

## OVERVIEW OF THE MICHIGAN TEACHER TENURE ACT

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### **A. Impact on Collective Bargaining of Tenure Act**

1. As a general rule, the requirements of the Tenure Act constitute a minimum level of protection for tenured teachers and do not preclude greater protection for teachers in collective bargaining agreements. Thus, protections for teachers found in collective bargaining agreements which are greater than in the Tenure Act are not considered inconsistent with the terms of the Tenure Act and are binding upon a controlling board.
2. Throughout this outline, there are examples of when the collective bargaining agreement may and should provide greater protection for a teacher than the Tenure Act.

### **B. Individuals Covered By the Teacher Tenure Act**

1. The term "teacher" under the Tenure Act means a "certificated" individual employed for a "full school year" by a "controlling board."
2. "Teacher" includes persons holding teaching certificates issued by the Michigan Department of Education, and persons who do not hold a teaching certificate, if:
  - a. The individual is permitted to teach certain subjects (computer science, foreign languages, mathematics, biology, chemistry, engineering, physics, or robotics) in grades 9 through 12 pursuant to Section 1233b of the Revised School Code; or
  - b. The individual holds an annual vocational authorization or a temporary approval from the State Board of Education.
  - c. Persons teaching pursuant to paragraphs a. and b. above accrue probationary service credit, but must be certificated before they can obtain continuing tenure and come under the protections of the Tenure Act.
3. "Certificated" for purposes of the Act has been defined as both "holding" teacher certification and being employed in a position which requires teacher certification.
  - a. "Holding" a teaching certificate includes an individual whose application for a teaching certificate has not yet been confirmed or

rejected by the Department of Education, when written evidence from the individual's teacher education institution that he or she meets the requirements for certification has been provided to the employer.

- b. An individual whose teaching certificate has expired or has been suspended or revoked is not covered by the Tenure Act.
4. The employment must be with a "controlling board."
    - a. All traditional public school districts and intermediate school districts in Michigan qualify as "controlling boards."
    - b. The board of a charter school, also known as a "public school academy," is not a controlling board.
    - c. A consortium is not a "controlling board," but the constituent members of the consortium are controlling boards. *Imbrunone v Inkster Public Schools*, (81-52), *aff'd*, 161 Mich App 132 (1987).
    - d. The Tenure Act does not cover community colleges, colleges, or universities.
  5. In order to be employed for a "full school year," one must be employed by the local school district as a "regular" (*i.e.*, not substitute) teacher. Employment as a "regular" teacher is considered employment for a "full school year." There is no minimum number of days that must be taught. *Breuhan v Plymouth-Canton Community Schools*, 425 Mich 278 (1986).
    - a. If the probationary period begins at the beginning of a school year, then a full school year should end at the close of the school year, which has been determined for all school districts to be June 30. *Ajluni v Board of Education of the West Bloomfield School District*, 397 Mich 462 (1976).
    - b. If a teacher's probationary service begins after the start of a school year, then a full school year will end on the anniversary date of employment. *Breuhan v Plymouth-Canton Community Schools*, 425 Mich 278 (1986).

### **C. The Probationary Period under the Teachers' Tenure Act**

1. A teacher must serve four full school years of probationary service in order to obtain tenure status, except:

- a. A teacher who has tenure status from another Michigan school district may not be required to serve more than two full school years of probationary service in another school district and may be granted immediate tenure by that district.
  - b. A teacher can't be required to serve more than one probationary period in a particular district. Thus, a teacher who acquires tenure status in a school district's adult education program may not be required to serve an additional probationary period if that teacher is assigned to or transfers to the same district's K-12 program. Similarly, tenured adult education teachers who are assigned high school age alternative education students attain immediate tenure in the district's K-12 program. *Gaffney v Hillsdale Community Schools* (96-24).
2. A part-time teacher who teaches only half of the workday obtains tenure status at the same time as a full-time teacher. *Hughes v Bullock Creek School District*, (72-9). However, tenure earned in a part-time position does not invest the teacher with tenure rights to a full-time position if one becomes available.
  3. Employment constitutes probationary service for purposes of the Tenure Act if the teacher has the full responsibility for the classroom, including grading students, attending open houses, developing lesson plans, and attending parent/teacher conferences. Thus, a substitute teacher serving in an assignment for substantial periods of time on a regular, continuous basis who has full responsibility for the classroom may have his/her service counted toward the probationary period. However, a substitute teacher serving in a long-term assignment for which the he or she is not certificated cannot acquire probationary service in that position.

