation report.

MISCELLANEOUS TEACHER TENURE ACT PROVISIONS

Discontinuing Services by a Tenured Teacher

The Michigan Teachers' Tenure Act provides:

> No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least sixty days before September 1 of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act.[74]

The above statutory provision refers to teachers who are on tenure but have not yet signed a contract to teach for the ensuing school year. (Such teachers may also resign within sixty days with the board's consent.)[75] The "discontinuance of services" must be in the nature of termination of employment, with an intention to sever the employer-employee relationship.[76]

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[74]Michigan Teachers' Tenure Act, Article V, Section 38.111.

[75]Opinion of the Michigan Attorney General, June 14, 1940.

[76]Opinion of the Michigan Attorney General, No. 4704, June 24, 1970.

The rights which are lost under the statute cited above are those rights acquired by a teacher under continuing tenure, and those rights are lost only if the teacher resigns without giving the required sixty-day notice to the school board. The statute, Article V, provides the sole exception by which a tenured teacher may lose his tenure rights without the necessity of a formal board hearing.

Article V, quoted above, was designed to prevent teachers from departing a school district immediately before school begins, leaving the school without sufficient teachers or time to replace the leaving teachers.[77]

Our courts have considered the question of whether the breach of a sabbatical leave agreement constitutes a discontinuance of service. In Rumph v. Wayne Community School District, a tenured teacher had been granted a sabbatical leave for one school year at one-half pay in order to do research approved by the board, with interim and final reports required. The teacher failed to file a report due in January and did not answer two written inquiries. The school board did not offer the teacher a contract for the next school year. The board alledged he had breached the sabbatical leave agreement which, it claimed, constituted a discontinuance of services without the controlling board's consent.

In reversing the lower court and finding for the teacher, the Appeals Court stated:

> To affirm the decision of the circuit court could mean that school boards could avoid the procedural requirements of Article IV merely by finding that the teacher had improperly discontinued services under MCLA § 38.111 (Stat Ann 1968 Rev § 15.2011). Such a result would certainly discourage a tenure teacher from taking a sabbatical leave, because the possibilty would exist that such a determination would be made without the teacher being provided with the procedural protection of Article IV.[78]

The Court further stated that the procedural approach of summarily dismissing tenure teachers placed the burden upon the tenured teacher to persuade the Tenure Commission that he should not have been dismissed, when the burden should be placed upon those making the charges against the tenured teacher.

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[77]Rumph v. Wayne Community School District, 31 Mich App 555 (1971).

[78]Ibid.

A question has arisen as to whether the withholding of services because of a labor dispute constitutes a discontinuance of services. In considering this issue, the Attorney General reviewed the findings in School District for the City of Holland v. Holland Education Association, 380 Mich 314 and stated:

> The majority of the court held that the teachers temporarily withholding their services because of a labor dispute were, nevertheless, employees of the district even though not under contract with the school district...
>
> If they are considered employees for the purposes of Act 336, PA 1947,...there is no valid basis to conclude that they are not also employees of the school district for the purpose of the tenure of teachers act...It must follow that such teachers have not discontinued their services contrary to Article 2, Section 1 of the tenure of teachers act...[79]

A tenured teacher not under written contract for the subsequent school year can "preserve his tenure" by giving appropriate notice of resignation at least sixty days before September 1 of the ensuing school year. The teacher may resign within the sixty days with the board's consent and "preserve his tenure."

The phrase "preserve his tenure" means that the teacher who resigns and leaves a district may not be required to serve a two-year probationary period in another district. If he has "preserved his tenure" through appropriate notice to the board of education, he may be placed on immediate tenure by another board or be required to serve no more than a one-year probationary period. If he has not "preserved his tenure" through appropriate action, he would be required to serve a two-year probationary period before acquiring tenure in another district.

However, if the tenured teacher is under contract for the next school year, he may not resign merely by giving notice sixty days before September 1. He must honor the contract unless the board agrees to release him. After a teacher and the controlling board execute a contract, neither the board nor the teacher can fail to observe its terms except by mutual consent. If the teacher breaks the contract the State Board of Education is authorized to suspend his certificate.[80]

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[79]Opinion of the Michigan Attorney General, No. 4704, June 24, 1970.

[80]Michigan School Code, Section 340.861.

A tenured teacher in a district is entitled to have a contract offered to him by the controlling board. Article III, Section 38.91 of the Michigan Teachers' Tenure Act requires that a teacher shall be continuously employed after satisfactory completion of the probationary period. However, Tenure status is not the same as being under contract. It can be fairly assumed that the board of education will renew contracts with its tenured teachers by utilizing the "Annual Supplementary Contract." Until the "Supplementary Contract" has been signed by the teacher and returned to the board of education, no contract exists for the ensuing school year. If the teacher refuses the salary proposal, he may request a reappraisal of the salary offered or resign his position. To preserve his tenure he must resign at least sixty days before September 1. If he resigns within the sixty day period before September 1, it must be with the assent of the controlling board to preserve his tenure.

After executing a "Supplementary Contract" for the ensuing school year, however, he cannot resign his position without the board's consent, regardless of when he wishes to resign.

Once a teacher has resigned and his resignation has been accepted by the board of education, he cannot change his mind and claim a position because he held tenure in the district.

Illegality of Forced Resignation to Evade Tenure Laws

To prevent avoidance or circumvention of the Michigan Teachers' Tenure Act, the Michigan Legislature has provided that:

> No teacher may waive any rights and privileges under this act in any contract or agreement made with a controlling board. In the event that any section or sections of a contract or agreement entered into between a teacher and a controlling board make continuance of employment of such teacher contingent upon certain conditions which may be interpreted as contrary to the reasonable and just causes for dismissal, provided by this act, such section or sections of a contract or agreement shall be invalid and of no effect in relation to determination of continuance of employment of such teacher.[81]

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[81] Michigan Teachers' Tenure Act, Article X, Section 38.172.

The above statute prevents the forcing of a resignation as a condition of reemployment for the following year. Under threat of a refusal to employ him for the ensuing year, accompanied by a promise to reemploy him if he resigns, a teacher could not be prevented from asserting his tenure rights even if he did resign. A resignation, given without the intention of terminating employment, is ineffective and does not deny the teacher's right to tenure.

A practice sometimes considered by boards of education to remove a tenured teacher and avoid a hearing is that of negotiating an agreement which provides that if the teacher resigns, the board will pay him for the rest of the year. In such a situation in New York, a teacher later decided not to be bound by the agreement. She brought an action to require restoration to her position with full tenure rights. The court ruled for the teacher on the ground that the agreement was not legal:

> A dismissal without hearing, charges and findings is illegal...If all this can be nullified by dismissal without charges, with or without pay or bonus, the protection of teachers has been removed. For the courts to validate a "waiver"...by the teacher of such rights would be violative of the spirit and public purpose of the act which protects the school system by given permanency to the jobs of experienced teachers.[82]

Staff Reduction for Lack of Need

The Teachers' Tenure Act does not prevent the release of either probationary or tenure teachers when there is a lack of need for their services, when positions have been abolished, or when there is a decrease in enrollment. When by reason of decreased numbers of pupils, suspension of schools or services, or territorial changes affecting the boundary lines of the district (consolidation attachment or annexation), a board of education decides that it will be necessary to reduce the number of teachers, it has full authority to make reasonable reductions. In the case of Funston v. District Board, 270 Pac 1075 (1929), the Supreme Court of Oregon held that school authorities have the right to dismiss a teacher when, for some reason not personal to the teacher, his services are no longer necessary, despite the statutory limitations in the Oregon Tenure Law upon the power to dismiss. The Court stated:

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[82]Boyd v. Collins, 228 N.Y.S. (2d) 228 (1962).

