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Michigan Education Association

I'M A PROBATIONARY TEACHER AND I HAVE RIGHTS, DON'T I?

**Tenure and My First Year:
What Do I Need to Know?**

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The Teachers' Tenure Act (MCL 38.71 *et seq.*) has historically provided little or no protection for probationary teachers. Amendments to the Act in 1993 lengthened the probationary period for tenure and imposed additional obligations upon employing school districts regarding the development and mentoring of new teachers. Cases based upon the amendments as they pertain to probationary teachers have been litigated and provide some guidance on the extent of the rights and protections afforded probationary teachers under the Act.

I. The Teachers' Tenure Act – In General

- A. Tenure is earned only in the district in which the teacher is employed. A teacher tenured in a Michigan school district has no particular or special right to employment in any other Michigan school district.
- B. School boards do not and cannot grant tenure. Rather, it is acquired by operation of law. In other words, a teacher becomes tenured automatically upon completion of the probationary period set forth in the Teachers' Tenure Act.
- C. Purpose of tenure.
 - 1. To protect teachers' rights by preventing the removal of capable and experienced teachers at the personal whim of changing office holders.
 - 2. To provide a remedy to protect teachers from arbitrary and discriminatory practices in hiring, promotion, and fringe benefits.
 - 3. To provide a hearing which comports with procedural due process before a tenured teacher can be discharged.
- D. Essential rights of tenured teachers.
 - 1. May not be discharged or demoted without reasonable and just cause or without a hearing as provided under the Act.
 - 2. A tenured teacher taking a job with another public school employer is entitled to a reduced probationary period with the new employer.
 - 3. For a period of three years, a tenured teacher who has been laid off must be recalled to the first vacancy in the district for which the teacher is certified and qualified.

D. Conditions for obtaining tenure.

1. Must hold a teaching certificate from the Department of Education valid for the assigned position. Holders of valid certificates are “certificated” for purposes of the Act.
2. Must be employed for a “full school year.” This requirement is satisfied if the teacher is under contract to teach for the full school year. Thus, teachers new to the profession are subject to the Tenure Act upon hire as a regular classroom teacher.
3. Must be employed by a “controlling board.” This means the board of education of a public school district or an intermediate school district. Charter schools are specifically exempted.

E. Positions not covered by the Teachers’ Tenure Act.

1. Non-certified employees.
2. School nurse, psychologist, social worker, etc.
3. Charter school teachers.
4. Non-certified counselors.
5. Speech and language pathologists who were not tenured before January 3, 2001.
6. Non-certified 9-12 teachers teaching under special permit in subjects where there is shortage of qualified teachers. *
7. Annual occupational authorization holders. *
8. Interim occupational certificate holders. *

*Teachers get credit toward completion of probationary period if working toward certification, but do not get tenure until certified.

II. The Probationary Period

A. Length of probationary period.

1. Four years. MCL 38.81(1)
2. A teacher can not be required to serve more than one probationary period in a single school district or institution. MCL 38.82
3. A tenured teacher accepting employment with another board is subject to a probationary period of not more than two years and can, at the option of

the controlling board, be given a shorter probationary period or immediate tenure. MCL 38.92

B. Calculating the probationary period.

1. If the teacher had tenure in another district he/she can be placed on immediate tenure. If not granted immediate tenure, the probationary period is limited to a maximum of two years.
2. If the teacher has provided previous service as a regularly scheduled, long-term substitute with full classroom responsibilities he/she may be able to “tack” together the previous work experience in the employing school district to establish the four-year probationary period. *Cadillac Area Public Schools Bd of Ed v Ward*, 134 Mich App 811 (1984). However, the Tenure Commission has found a 48-day substitute assignment to a single position to be of insufficient duration to allow tacking. *Gleason v Holt Public Schools*, STC 01-3. Day-to-day substitute assignments cannot be counted towards probationary service. *Mainzinger v Riverview Community Schools*, STC 00-3.
3. Summer school programs may be counted towards probationary service if the summer program requires that the teacher hold a certificate, and classes taught are for credit. *Mayman v Bd of Ed of the Ann Arbor Schools*, STC 98-44. However, the summer program must meet the *Ward/Gleason* requirement that the service be of sufficient duration to qualify.
4. An anniversary date calculation is applied if the teacher is hired after the beginning of the school year. However, an anniversary date teacher can be nonrenewed at the end of a school year. *Rodgers v Reading Community Schools*, STC01-8.
5. While extended breaks in service may extend probationary period, use of available sick days generally does not.
6. If the teacher is employed in a district’s adult education program and achieves tenure in that program, he/she will have tenure only in that program, and will have no tenure rights in the elementary and secondary programs of that same district. Likewise, teachers employed in a district’s elementary and secondary program will earn tenure only in that program and will have no tenure rights in the district’s adult education program. However, if a teacher tenured in either program is assigned to a position in the other program, he/she will immediately have tenure in that program because he/she cannot be required serve more than one probationary period in a single school district or institution. MCL 38.82
7. For service to count towards the completion of probation, the teacher must be teaching within the scope of his or her certification. However,