> When such an employee's services must be discontinued because of the demands of economy, or by reason of a lack of pupils, the cause does not have its inception in the teacher, but arises from a source foreign to her and over which she possesses no control. But when her misconduct results in a complaint and subsequently in a dismissal, the cause is personal to herself. Because a ground of removal of the type first above mentioned is one which she could not explain away, statutes of this kind, which regulate the dismissal of teachers and other public employees generally, are interpreted as intending only a regulation of dismissal for causes personal to the employee. An investigation into a situation of the type first mentioned would constitute an inquiry into the policy of the board, and the wisdom of the course it adopted. It is not difficult to perceive that a few decisions by the reviewing tribunal upon matters of policy, adverse to the board, would soon dispossess the latter of its authority and usurp it to the former.

The Michigan Supreme Court has not ruled on this precise question under the Teachers' Tenure Act, but it has ruled on a similar point regarding release of municipal employees. In Swahtush v. City of Detroit, 257 Mich. 389 (1932), the Court quoted with approval as follows:

> But it is well settled that statutes forbidding municipal officials from removing appointees except for <u>cause</u> are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose and is not a mere subterfuge to oust him from his position.
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> State, ex. rel. Quintin v. Edwards, 40 Mont. 287, 106 Pac. 695.

In the case of Slavin v. City of Detroit, 262 Mich. 173, 179 (1933), the Court stated the following:

> In coming to our conclusion, we have not been unmindful of the fact that appointments to the fire department are regulated by civil-service provisions in the charter, which however, do not affect dismissals made for reasons of economy.

> See Swantush v. City of Detroit, 257 Mich. 389; Owen v. City of Detroit, 259 Mich. 176; Durkin v. Newark Board of Fire Com., 89 N.J. Law, 468 (99 At). 432); Essenger v. New Castle, 275 Pa. 408 (119 At). 479).

In the case of Fricke v. City of Grand Rapids, 278 Mich. 323, 329 (1936), the Court stated:

> Authorities universally sustain the proposition that a city can dismiss a civil service employee by abolishing the position which the employee holds. Smith v. Flint City Commission, 258 Mich. 698, and cases cited therein; and that a city may abolish a position for bona fide reasons of economy, Slavin v. City of Detroit, 262 Mich. 173. It is conceded by plaintiffs that if an office or position in the city government is abolished for bona fide reasons of economy, the holder of that position is not entitled to a hearing before the civil service board under the civil service provisions of the city charter...

Based upon the cases cited above it is reasonable to assume that a school district has the authority to reduce its teaching staff, if the reasons are not personal to the teacher, and when the true reasons are for the benefit of the district. This right is implied in the language of Article IV, Section 5 of the Teachers' Tenure Act:

> Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified.

An issue which has been raised, but not fully clarified, is whether any of the procedural provisions of the Tenure Act apply to probationary and tenured teachers whose services are discontinued because of a necessary reduction in personnel. One question is: Does the Tenure Act provide a procedure which must be followed in determining which teachers shall be laid off first?

The general rule has been that in the absence of any statutory basis for the determination of which teachers' services will be discontinued, the school board may exercise its own discretion. Although Article IV, Section 5 allows a district to lay off teachers, it does not by its express language prescribe a scheme or formula to be followed in determining which teachers are to be laid off first. However, the Attorney

General has stated that a school board may not refuse employment to a tenured teacher while a non-tenured teacher continues to occupy a position for which the tenured teacher is legally qualified.[83] Therefore, if a reduction is made at all, and a place remains which a tenured teacher is qualified to fill, such teacher is entitled to that place as against the retention of a probationary teacher. To conclude otherwise would be contrary to the purpose and spirit of the Tenure Act, which is to secure continuity and permanency in the school district's faculty.

If the school board, in decreasing the number of teaching positions, could choose between tenured and probationary teachers both of whom were qualified for the positions still remaining, the board would have the power to nullify the Act's intent. The board of education would thereby be permitted to do indirectly that which the law forbids it to do directly. It is the writer's recommendation that school boards and teacher organizations negotiate clear and concise policies for the reduction of staff. Numerous excellent master agreement clauses on staff reduction are now in effect in many Michigan school districts.

School boards and teacher organizations should consider and put into effect policies such that when reduction of staff becomes necessary, teachers will not be selected for dismissal by reason of residence, age, sex, marriage, race, religion, or political affiliation. It has been recommended that the following points be included in the tenure law provisions covering dismissal of teachers due to emergencies:

1. A tenured teacher should not be dismissed while a probationary teacher is retained in a position which the tenured teacher is qualified to fill.

2. Teachers should be dismissed in reverse order of employment.

3. Tenured teachers so dismissed should be reemployed before probationary teachers are added to the staff.

4. Tenured teachers so dismissed should be reemployed in order of length of service.[84]

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[83] Opinion of the Michigan Attorney General, No. 3609, February 7, 1962.

[84] Trends in Teacher Tenure Through Legislation and Court Decisions, National Education Association, 1957. p. 25.

A second major question regarding staff reduction is: Are teachers whose services have been discontinued because of a necessary reduction in personnel entitled to notice at least sixty days before the close of the school year, and to a hearing? Article II, Section 3 of the Tenure Act states:

> Any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified in writing at least sixty days before the close of the school year that his services shall be discontinued.[85]

In construing the above statute the Tenure Commission held that it is not necessary to comply with the procedural requirement of notice when the reason for the discontinuance of service is not personal, but is rather a necessary reduction in staff.[86] The Commission held that the hearing procedure outlined in Article IV is not applicable in lay-off situations.

It must be recognized that clear, definite guidelines in setting forth procedural requirements for reduction of staff have not been well developed. In view of the sparsity of clear guidelines governing lay-offs, many school districts do provide the sixty-day notice if lay-offs are anticipated. Until the law is more specific, such practice may be the better way.

Effect of Transfer to Another District on Teachers' Tenure Rights

A Michigan teacher who has acquired tenure in one district is not subject to more than a one-year probationary period, effective the date of employment, if he takes a position in another district. The employing board has an option, however, of placing such a teacher immediately on continuing tenure.[87] Of course, the teacher would have the option of declining the position unless placed on immediate tenure.

The question sometimes arises whether a tenured teacher "transferring in" from another district may be required to serve an additional year of probation, similar to the third year of probation permissible for teachers completing their first two years of employment. It is clear that a tenured teacher who moves to another district cannot be required to serve more than one year of probation. Sixty days before the end of the one probationary year, the board has the option of releasing the teacher or of granting tenure; but it cannot require another year of probation.

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[85]Michigan Teachers' Tenure Act, Article II, Section 38.83.

[86]Steeby at al. v. Highland Park School District, Michigan Teacher Tenure Commission, Docket No. 70-25 (March 10, 1971).

[87]Michigan Teachers' Tenure Act, Article III 38.92.

Another question which sometimes arises is whether a non-tenured teacher who has served one year of satisfactory probationary service and transfers to another district is required to serve one, or two, more years of probationary service before becoming eligible for tenure. Neither the Attorney General nor the courts of Michigan have ruled on this question. Section 38.91 of the Michigan Teachers' Tenure Act states:

> After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed.

It seems reasonable to interpret the Legislature's intent as requiring each of the first two years of probation to be completed in the same school district. Therefore, if a teacher has completed only one year of satisfactory service before transfering to another district, he would be required to serve a two-year probation period in the new district. However, if the teacher completes a satisfactory two-year probationary period and is eligible for tenure, but decides to transfer, he is probably eligible to be employed as a tenure teacher in his new position.

We may therefore state as a general rule, without support of court opinion or an attorney general's ruling, that if a teacher has taught two years, his work has been deemed satisfactory, and he moves to another district, the controlling board may at its discretion either require one year of probation or place the teacher immediately on tenure.

Right of a Teacher to Claim Tenure

We have already mentioned that in 1964 the Michigan Legislature made the provisions of the Teachers' Tenure Act applicable to all districts in the state. Section 38.81 of the Act provides that the controlling board could have placed on continuing tenure any teacher who had previously rendered two or more years service in the district, and was under contract at the time the Tenure Act became affective in the district. The board could, however, deny tenure, but only by a unanimous vote of its full membership.[88]

An important question is whether a teacher has the right to claim tenure status upon return to a school district which has come under the provisions of the Tenure Act while the teacher was unemployed by the district. If a teacher has served two

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[88]Opinion of the Michigan Attorney General, No. 782, May 26, 1948.

or more years before the effective date of the Act, he cannot demand tenure status as a matter of right upon his return to the school system.[89] However, the controlling board may grant him tenure upon his return.

Extra Pay for Extra Duty

Under the Michigan Teachers' Tenure Act which was in effect before 1963, a teacher's or administrator's salary could not be reduced when he was relieved of extra duty or responsibility. The usual court interpretation in other states was that a teacher entrusted with a position of extra responsibility, which carried compensation above the salary schedule, was deemed to possess such experience, training, and other qualifications as to command higher pay. He was therefore entitled to continue to receive the higher compensation by reason of such qualifications, regardless of whether he continued to be assigned extra duties.[90]

Article IV, Section 38.101 provides that a tenured teacher cannot be demoted except for reasonable and just cause and only after a hearing, etc. The elimination of duties or responsibilities cannot be used as a device for a reduction in salary which is, in effect, a demotion.

In 1963 the Michigan Legislature amended the Tenure Act to permit salary reductions when extra services, duties, and/or responsibilities were reduced.[91] As a result, it would now be held that any rights a tenured teacher has under the Tenure Act do not extend to automatic continuation of extra pay for extra duty. If the teacher is relieved of the extra duty and his pay reduced, he has not been demoted.

Tenure Rights of School Administrators

A school administrator holding a valid Michigan teaching certificate[92] is protected by all the provisions of the Teachers'

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[89]Opinion of the Michigan Attorney General, No. 3511, January 30, 1961.

[90]Board of Education of Nelson County v. Katherine C. Lawrence, 375 S.W. (2d) 830 Kentucky (1962).

[91]Michigan Teachers' Tenure Act, Article III, Section 38.91.

[92]The state does not require Michigan school administrators to hold administrators' certificates. An administrator is required to have a teacher's certificate.

Tenure Act in his capacity as a teacher, and also unless the employing board withholds tenure as its permitted by statute, in his capacity as an administrator.[93] A school administrator who is not yet eligible for tenure as a teacher in the district, is protected by the provision of law applicable to probationary teachers. An administrator who has completed a satisfactory probationary period and is reemployed, possesses tenure as a classroom teacher and is eligible for tenure as an administrator.

Whenever a board of education employs an administrator who has completed a satisfactory period of probation and does not intend to grant tenure to him in his position, the board must stipulate clearly in the contract that it is not granting tenure in his administrative position. Failure of the board to so provide in the contract will be deemed as granting tenure to the administrator in his administrative position.

Administrative tenure, therefore, is at the discretion of the board of education, and it may withhold such tenure, but only by stipulating this intent in the administrator's contract. In a case which came before the Michigan Supreme Court, a principal was denied tenure in his administrative position.[94] The contract contained the following provisions:

> The conditions of this appointment are: that you are subject to assignment and transfer at the discretion of the superintendent of schools, and subject to the rules and regulations of the board of education...

and:

> ...the teacher with whom this contract is made shall not be deemed to be granted tenure in the capacity of principal under or by virtue of this contract.

The principal had served in the capacity of a principal and was assigned duties in mid-year as a "visiting teacher" with no decrease in pay. The court ruled that he had no tenure in his capacity as principal because of the wording of his contract and that his removal from the position and reassignment to a teaching position did not constitute a demotion. The rights the principal had to tenure, he possessed by virtue of being a teacher, and they did not extend to his position as a principal. The second phrase quoted from the contract denied

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[93]Michigan Teachers' Tenure Act, Article III, Section 38.91.

[94]Street v. Ferndale Board of Education, 361 Mich 82 (1962).

him tenure in his position as a principal.

It should be noted, however, that even though the board provided in the contract that it had no intention of granting tenure as an administrator, and later transferred him to a teaching position, it was required to pay him whatever salary it had agreed to pay him as an administrator. Upon expiration of the administrator's contract and his continued employment in the district as a teacher, his salary would be determined as if he had been continuously employed in the district as a teacher.[95]

A board of education must closely follow the means available in the statute if it intends to deny tenure to an administrator in his capacity as administrator. The case of Dodge v. Saginaw Board of Education[96] illustrates this point. The plaintiff, a tenure teacher, was employed by the defendant, the board of education, in the capacity of principal. For that position she had received contracts for the school years 1963-64, 1964-65, and 1965-66, each of which expressly provided that no tenure as principal was to be acquired thereunder. For the school years 1966-67 and 1967-68, she received a contract in which the language in the previous contracts about non-acquisition of tenure did not appear. In the latter contract the word "teacher" was used and the word "principal" did not appear. The term "Tenure-Teacher," part of the contract title, had been stricken out with a typewriter and over this was typed in "Elem. Prins."

The school board argued that striking out the word "Tenure" from the printed form was equivalent of meeting the statutory provision of specifically providing against tenure. The Michigan Supreme Court held that the board had not met the legal requirements necessary to deny tenure and ordered it to reinstate the principal in her position, also to pay the salary difference between what she received as a classroom teacher and what she would have received as principal.[97]

The Michigan Teachers' Tenure Act provides the opportuntiy for a local board of education to establish tenure policies for school administrators in their administrative positions. It can do so by establishing a probationary period, during which time administrators' contracts will contain a statement that the board is not granting administrative tenure. Upon

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[95]Michigan Teachers' Tenure Act, Article III, Section 38.91.

[96]Dodge v. Saginaw Board of Education, 384 Mich 346 (1971).

[97]Ibid.

satisfactory completion of a probationary administrative period, the board can grant administrative tenure by merely dropping the phrase from the new contract.

School boards should have all administrator contracts prepared with an exclusion of administrative tenure clause. Should they deem it appropriate to grant administrative tenure, it would be necessary to strike out the clause. Such practice would help reduce oversights which result in allowing tenure when it was not intended. A board should not rely on a resolution included in its minutes to deny administrative tenure. The denial should be clearly stated in the administrator's individual contract.

Transfer and Assignment of Tenured Teachers

It may be stated as a general rule that boards of education, in order to maintain efficiency and to solve personnel problems, have discretionary authority to transfer professional personnel to positions in keeping with their qualifications. Tenure laws were not intended to guarantee a teacher employment in the same school and/or the same position regardless of changing educational policies. The statutes providing for permanent tenure are interpreted as intending only to regulate dismissal for causes personal to the employee.

The assignment of teachers, regardless of whether they hold tenure contracts, is a discretionary right of the board of education, subject to the terms of the teacher's master agreement. If the individual teacher's contract does not (and most contracts do not) specify the school and class of position, school authorities may transfer teachers from one school and class of position to another. They may do so provided the teacher is qualified for the new position, and the transfer and assignment do not violate any provision of the teachers' master agreement.

The Michigan Teachers Tenure Act does not prohibit a change of grade or school so long as the teacher is retained in a position which he is qualified to occupy under state law.[98] Transferal of a teacher to a different grade or school does not constitute a demotion.

Michigan school boards have the power to assign, reassign, or transfer teachers, principals, and superintendents. In exercising such power, the school authorities ordinarily have wide discretion. The board has the power to assign and subsequently to transfer a teacher to such classroom, building, or division as it may determine to be in the best interest of the school.

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[98] Opinion of the Michigan Attorney General, No. 3609, February 7, 1962.

However, the power to assign and transfer must be exercised in good faith and in the best interest of the school district. A transfer may not be made for the purpose of compelling a teacher's resignation. A teacher may not be assigned to a position for which he is not qualified. A teacher's refusal to accept a reasonable assignment which the school authorities have the power to make constitutes grounds for dismissal.