noncertified individuals teaching under a full-year special permit, an annual occupational authorization, interim occupational certificate or section 1233b of the Revised School Code (areas of shortage of qualified teachers), all of which require enrollment in a planned program leading to certification, can satisfy the probationary requirement while uncertified, but will acquire tenure only upon certification.

III. Non-renewal of Probationary Teachers

A. At least 60 days before the close of the school year, the controlling board must provide the probationary teacher who is to be non-renewed with a definite written statement that the teacher's work had been unsatisfactory. MCL 38.83.

1. 60 day requirement.

a. The "close of the school year" for all Michigan school districts is June 30. *Ajluni v Bloomfield Board of Education*, 397 Mich 462 (1976). Thus, the deadline for receipt of notices of non-renewal is May 1 of each year.

b. A notice of non-renewal received by the probationary teacher by May 1 of the current school year means that the teacher will not be employed by the district the following year. *Weckerly v Mona Shores Board of Education*, 388 Mich 731 (1971).

c. A probationary teacher who is not notified at least 60 days before the close of the school year that his/her services will be discontinued is entitled to employment in the following school year.

d. Failure to provide the notice at least 60 days before the close of the school year renders the notice ineffective. If the teacher is in his/her last year of probation, this means that the teacher will obtain tenure by operation of law.

e. For anniversary date teachers (those who begin employment after the start of the school year), the 60-day notice requirement means at least 60 days before the anniversary of their start date. *See, e.g., Rodgers v Reading Community Schools*, STC 01-8.

This provides little protection for anniversary date teachers, however, as they can also be non-renewed before the end of a school year. In *Rodgers*, for example, the teacher was given a notice of nonrenewal 66 days before the end of the school year, but 9 months before her next employment anniversary date. The Tenure Commission found that the notice was timely and effective because it was received by the teacher at least 60 days before her anniversary date.

2. Statement of unsatisfactory performance.
 - a. The board is not required to explain its reasons for finding the teacher's work unsatisfactory.
 - b. The Supreme Court, in *Lipka v Brown City Schools*, 403 Mich 554 (1978), held that the Tenure Commission could not review the merits of the board's decision that the teacher's work was unsatisfactory. The court said:

“The Tenure Commission may not assay a board's reason for concluding the work unsatisfactory. The act is followed when the notice of unsatisfactory work is timely given whether based on good, bad, or unstated reasons. If timely notice of unsatisfactory work is given, no entitlement to tenure arises under the act.” *Id.* at 559-560.

Thus, the statement of “unsatisfactory performance” need not be true!

- c. Failure to provide the teacher with a written statement of unsatisfactory performance is conclusive evidence that the teacher's work was satisfactory.
3. The Teachers' Tenure Act itself is silent about how notice of nonrenewal should be sent to a probationary teacher, but Tenure Commission decisions indicate that the school district has the burden of proving actual receipt of the notice by the teacher. Presumed or constructive receipt will not satisfy the district's burden of proof on this issue. Thus, in order to be valid, the notice of nonrenewal has to actually be in the teacher's possession on or before the May 1 nonrenewal deadline. Active efforts to evade receipt, however, deprives the teacher of the defense that he or she was not properly served with the notice of non-renewal. *Gordon v Woodhaven School District*, STC 80-55.

IV. The Rights of Probationary Teachers in Layoff and Recall Situations

- A. Tenured teachers are never in competition with probationary teachers in layoff and recall situations. All things being equal, the tenured teacher must be given preference for continued employment in the face of layoffs or recall after layoff.
- B. A controlling board may not refuse employment to a tenured teacher who is certified and qualified for an available position even if a probationary teacher must be dismissed to make way for the tenured teacher. OAG 1961-62, No 3609, p 265 (Feb 7, 1962).

- C. A position held by a probationary teacher is “vacant” for purposes of recalling a laid-off tenured teacher who is certified and qualified for the position.
Smith v Farmington Public Schools, STC Docket No. 03-29.

V. Development and Evaluation of Probationary Teachers MCL 38.83a(1)

A. **IDP** : Each probationary teacher employed for at least one full school year must be provided with an individualized development plan (IDP) developed by appropriate administrative personnel in consultation with the individual teacher.