In Michigan, the contract for employment may stipulate the assignment, reassignment, or transfer. Where, under terms of the contract, the teacher agrees to teach in such school as may be designated by the school authorities, the teacher is under obligation to teach in the school assigned him. If the teacher has a right under his contract to an assignment to a particular position, the board has no power to assign him to a different position. Many Michigan school boards use an "Annual Supplementary Contract" for tenure teachers which states the salary for the ensuing school year and includes a statement such as the following: "Failure to return acknowledgement of this form before (some specified date), forfeits your rights to placement in present position or building." If the teacher complies with the request, it could be assumed the teacher would possess contractual rights to a position in the building or to his present assignment.

Michigan tenure statutes do not guarantee that a teacher must be retained in a particular school or assigned to teach any particular class or classes. The teacher acquires no vested right to teach any certain class or in any certain school. The statutes providing for permanent tenure were never intended to guarantee employment in spite of reduction in number of pupils or closing of schools. There was never any intention of the legislature to confer upon employees any special privileges to enable them to retain permanently their positions or pay regardless of changing conditions.

Effect of Annexation, Attachment or Consolidation on Tenure Rights of Teachers

The question sometimes arises regarding the status of tenure teachers when the district to which they are under contract is annexed by, or attached to, another school district, or become part of a consolidated district. (In annexation, the annexing district continues as a political entity, the annexed district is dissolved, and the board of education of the annexing district assumes control over the annexed area. When a district becomes disorganized, it is

attached to another district by the county or intermediate board. In consolidation, if school districts A, B, and C consolidate into D, district D is a newly created political subdivision.)[99]

Teachers on continuing tenure in an annexed district may be placed on probation, not to exceed more than one full year, by the controlling board of the annexing district.[100]

> If a teacher on continuing tenure becomes an employee of another controlling board as a result of school district annexation, consolidation or other form of school district reorganization, he shall be placed on continuing tenure within 30 days unless the controlling board, by a 2/3 vote on an individual basis, places the teacher on not more than 1 year probation.[101]

The year of probation commences on the date the annexation becomes effective. For example, if district A annexes to district B on December 1, the term of probation ends on November 30 of the next year.[102] A teacher who is to be dismissed must be notified that his work is unsatisfactory, and given a dismissal notice sixty days before November 30.

All teachers in Michigan school districts which are dissolved and attached to an existing district will have existing contracts honored by the attaching district. The teachers in the attached district may be required to serve a probationary period of not more than one year.

Tenured teachers from an annexing or attaching district retain full tenure rights and cannot be required to serve a one-year probationary period after the annexation or attachment.

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[99] In annexation, the voters in the annexed area vote to become part of another district. When a district is disorganized, it is because of too few students or lack of a sufficient number of board members. In consolidation, voters in all districts vote.

[100] Opinion of the Michigan Attorney General, No. 3364, September 2, 1959.

[101] Michigan Teachers' Tenure Act, Article III, Section 38.92.

[102] Opinion of the Michigan Attorney General, No. 3364, September 2, 1959.

When school districts are consolidated, all tenure teachers in all the districts involved may be placed on immediate tenure or on one year's probation, at the discretion of the new controlling board of the consolidated district.

Probationary teachers, in either annexation, attachment, or consolidation, will probably have valid contracts which must be honored by the annexing district in case of annexation; the attaching district, in case of attaching; and by the new board, in case of consolidation. But probationary contracts can be terminated by giving sixty days notice before the close of the school year.[103]

Retirement and Tenure

The Tenure Act provides for the establishment of reasonable retirement policies consistent with the Teachers' Retirement Act. Article IV, Section 1 of the Tenure Act reads, in part, as follows:

> Nothing in this act shall be construed as preventing any controlling board from establishing a reasonable policy for retirement to apply equally to all teachers who are eligible for retirement under Act No. 136 of the Public Acts of 1945 or having established a reasonable retirement age policy, from temporarily continuing on criteria equally applied to all teachers the contract on a year-to-year basis of any teacher whom the controlling board might wish to retain beyond the established retirement age for the benefit of the school system.

A frequent question is whether a teacher may lose his tenure rights in a school district before age 65 under a school board policy on retirement. The Michigan Teachers' Tenure Act provides that local boards of education may establish a reasonable policy for retirement.[104] A Michigan Supreme Court case illustrates the application of the statute.

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[103] Ibid.

[104] School District of Royal Oak v. State Tenure Commission, 367, Mich 689 (1962).

A board of education had adopted the following policy on retirement:

> At the age when teachers may retire under the State Retirement Act, all such teachers shall cease to be on continuing contract, and contracts shall cease to be renewed from year to year until such teachers, on 60 days notice to the board of education, elect to retire; or until the board, by majority vote of the whole membership at least 60 days before the end of the school year, refuses such renewal of the contract.

In 1959, when a tenured teacher in the district reached the age of 60, she was employed on an annual contractual basis and in effect removed from continuing tenure status. The teacher requested a hearing before the board of education but was advised that she was not being discharged, but retired. The teacher appealed to the Tenure Commission.

The board of education argued that in view of its policy for retirement the provisions of the Tenure Act did not apply nor did the Tenure Commission have jurisdiction.

In ruling on the question of the jurisdiction of the Tenure Commission, the Supreme Court held that the Commission could hold a hearing to determine whether the teacher's discharge was an act of the board under a reasonable retirement policy (in which case the Commission would have no jurisdiction). However, should the Commission decide to the contrary, the discharge of the teacher would be in violation of the Tenure Act and the Commission would have jurisdiction.

From this interpretation it can be concluded that a board has the right to adopt a reasonable retirement policy which may be less than age 65. The board also has the right to employ on an annual basis a teacher eligible to be retired. But the Tenure Commission has the authority to determine the reasonableness of the school board's retirement policy upon appeal by an aggrieved teacher.

Having established a reasonable retirement age, school boards are allowed to continue the contracts of retirement age teachers on a year-to-year basis, with the condition that they establish criteria which applies equally to all teachers requesting such continuation. The Legislature provided that the contract continuation "benefit the school system."

Generally, school boards follow a mandatory retirement age of 65 and allow all teachers to teach until 65, but none after. Some school districts employ a few selected teachers on a year-to-year basis after age 65 using the criteria of a satisfactory physical examination. However, the phrase "on criteria equally applied to all teachers" has not been fully

clarified by the court, and the utilization of some teachers beyond the school district's reasonable retirement age may provoke litigation by those rejected. Thus far, the Tenure Commission has supported school boards employing only certain teachers eligible for retirement.[105]

Leave of Absence

The Tenure Act provides that a board "...upon written request of a teacher may grant a leave of absence for a period not to exceed one year, subject to renewal at the will of the board."[106] A leave of absence is usually requested for educational or professional purposes, illness, maternity, or other disability.

A board of education, without request, may grant a leave of absence, not to exceed one year, to any teacher because of physical or mental disability. However, the teacher placed on leave of absence has the right to a hearing on such unrequested leave of absence under the same provisions as for a dismissal.

At the expiration of a leave of absence and upon return to service, the teacher resumes the contract status he held before the leave. Provisions of this statute have never been questioned before the Michigan Supreme Court.

A teacher on continuing tenure returning from a leave of absence may be placed in any school or grade for which he is legally qualified.[107] A school district may not retain a non-tenured teacher, in preference to a tenured teacher returning from a leave of absence, in a position which the latter is qualified to fill.[108]

ALTERNATIVE LEGAL PROTECTIONS AVAILABLE TO TEACHERS

Public Employee's Relations Act

Any activity on the part of a school board to discriminate against an employee because of his organizational membership and/or activities or to interfere with, restrain or coerce

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[105] See Ellingson v. Alpena Schools, Docket No. 67-10, October 9, 1967; and McLain v. School District of East Detroit, Docket No. 68-9, December 27, 1968.

[106] Michigan Teachers' Tenure Act, Article V, Section 38.112.

[107] Opinion of the Michigan Attorney General, No. 3609, February 7, 1962.

[108] Ibid.

employees in the exercise of their rights under the Public Employee's Relations Act (PERA) is an unfair labor practice.[109] Unfair labor practices charges may be filed with the Michigan Employment Relations Commission (MERC) by any labor organization or public employee, or his agent, against a public employer, its officers, or its agents.[110]

A board of education is prohibited from discontinuing the services of a probationary or tenured teacher if the motivation for the discharge was to retaliate against the teacher because of his membership and activities in a union.

The authority of the MERC in deciding unfair labor practice cases is defined by the statutes which created it. The MERC is limited to considering whether a public employer was motivated to discriminate against an employee because of his membership and activities in a labor organization. The charge of a violation must be supported by a preponderance of evidence, which must be convincing, that the public employer was motivated by the employee's union activity, and the charging party must sustain the burden of proof. It is incumbent upon the charging party to produce evidence that the employer was motivated by animosity toward the union in discharging the employee. The motivation of the employer is the crucial question. Mere suspicion, or a feeling that the employer's actions "smell wrong" is not enough. However, without some affirmative evidence of anti-union activity, mere weakness of the employer's defense does not satisfy the burden of proof.

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[109] Mich. Comp. Laws Ann. § 423.210 (1967). "It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9; (b) to initiate, create, dominate, contribute to or interfere with the formation or administration of any labor organization; Provided, that a public employer shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay; (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in labor organization; (d) to discriminate against a public employee because he has given testimony or instituted proceedings under this act; or (e) to refuse to bargain collectively with the representatives of its public employees, subject to the provisions of section 11."

[110] Parker, Hyman, "Michigan Public Employment Relations Act and Procedures," School of Labor and Industrial Relations, Michigan State University, Lansing, 1970.

Specific "proof of intent" is unnecessary where the employer's conduct inevitably produces results prohibited by PERA. Although an employer may insist that he did not intend to encourage or to discourage union membership, or did not intend to proscribe the exercise of employee rights guaranteed under the law, yet his actions resulted in such a violation, it is presumed that he intended the certain consequences of the act.

The MERC has neither the right nor the authority to pass on the sufficiency of cause for discharge of an employee, but it may look to the alleged cause in determining whether or not the reasons advanced were used falsely, and whether the actual reason for discharge was the union or concerted activities of the employee. Discharge can be for sufficient cause only.

PERA does not give the MERC broad powers to determine whether a discharge violates the due process clause of the 14th Amendment or the Civil Rights Act of 1871; to duplicate the role of the Teacher Tenure Commission and determine whether the dismissal was for reasonable and just cause; to pass upon the validity, propriety, or soundness of the decision to discharge an employee; to decide whether a discharged employee received due process of law, or whether just cause existed for the action taken against him. An arbitrary dismissal which does not violate PERA cannot be set aside by the MERC. It is not a violation of PERA if a public employer goads an employee into quitting in order to save money, or because he considered her to be a poor teacher.

If an employee is forced to resign because of his union activity, his separation may be treated as a "constructive discharge," and a violation of PERA.

Of several unfair labor practice cases involving charges or interference and discrimination of teachers, the MERC found one violation which resulted in a reinstatement order. In Summerfield School District,[111] a probationary teacher was not offered a contract for the ensuing year by a unanimous vote of the board of education, contrary to the recommendation of the superintendent. This was the first time in the five-year tenure of the superintendent that his recommendation had been overruled. The teacher, as leader of the teachers' bargaining team, had been aggressive in his negotiations at the bargaining table, and had evoked the ire of certain of the board members.

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[111]Summerfield School District, No. C68 D-37, 1969 Lab Ops 439.

Several school board members testified they had received complaints about the teacher and that he was terminated because of: "The way the classes were conducted; the way people felt about him; the way the public felt about him..." None of the board members had observed his classroom procedure.

The principal had never discussed the teacher with any board members, except with the superintendent who recommended the teacher's retention. When the superintendent discussed with the teacher the reason for his discharge, the superintendent said, "I don't believe you are getting the message," which was, in the Commission's opinion, meant to convey the meaning that the real and undisclosed reason for the discharge was for irritating members of the school board by his aggressive representation activities. The Commission ordered the teacher reinstated in his position without prejudice to his seniority rights. It further ordered that he be reimbursed for loss of pay for the discrimination, less any interim earnings.[112]

Job Security and Federal Law

The validity and application of the Michigan Teachers' Tenure Act is subject to the basic requirement that it must not violate the Federal Constitution, as amended, including the Bill of Rights or Federal Statutes. In all cases the Federal Constitution and its interpretation by the federal judiciary controls state action, and every teacher has the right not to be punished or to suffer retaliation by a board of education in the exercise of his constitutional rights. A school board or school administrator, while acting under the color of state law, may not deprive a teacher of rights secured by the due process clause of the fourteenth amendment through the Civil Rights Act of 1871. The specific provision is:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the juridsiction thereof of

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[112] Ibid. Testimony was given that he (the teacher) "lectured too much and ran his classes like a college professor. . ."

> the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws. shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[113]

There are constitutionally nonpermissible reasons for refusal to rehire a teacher. If the reason, either as stated by the board, or as suspected by the teacher, for the refusal to rehire is constitutionally nonpermissible, the teacher can state a claim for which relief can be granted under 42 U.S.C. Section 1983. A school board may not refuse to reemploy a probationary teacher, or discharge any teacher on account of his race, or retaliate against him for exercising his constitutional right to protest racial discrimination. Neither can a school board remove a teacher for belonging to unpopular or minority organizations, who, outside of school, exercises his rights as guaranteed by the free speech clause of the First Amendment, nor for his religious convictions, nor for exercising his rights against self-incrimination.

When the moving cause advanced for nonretention is a mere pretext or a sham and the real reason is constitutionally nonpermissible, the school board and its administrators may be held personally accountable. When the school board's discretion is challenged, the burden of proof is on the teacher to demonstrate constitutionally nonpermissible grounds.

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[113]42 U.S.C. Section 1983. For example of this legal principle's application, see Lucia v. Duggan, 303 F. Supp 112 (1969) where bearded teacher was reinstated with back pay plus $1,000 for pain and suffering. School board members and superintendent, not district, paid damages.

APPENDIX

Complete Text of the Michigan Teachers' Tenure Act

State Department of Education's Definition of "Certificated"

State Tenure Commission's Rules of Practice and Procedure

Teacher Tenure Opinions of the Michigan Attorney General

List of Michigan Supreme Court and Michigan Court of Appeals Decisions on Teachers' Tenure Act

Michigan Teachers Tenure Act

An Act relative to continuing tenure of office of certificated teachers in public educational institutions; to provide for probationary periods; to regulate discharges or demotions; to provide for resignations and leaves of absence; to create a state tenure commission and to prescribe the powers and duties thereof; and to prescribe penalties for violation of the provisions of this act.

The People of the State of Michigan enact:

ARTICLE I.

DEFINITIONS.

§ 38.71 Definitions; teacher.

Section 1. The term "teacher" as used in this act shall include all certificated persons employed for a full school year by any board of education or controlling board of any public educational institution.

§ 38.72 Same; certificated.

Section 2. The term "certificated" shall be as defined by the state board of education.

§ 38.73 Same; controlling board.

Section 3. The term "controlling board" shall include all boards having the care, management, or control over public school districts and public educational institutions.

§ 38.74 Same; demote.

Section 4. The word "demote" shall mean to reduce compensation or to transfer to a position carrying a lower salory.

§ 38.75 Same; school year.

Section 5. The "school year" shall be defined as the legal school year at the time and place where service was rendered.