1. *Van Gessel v Lakewood Public Schools*, 220 Mich App 37 (1996).

“employed court found it prepare meaningful vacuum” evident that the would require substantial for whom it is designed.” Thus, a developed for a first-year teacher.

- a. School districts are not required to provide first-year probationary teachers with an IDP.
- b. The court focused upon the language of MCL 38.83a(1) requiring that an IDP be provided to each probationary teacher by a school district for at least one full year.” The “inconceivable to require that school districts and constructive IDPs for total strangers in a Further, the court stated that, “It appears development of an effective IDP familiarity with the teacher meaningful IDP cannot be

2. *Cummings v Centerline Schools*, STC Docket No. 98-18

- a. Development “in consultation with the individual teacher” requires only minimal input from the teacher.
- b. The IDP, completed entirely by the administrator, was handed to the teacher. She was asked to read it, and did so. She was asked if she had any questions about the IDP. She did not. She was then asked to sign the IDP, which she did. The Tenure Commission found that the teacher had been provided an opportunity to offer input regarding her IDP and the fact that she chose not to respond did not negate the fact that she had been consulted regarding that document. Consequently, the Commission held that the district had complied with the consultation requirement of the Act.
- c. The Commission held that a teacher who chooses to remain silent when offered the opportunity to ask questions or offer input on an IDP can not later complain that he/she was never consulted in the development of the document.
- d. The Commission noted that the Act does not require a particular method of providing an IDP. Rather, the legislature had

given school districts wide discretion in the development of IDPs. A district can, therefore, develop an IDP after meeting with a teacher, during a meeting with a teacher, or as in this case, it can present a completed IDP to a teacher and then seek input. In a later case, *Korri v Norway-Vulcan Area Schools*, STC01-06 the Commission ruled that the goals of an IDP can be developed orally and need not be in writing (although it recommended that the goals be reduced to writing at a later date).

B. **Evaluation:** Each probationary teacher must be provided with an annual year-end performance evaluation each year during the teacher’s probationary period. The annual year-end performance evaluation must be based upon at least two classroom observations held at least 60 days apart and must include at least an assessment of the teacher’s progress in meeting the goals of his/her IDP.

1. Two Classroom Observations

a. In *Cummings v Centerline Schools*, STC Docket No. 98-18, the teacher’s year-end evaluation stated on its face that it was based on classroom observations on March 24, March 26, and April 2, 1998. The district produced evidence that observations considered in development of the year-end evaluation conducted in November of 1997 were also

b. The Commission noted that the issue was not whether the observations occurred more than 60 days apart, but whether the year-end evaluation was based on observations occurring at least 60 days apart.

c. The teacher eventually conceded that she was observed in November of 1997 and again in March and April of 1998. Accordingly, the Commission found that the year-end evaluation was based upon two classroom observations at least 60 days apart.

2. “Year-End”

a. In *Korri v Norway-Vulcan Area Schools*, STC Docket No. 01-06, a probationary teacher received a final evaluation on January 23. The Commission held that an evaluation that early in the year can not be the “annual year-end evaluation” required by the Act. The Commission ruled that the annual year-end evaluation should occur “within a reasonable time frame of the May 1 unsatisfactory notice deadline.” The Commission went on to hold, however, “that the year-end evaluation requirement does not prevent a school district from terminating an unsatisfactory probationary teacher before the end of the school year. Where it is necessary to terminate a poorly performing teacher prior to completion of the school year,

there is no requirement to provide the year end performance evaluation because the teacher will not complete the school year.”

b. For anniversary date teachers, the annual year-end performance evaluation must be completed within a reasonable time frame of the end of the anniversary period. *Rodgers v Reading Community Schools*, STC Docket No. 01-8.

c. In *Rodgers*, the Commission held that an anniversary date probationary teacher who was non-renewed at the end of the school year (rather than the end of her anniversary period) was not entitled annual year-end performance evaluation because the non-renewal constituted a dismissal before the end of the year (*i.e.*, her anniversary date) and, consequently, she would not complete the school (anniversary) year.

C. General Rules Regarding IDPs and Evaluations.

1. The statute does not impose a particular method for conducting a performance evaluation or classroom observation, or for providing an IDP. MCL38.83a(1)

2. Failure of the employing district to comply with the IDP requirement or evaluation procedures set out in the Act is conclusive evidence that the teacher’s performance for that school year was satisfactory. MCL 38.83a(2)

VI. Concurrent Amendments to the Revised School Code Affecting Probationary Teachers, MCL 380.1526

A. New teachers are to be assigned a mentor or master teacher for the first three years of employment in a classroom teaching.