ARTICLE II.

PROBATIONARY PERIOD.

§ 38.81 Probationary period; teachers that have served one system the required period on effective date of act; authority of controlling board.

Section 1. All teachers during the first two school years of employment shall be deemed to be in a period of probation: Provided, That any teacher under contract at the time this act becomes effective who has previously rendered two or more years of service in the same school district shall be granted continuing tenure immediately upon reappointment by the controlling board. Any such controlling board by unanimous vote of its members, however, may refuse to appoint a teacher who has rendered two or more years service in the school district under its control. In the event the vote against reappointment of such teacher is not unanimous the controlling board shall deem such teacher as on continuing tenure with full right to hearing and appeal as provided in article four and article six of this act: Provided further, That the controlling board, after this act becomes effective, may place on continuing tenure any teacher who has previously rendered two or more years of service.

§ 38.82 Same, number of years a teacher may be required to serve; extension of period.

Section 2. No teacher shall be required to serve more than one probationary period in any one school district or institution: Provided, That a third year of probation may be granted by the controlling board upon notice to the tenure commission.

§ 38.83 Same; notice to teacher, written statement.

Section 3. At least 60 days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory. Failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory. Any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified in writing at least 60 days before the close of the school year that his services will be discontinued.

§ 38.84 Same; application of Articles 4, 5 and 6.

Section 4. Articles 4, 5 and 6 shall not apply to any teacher deemed to be in a period of probation.

ARTICLE III.
CONTINUING TENURE

§ 38.91 Continuing tenure, administrative capacity, provision in contract to govern.

Section 1. After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed, and shall not be dismissed or demoted except as specified in this act. If the controlling board shall provide in a contract of employment of any teacher employed other than as a classroom teacher, including but not limited to a superintendent, assistant superintendent, principal, department head or director of curriculum, made with such teacher after the completion of the probationary period, that such teacher shall not be deemed to be granted continuing tenure in such capacity by virtue of such contract of employment, then such teacher shall not be granted tenure in such capacity, but shall be deemed to have been granted continuing tenure as an active classroom teacher in such school district. Upon the termination of any such contract of employment, if such controlling board shall not re-employ such teacher under contract in any such capacity, such teacher shall be continuously employed by such controlling board as an active classroom teacher. Failure of any controlling board to re-employ any such teacher in any such capacity upon the termination of any such contract of employment shall not be deemed to be a demotion within the provisions of this act. The salary in the position to which such teacher is assigned shall be the same as if he had been continuously employed in the newly assigned position. Failure of any such controlling board to so provide in any such contract of employment of any teacher in a capacity other than a classroom teacher shall be deemed to constitute the employment of such teacher on continuing contract in such capacity and subject to the provisions of this act. Continuing tenure shall not apply to an annual assignment of extra duty for extra pay.

§ 38.92 Same; employment by another controlling board, maximum length of probationary period, option of board.

Section 2. If a teacher on continuing tenure is employed by another controlling board, he shall not be subject to another probationary period of more than 1 year beginning with the date of employment, and may at the option of the controlling board be placed immediately on continuing tenure. Any notice provided under

section 4 of article 2 shall be given at least 60 days before the completion of the year of probation. If a teacher on continuing tenure becomes an employee of another controlling board as a result of school district annexation, consolidation or other form of school district reorganization, he shall be placed on continuing tenure within 30 days unless the controlling board, by a 2/3 vote on an individual basis, places the teacher on not more than 1 year probation.

ARTICLE IV

DISCHARGE, DEMOTION OR RETIREMENT.

§ 38.101 Discharge, demotion or retirement of teacher.

Section 1. Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as are hereinafter provided. Nothing in this act shall be construed as preventing any controlling board from establishing a reasonable policy for retirement to apply equally to all teachers who are eligible for retirement under Act No. 136 of the Public Acts of 1945 or having established a reasonable retirement age policy, from temporarily continuing on criteria equally applied to all teachers the contract on a year-to-year basis of any teacher whom the controlling board might wish to retain beyond the established retirement age for the benefit of the school system.

§ 38.102 Same, written charges, signatures, professional services.

Section 2. All charges against a teacher shall be made in writing, signed by the person making the same, and filed with the secretary, clerk or other designated officer of the controlling board. Charges concerning the character of professional services shall be filed at least 60 days before the close of the school year. The controlling board, if it decides to proceed upon such charges, shall furnish the teacher with a written statement of the charges including a statement of the teacher's rights under this article, and shall, at the option of the teacher, provide for a hearing to take place not less than 30 nor more than 45 days after the filing of such charges.

§ 38 103 Same; suspension, compensation.

Section 3. On the filing of charges in accordance with this section, the controlling board may suspend the accused teacher from active performance of duty until a decision is rendered by the controlling board, but the teacher's salary shall continue during such suspension: Provided, That if the decision of the controlling board is appealed and the tenure commission reverses the decision of the controlling board the teacher shall be entitled to all salary lost as a result of such suspension.

§ 38.104 Same; hearing.

Section 4. The hearing shall be conducted in accordance with the following provisions:

a. The hearing shall be public or private at the option of the teacher affected.

b. No action shall be taken resulting in the demotion or dismissal of a teacher except by a majority vote of the members of the controlling board.

c. Both the teacher and the person filing charges may be represented by counsel.

d. Testimony at hearings shall be on oath or affirmation.

e. The controlling board shall employ a stenographer who shall make a full record of the proceedings of such hearing and who shall, within ten days after the conclusion thereof, furnish the controlling board and the teacher affected thereby with a copy of the transcript of such record, which shall be certified to be complete and correct.

f. Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing within fifteen days after the termination of the hearing. A copy of such decision shall be furnished the teacher affected within five days after the decision is rendered.

g. The controlling board shall have the power to subpoena witnesses and documentary evidence, and shall do so on its own motion or at the request of the teacher against whom charges have been made. If any person shall refuse to appear and testify in answer to any subpoena issued by the controlling board, such controlling board may petition the circuit court of the county setting forth the facts which court shall there upon issue its subpoenas commanding such person to appear before the controlling board there to testify as to the matters being inquired into. Any failure to obey such order of the court may be punished by such court as contempt thereof.

§ 38.105 Necessary reduction in personnel, first vacancy.

Section 5. Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified.

ARTICLE V.
RESIGNATION AND LEAVE OF ABSENCE.

§ 38.111 Resignation and leave of absence, teacher's duties, notice.

Section 1. No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least sixty days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act.

§ 38.112 Same, leave of absence, physical or mental disability.

Section 2. Any controlling board upon written request of a teacher may grant leave of absence for a period not to exceed one year, subject to renewal at the will of the board. Provided, That without request, leave of absence because of physical or mental disability may be granted by any controlling board for a period not to exceed one year. Provided further, That any teacher so placed on leave of absence shall have the right to a hearing on such unrequested leave of absence in accordance with the provisions for a hearing in article four, section four of this act. Provided, That no leave of absence shall serve to terminate continuing tenure previously acquired under this act.

ARTICLE VI.
RIGHT TO APPEAL.

§ 38.121 Appeal; hearing notice.

Section 1. A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission. The state tenure commission shall provide for a hearing to be held within 60 days from the date of appeal. Notice and conduct of such hearing shall be the same as provided in article 4, section 4 of this act, and in such other rules and regulations as the tenure commission may adopt.

ARTICLE VII.
STATE TENURE COMMISSION.

§ 38.131 State tenure commission; creation, members, ex-officio secretary; legal advisor.

Section 1. There is hereby created a state tenure commission of 5 members: 2 of whom shall be classroom instructors, 1 a member of a board of education of a graded or city school district, 1 a person not a member of a board of education or a teacher, and 1 a superintendent of schools. The superintendent of public instruction shall be ex-officio secretary of the commission, and the attorney general shall assign to the commission an assistant who shall be legal advisor to the commission.