B. During the three year period, the teacher must receive “intensive professional development induction into teaching” including classroom management and instructional delivery as part of a plan that meets the requirements of an IDP under the Tenure Act. “The intensive professional development into teaching shall consist of at least 15 days of professional development, the experiencing of effective practices in university-linked professional development schools, and regional seminars conducted by master teachers and other mentors.”

C. Failure to provide a mentor and or to meet the professional development requirements for new teachers subjects the offending person (*e.g.*, school officials or board members) to the penalty provision of the Revised School Code – “guilty of a misdemeanor punishable by a fine of not more than \$500 or imprisonment for not more than 3 months, or both.” MCL 380.1804.

VII. Jurisdiction of the Tenure Commission

- A. The Tenure Commission's jurisdiction over the non-renewal of probationary teachers is very limited. If a teacher can claim tenure due to satisfactory completion of the probationary period, the Commission has jurisdiction to determine the timeliness and legal effect of a notice of unsatisfactory performance. *Lipka v Brown City Schools*, 403 Mich 554 (1978).
- B. In *Cummings v Centerline Schools*, STC Docket No. 98-18, the Tenure Commission recognized that the 1993 amendments expanded its jurisdiction to include review of IDP and evaluation issues: "Our inquiry into the legal effect of a notice of unsatisfactory performance must be expanded to include the concepts addressing satisfactory performance contained in the 1993 amendments to the Tenure Act."
- C. The Commission's expanded jurisdiction, however, does not extend to probationary teachers who cannot claim to have attained tenure due to a violation of the IDP/evaluation process. In other words, the Commission will not hear the IDP/evaluation claims of teachers who are not in their last year of probation.
1. *Gonzalez v Riverview Community School District*, STC 99-10.
 - a. A first-year probationary teacher claimed a right to be returned for his second year of probation due to the district's failure to comply with the procedural requirements of MCL 38.83a(1). The teacher alleged that the district's failure to provide him with an evaluation process consistent with the provisions of the Act was conclusive evidence that his performance was satisfactory. The teacher also asked for declaratory relief in the form of a declaration by the Commission regarding the appropriateness of terminating a probationary teacher without compliance with the statutory evaluation procedure.
 - b. Relying upon *Lipka*, the Commission determined that its jurisdiction was limited to appeals by tenured teachers and individuals who claim to have attained tenure as a result of the successful completion of the probationary period. The Commission held that Mr. Gonzalez, as a first-year teacher, would not have gained tenure regardless of the outcome of his case. Accordingly, because he could not claim to have attained tenure status as a result of the successful completion of the probationary period, the Commission had no jurisdiction.
 - c. The Commission also noted that Article II, §4 of the Act, MCL 38.84, remained unchanged by the amendments. That section provides that Articles IV, V, and VI do not apply to probationary teachers. As Articles IV and VI are the only articles authorizing hearings before the Commission, the inescapable conclusion was

that probationary teachers could not challenge alleged violations of the Act before the Commission.

- d. The Commission also denied Mr. Gonzalez’s request for a declaratory ruling. Although noting that “any interested person may request the Commission to issue a declaratory ruling” and that “the right to request a declaratory ruling has been extended to probationary teachers,” the Commission declined to issue a declaratory ruling here because, given the facts of the case, it would require the Commission to weigh the reasons behind Mr. Gonzalez’s non-renewal. The Commission is prohibited by *Lipka* from weighing the reasons behind a non-renewal decision. The Commission restated that it had no authority to look beyond the school district’s finding of unsatisfactory performance.
- e. Likewise, in *Rodgers v Reading Community Schools*, TTC 01-8, the Commission held that it had no jurisdiction over a teacher who claimed a violation of the statutory evaluation procedure because she had not completed her probationary period.

VIII. Mid-Year Dismissal of Probationary Teachers

- A. Probationary teachers facing mid-year dismissal are, by definition, not tenured and are not in a position to claim tenure due to satisfactory completion of the probationary period. Consequently, the Tenure Act does not apply.
- B. Contract rights may require a “due process” hearing. Both the federal and state constitutions provide that a person may not be deprived of “life, liberty, or property without due process of law.” A contract right is an interest in property subject to due process.
 - 1. Collective bargaining agreements (CBAs) with public employers.
 - a. CBAs which grant “just cause” employment to probationary teachers create a property interest in continued public employment. Procedural due process is required if a teacher is to be deprived of that property interest.
 - 2. Individual employment contracts.
 - a. The Revised School Code requires that teachers (tenured and probationary, alike) sign individual employment contracts stating that they are employed for a particular school year at a particular salary. Unless the contract or the CBA provides otherwise, a school district is not justified in dismissing a teacher without compensation before the contract expires.

3. “The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement.” *Cleveland Board of Education v Loudermill*, 470 US 532, 105 S Ct 1487, 84 L Ed 2d 494 (CA 6, 1985).
 - a. Hearing procedures of a more elaborate or formal nature (which may include witness testimony, cross-examination, a neutral decision maker, etc.) may be required to satisfy due process where:
 - i. The interest at stake is significant (*e.g.*, one’s livelihood). *Tomiak v Hamtramck School District*, 426 Mich 678 (1986).
 - ii. There is no post-termination process available to challenge the decision. *Tomiak, supra*. (“When a discharged employee may receive a post-termination hearing to review adverse personnel action, the pre-termination hearing need only be extensive enough to guard against mistaken decisions.”)

C. Teachers dismissed under circumstances damaging to their reputations may have a due process claim based on a deprivation of liberty. Due process may require that they receive a “name clearing” hearing. *Manning v City of Hazel Park*, 202 Mich App 685 (1993).

D. The mid-year discharge of a probationary teacher can be challenged in the courts.

1. The Michigan Constitution provides:

“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.” Mich Const 1963, art 6, Section 28.

2. Michigan statutes also provide for an appeal of a school board’s decision to discharge a probationary teacher in mid-year. MCL 600.631 provides:

“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 from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident”

- E. The due process arguments set forth in this section do not apply to tenured teachers (who receive all the process they are due through the hearing procedures of the Tenure Act), or to probationary teachers who are non-renewed pursuant to the procedures set forth in the Act. The Michigan Supreme Court in *Lipka* said:

“The Act is followed when the notice of unsatisfactory work is timely given whether based on good, bad, or unstated reasons. If timely notice of unsatisfactory work is given, no entitlement to tenure arises under the Act, and therefore the Due Process Clause does not require a hearing. See *Board of Regents v Roth*, 408 US 564, 92 S Ct 2701, 33 L Ed2d 548 (1972).”

- F. The Pupil Protection Laws, enacted in September of 2005, prohibit the employment, in any capacity, of a person convicted of a crime which requires registration under the Sex Offenders Registration Act (SORA). This prohibition applies to all schools in the state, public or private.
- G. The Pupil Protection Laws also require that school employees report being charged with a SORA offense or any other offense listed in section 1535a of the Revised School Code, MCL 380.1535a (crimes for which the Superintendent of Public Instruction may suspend or revoke a teacher’s certificate). School employees are also required to report convictions of any crime arising from being charged with a self-reporting crime. Failure to self-report is itself a crime and constitutes just cause for discharge or demotion. Conviction of any of the crimes set forth in section 1535a also constitutes just cause for discharge or demotion.

IX. Current State of the Law

- A. First-year probationary teachers are not entitled to an IDP.
- B. The development of an IDP “in consultation” with a probationary teacher requires only minimal participation by the teacher. A probationary teacher need be given only an opportunity to ask questions or offer input into the plan. An IDP need not be in writing.
- C. A year-end evaluation meets the requirements of the statute if it is based upon any two classroom observations more than 60 days apart as long as the evaluator had access to and relied upon information from those observations, and as long as it occurs within a reasonable time frame of the May 1 unsatisfactory notice deadline.
- D. The Tenure Commission has no jurisdiction over cases involving IDP’s or year-end evaluations of probationary teachers if those teachers are not in the last year of probation, *i.e.*, not in a position to claim tenure by virtue of completing the probationary period.
- E. The Tenure Commission will not issue declaratory rulings which would require an examination of the merits of a notice of unsatisfactory performance.

- F. The IDP and year-end performance evaluation requirements do not preclude the dismissal of poorly performing probationary teachers before completion of the school year.
- G. Anniversary date probationary teachers who are non-renewed at the end of a school year are not entitled to an annual year-end performance evaluation because the non-renewal constitutes a dismissal before the end of the year (anniversary date) and, consequently, the teacher will not complete the school (anniversary) year.
- H. A probationary teacher dismissed in mid-year is likely entitled to a due process hearing and has a right to challenge the dismissal in court.
- I. The mentor teacher and professional development requirements for probationary teachers are contained in the Revised School Code rather than the Tenure Act.
- J. School employees convicted of SORA crimes must be discharged.
- K. School employees who fail to report being charged with one of the crimes listed in MCL 380.1535a or who fail to report a subsequent conviction are guilty of yet another crime and are subject to discharge.