§ 38.132 Same; terms, vacancy.

Section 2. Within thirty days after the effective date of this act, the governor shall appoint the members of the tenure commission for the following terms: One for a term of three years, one for a term of two years and one for a term of one year. Each term shall begin on the first day of September. Immediately preceding the expiration of their respective terms the governor shall appoint succeeding members of the tenure commission for terms of five years. In the event of a vacancy on the tenure commission the governor shall immediately appoint a successor to complete the unexpired term.

§ 38.133 Same, geographical qualifications of members.

Section 3. Not more than one member of the tenure commission shall be appointed from any one school district.

§ 38.134 Same; qualification of teacher member.

Section 4. Any teacher appointed to the tenure commission after September one, nineteen hundred thirty-eight, must be on continuing tenure.

§ 38.135 Same; teacher member's status with controlling board.

Section 5. Membership on the state tenure commission shall not adversely affect the status of the teacher's tenure with a controlling board.

§ 38.136 Same; meetings.

Section 6. The tenure commission shall meet twice a year at stated times in the city of Lansing, and at such other times and in such other places as shall be determined by the commission.

§ 38.137 Same; power to enforce act.

Section 7. The tenure commission is hereby vested with such powers as are necessary to carry out and enforce the provisions of this act.

§ 38.138 Same; compensation and expenses.

Section 8. The members of the state tenure commission shall receive $25.00 per day while hearing cases and shall be reimbursed for necessary traveling and other expenses incurred in the performance of the duties of the commission. The expenses of the state tenure commission shall be paid out of appropriations made by the Legislature.

§ 38.139 Same; duty to act as board of review.

Section 9. The tenure commission shall act as a board of review for all cases appealed from the decision of a controlling board. All records shall be kept in the office of the superintendent of public instruction.

§ 38.140 Same, first meeting, election of chairman and secretary, rules and regulations.

Section 10. Within thirty days after the effective date of this act, the tenure commission shall hold a meeting in the city of Lansing for the purpose of organization and the election of a chairman and secretary, both of whom shall be members of the commission. The tenure commission shall draw up rules and regulations and shall have the power to amend same and to provide for the conduct of its affairs in such manner as shall be consistent with the provisions of this act.

ARTICLE VIII.
DISTRICTS.

§ 38.151 Application.

Section 1. This act shall apply to all school districts of the state.

ARTICLE IX
PENALTY.

§ 38.161 Penalty.

Section 1. Failure of any member of a controlling board to comply with any provisions of this act shall be deemed a violation of the law and shall subject said member to the same penalty as prescribed for a violation of the general school law.

ARTICLE X.
INCONSISTENT ACTS.

Sec. 1 repealed 1947, Act 129.

§ 38.172 Waiver of rights by teachers.

Section 2. No teacher may waive any rights and privileges under this act in any contract or agreement made with a controlling board. In the event that any section or sections of a contract or agreement entered into between a teacher and a controlling board make continuance of employment of such teacher contingent upon certain conditions which may be interpreted as contrary to the reasonable and just causes for dismissals, provided by this act, such section or sections of a contract or agreement shall be invalid and of no effect in relation to determination of continuance of employment of such teacher.

Article XI repealed 1945, Act 267.

ARTICLE XII.

§ 38.191 Effective date.

Section 1. This act shall take effect and be in force from and after September first, nineteen hundred thirty seven.

TEACHER'S TENURE

(By authority of art. 1, par. 2, Act No. 4, Public Acts of 1937 (Ex. Ses.) [CL 1948, § 38.71 et seq.].)

R 390.661. Certification of teachers under teacher's tenure act.

a. For the purposes of teacher tenure under the provisions of article 2, Act No. 4, Public Acts of 1937, Extra Session, "certificated" as it refers to teachers shall include any teacher holding a Michigan certificate which is valid for the position to which he is assigned, but shall not include nondegree persons holding special certificates as teachers or teacher aides in training in experimental programs.

b. For the purposes of article 3, Act No. 4, Public Acts of 1937, Extra Session, "certificated" shall include any teacher who holds a junior (community college) permanent certificate, an elementary or secondary permanent certificate, or an elementary or secondary provisional certificate. It shall also include any teacher who holds both a bachelor's degree and a life certificate. In the event that a nondegree life certificated teacher is employed in a school district which has adopted tenure on or after July 1, 1958, or whose services have been acquired by a tenure district through school district reorganization or annexation, the teacher shall be considered certificated under the provisions of article 3, Act No. 4, Public Acts of 1937, Extra Session, if he annually completes 6 semester hours of additional credit applying on requirements for a bachelor's degree: Provided that the state board of education may make exceptions to this requirement in hardship cases. It shall also include any teacher who holds a degree but is serving on a special certificate because of other deficiencies toward a provisional certificate, providing that he annually completes 6 semester hours of additional credit applying toward such deficiencies. It shall also include any nondegree teacher serving on a special certificate because of deficiencies toward a provisional certificate providing that he completes annually 6 semester hours of additional credit applying toward such deficiencies, but shall not include nondegree persons holding special certificates as teachers or teacher aides in training in experimental programs.

HISTORY: 1954 ACS 6, p. 16; 1954 ACS 25, p. 36; 1954 ACS 27, p. 9; 1954 ACS 40, p. 25.

PERMITS TO SOLICITORS OF PRIVATE TRADE SCHOOLS AND INSTITUTES

(By authority of Sec. 2b, Act No. 148, Public Acts of 1943, as amended)

R 390.671. I. Solicitors.

1. No permit will be issued to any solicitor or salesman unless the school he represents is approved or licensed by the Michigan state board of education.

2. Separate applications must be submitted for each school represented.

3. Separate permits will be issued for each school represented.

4. It will be the responsibility of the school to notify the state board of education when the employment of the solicitor is terminated.

5. Within 10 days of termination of employment with a school, the solicitor must return the permit to the state board of education. Willful failure to do so will be grounds for invalidating other permits held.

6. Failure to obey the law and the rules and regulations promulgated by the board of education shall constitute grounds for revocation of permit.

HISTORY: 1954 ACS 13, p. 74.

FEE FOR STATEMENTS OF PROVISIONAL OR LIFE CERTIFICATES OR DUPLICATES OF PERMANENT CERTIFICATES

(By authority of Act No. 202, Public Acts of 1903 [CL 1948, § 390.431 et seq.])

R 390.691.

There shall be a fee of $3.00 charged for providing a statement of the Michigan provisional or life certificate, or for a duplicate of a Michigan permanent certificate when the issuance of such a duplicate permanent certificate is approved by the state board of education.

HISTORY: 1954 ACS 32, p. 22.

STATE TENURE COMMISSION

RULES OF PRACTICE AND PROCEDURE

(By virtue of the authority vested in it by Act 4, Public Acts of 1937 [ex. sess.] [CL 1948, § 38.71 et seq.] the state tenure commission issues the following rules of practice and procedure which it finds necessary to carry out the provisions of said act).

R 38.71. Definitions.

1. The term "act" as used herein shall mean the tenure of teachers act, Act 4, 1937, (Ex. Sess.) [CL 1948, §38.71 et seq.].
2. The term "controlling board" shall mean the school board where a teacher is employed.
3. The term "commission" shall mean the state tenure commission created by the tenure of teachers act.
4. The term "petitioner" and "appellant" shall mean a person initiating a request for a hearing under the act.

HISTORY: 1954 ACS 10, p. 5.

RULES

R 38.101. 1. Business hours.

The office of the commission shall be the office of the chairman of the commission and will be open from 9:00 to noon and 1:00 to 5:00 p.m., daily except Saturday.

HISTORY: 1954 ACS 10, p. 5.

R 38.102. 2. Representation.

Practice before this commission shall be limited to attorneys at law in good standing: Provided, That any teacher whose rights are affected may appear for himself.

HISTORY: 1954 ACS 10, p. 5.

R 38.103. 3. Appearance.

Any attorney representing litigants under this act shall file an appearance in writing, filing same with the chairman of the commission. A teacher representing himself shall also file an appearance in writing in the same manner.

HISTORY: 1954 ACS 10, p. 5.

R 38.104. 4. Form and style of papers.

All papers filed with the commission shall be either printed or typewritten, and if typewritten, shall be on only one side of plain white paper. This paper shall be no more than 8½ inches wide and 13 inches long. The original of any papers filed shall be filed with the commission chairman along with 3 copies, duly signed by attorney, teacher or controlling board member, whichever the case may be.

The proper caption shall be placed upon all papers filed. The full given name and surname shall be set forth in the caption.

The full name of the school board shall be set forth also.

HISTORY: 1954 ACS 10, p. 5.

R 38.105. 5. Initiation of appeal.

An appeal from a decision of a controlling board under this act may be initiated by a teacher within 30 days from the date of such decision, with the filing of a notice of appeal by petition directed to the chairman of the commission in person or by registered mail, and substantially in accordance with the form hereinafter set forth.

The petition shall be complete in itself so as to fully state the issues and shall contain the following:

STATE OF MICHIGAN

STATE TEACHERS' TENURE COMMISSION

Appellant

vs. Docket No.

Appellee

PETITION

TO THE STATE TEACHERS' TENURE COMMISSION:

The above named appellant hereby petitions for a hearing and appeals the decision of appellee, and as a basis alleges as follows:

1. (Set forth jurisdictional averments and principal office and residence)
2. (Enumerate specifically the assignments of error in a concise manner)
3. The facts and law upon which the appellant relies as basis for appeal are as follows:

   (Here set forth allegations of facts relied upon, in orderly and logical sequence, with subparagraphs lettered, so as to inform the commission of the issues to be presented and to enable the appellee to admit or deny each specific allegation)

Wherefore, the appellant prays that this commission may hear the appeal and (state the relief desired).

Signed

Appellant

STATE OF MICHIGAN)
COUNTY OF) SS.

, being duly sworn, says that he or she is the petitioner above named; that he or she has read the foregoing petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

Signed

Subscribed and sworn to before me this day of ,

A. D., 19 .

Signed (Official Title)

HISTORY: 1954 ACS 10, p. 5.

R 38.106. 6. Filing.

Any document to be filed with the commission must be filed at the office of the chairman.

HISTORY: 1954 ACS 10, p. 6.

R 38.107. 7. Docket.

Upon receipt of the notice of appeal by petition, the appeal will be docketed and assigned a number, and the parties notified thereof. This number shall be placed by the parties on all papers thereafter filed in the proceeding.

HISTORY: 1954 ACS 10, p. 6.

R 38.108. 8. Service of notice of appeal.

The appellant shall forthwith serve a copy of the notice of appeal upon the appellee, and shall file with the chairman of the commission proof of service within 5 days after such service. Service shall be made by appellant or his attorney in person, or by registered mail with return receipt requested.

HISTORY: 1954 ACS 10, p. 6.

R 38.109. 9. Answer.

After service of copy of notice of appeal by petition, appellee shall have 15 days within which to file an answer thereto. The answer shall contain specific admission or denial of each material allegation of fact contained in the petition, and a statement of fact or facts upon which appellee relies for defense, and shall contain any affirmative allegations to be relied upon by appellee.

Each paragraph contained in the answer shall be numbered to correspond with the paragraphs of the petition. An original and 3 copies shall be filed with the commission chairman and a copy shall be served by ordinary mail upon appellant or his attorney.

HISTORY: 1951 ACS 10, p. 6.

R 38.110. 10. Hearings.

The commission chairman shall set a time and place for hearing the appeal, provided that it shall be held within 60 days from date appeal notice is filed with commission, if at all possible.

HISTORY: 1951 ACS 10, p. 6.

R 38.111. 11. Notice of hearing.

The commission chairman shall notify all parties interested, including the members of the commission, of the time and place of hearing either in person or by ordinary mail at least 10 days prior thereto. Parties shall arrange to be on time with witnesses, and exhibits must be ready for presentation at such time.

HISTORY: 1951 ACS 10, p. 7.

R 38.112. 12. Failure to appear.

Excepting for good cause shown in writing, the appeal will be heard at the place and hour set. Unexcused absence will not be a basis for delay or adjournment of the hearing.

HISTORY: 1951 ACS 10, p. 7.

R 38.113. 13. Evidence.

The legal rules of evidence will be adhered to at the hearing as much as possible and the hearing will proceed with the same decorum and orderly procedure used in the circuit courts.

HISTORY: 1951 ACS 10, p. 7.

R 38.114. 14. Amendments.

Either party may amend his petition or answer at any time prior to the hearing, by consent or by order of the commission. Amendments shall be in writing and served on all parties concerned.

HISTORY: 1951 ACS 10, p. 7.

R 38.115. 15. Adjournments.

No continuance shall be granted except for good cause shown by the parties concerned, and then only upon notice in writing to the chairman of the commission at least 10 days prior to the date of the hearing, provided that the length of the continuance shall be discretionary with the commission.

HISTORY: 1951 ACS 10, p. 7.

R 38.116. 16. Substitution of attorney.

Substitution of an attorney shall be made only upon the stipulation of the withdrawing attorney and the substituted attorney being promptly filed with the commission.

HISTORY: 1951 ACS 10, p. 7.

R 38.117. 17. Stipulation of facts.

The parties, by stipulation in writing filed with the commission or presented at the hearing may agree upon any facts involved in the appeal.

HISTORY: 1951 ACS 10, p. 7.

R 38.118. 18. Proposed findings of fact.

The commission may require either party to a proceeding to submit proposed findings of fact at the close of the hearing or within such time as it may direct.

HISTORY: 1954 ACS 10. p. 7.

R 38.119. 19. Briefs.

The commission, in its discretion, may require that briefs be submitted either before or after the hearing and may designate the manner of filing and serving the same and the time therefor.

HISTORY: 1954 ACS 10. p. 7.

R 38.120. 20. Oral argument.

The parties shall be entitled, upon request, to a reasonable time at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing.

HISTORY: 1954 ACS 10. p. 7.

R 38.121. 21. Witnesses and subpoenas.

a. Witnesses shall be examined orally under oath, except that for good and exceptional cause, the commission chairman may permit the testimony to be taken by deposition under oath. Any such deposition shall be taken in accordance with the procedural requirements for the taking of depositions provided by the laws of the state of Michigan.

b. Applications for subpoenas may be filed by either petitioner or appellant at least 1 week prior to the hearing. It shall be in writing directed to the chairman of the commission and the subpoena may require the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents that relate to any matter under investigation or in question before the commission conducting the hearing or investigations.

c. The application shall specify the name of the witness, his address, and the nature of the fact to be proved by him, and, if calling for documents, must specify the same with such particularity as will enable them to be identified for purposes of production.

d. Witnesses other than the real parties in interest summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the circuit court in the county in which the hearing is held. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear.

HISTORY: 1954 ACS 10. p. 7.

R 38.122. 22. Decision or order.

Any decision or order of the commission shall be effective only by majority vote of the members of the commission provided that at the conduct of the hearing the rulings of the chairman shall be final.

Any decision or order of the commission shall be served in writing to the parties concerned, or to their attorneys, if represented, by ordinary mail within a reasonable time after conclusion of the hearing.

HISTORY: 1954 ACS 10. p. 8.

R 38.123. 23. Incorporation of other rules.

The commission incorporates herein by reference any and all other rules contained in the teachers' tenure act.

The foregoing rules of practice and procedure were adopted and promulgated this 10th day of March, A. D., 1956. The commission reserves the right to amend, alter, and change these rules from time to time as, in its discretion, circumstances may require or render necessary or expedient, according to law.

HISTORY: 1954 ACS 10. p. 8.

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