Similarly, a certificated teacher serving in a position which does not require a certificate, does not involve full responsibility for the classroom, or which does not involve instruction which is part of the school district's adopted curriculum does not acquire probationary service in that position. *Joseph v Bd of Ed of the Ann Arbor Public Schools*, (98-17).

4. The probationary period need not be continuous. Substantial periods of employment with the same district may be "tacked" to establish a complete probationary period. *Cadillac Area Public Schools Board of Education v Ward*, 134 Mich App 811 (1984).
5. An extended leave of absence, paid or unpaid, constitutes a break in service for purposes of completing the probationary period. *In the matter of Jonathan Skiba*, (91-1). But see *Gladstone v Highland Park Board of*

*Education*, (80-14) (holding that a probationary teacher's use of 63 consecutive sick days did not interrupt his probationary service because the number of sick days used did not exceed the days allowed under the collective bargaining agreement).

6. Persons who are teaching pursuant to Section 1233b of the Revised School Code or with an annual vocational authorization or temporary approval may be accruing time toward completion of the probationary period, although they may not obtain tenure status until and unless they obtain a teaching certificate.

#### **D. Tenure Status in Specialized Situations**

##### 1. Tenure Status for Teachers Employed by Consortia

- a. Before the 1993 amendments to the Tenure Act, a teacher employed by a consortium could obtain tenure in each of the constituent districts based upon application of the economic reality test. *Imbrunone v Inkster Public Schools*, (81-52), *aff'd* 161 Mich App 132 (1987).
- b. Teachers who already have obtained tenure status through employment with a consortium are not affected by the amendments to the Tenure Act.
- c. Teachers employed by a consortium who did not have tenure status on June 11, 1993, may obtain tenure status in the following ways:
  - (1) If the teacher has tenure status in a school district that participates in the consortium, then the teacher shall be considered to have tenure status only in that school district.
  - (2) If the teacher did not previously have tenure status in one of the districts participating in the consortium, then the teacher may obtain tenure status in the school district that is the fiscal agent for the consortium, unless there is a written agreement between the teacher and another participating school district that provides the teacher will have tenure status in that school district.

##### 2. Tenure Status for Adult Education Teachers

- a. A teacher who satisfactorily completes the probationary period as an adult education teacher obtains tenure status only in the adult education program and not the K-12 program. A teacher with adult

education tenure does not have an automatic right to a K-12 position. Likewise, a tenured K-12 teacher is not considered tenured in the school district for adult education.

- b. But, a tenured adult education teacher who becomes employed in a regular K-12 position in the same district, immediately acquires K-12 tenure. The reverse is also true. A tenured K-12 teacher who takes an adult education position in the same district immediately acquires adult education tenure. A teacher cannot serve a second probationary period in the same district.
- c. Alternative education is regarded as a regular K-12 position, regardless of where it is placed organizationally in a particular district. Therefore, an adult education teacher teaching alternative education students can acquire tenure status as a K-12 teacher. *Gaffney v Hillsdale Community Schools*, (96-24).

3. Classroom Tenure Status for Certain Administrative Positions

- a. An individual can complete a probationary period and acquire tenure as a classroom teacher while serving in administrative positions that require certification. (Such a requirement is imposed by the local school board; there is no statutory requirement that administrators be certificated.) These include the positions of:
  - (1) superintendent;
  - (2) adult education administrator;
  - (3) principal;
  - (4) assistant principal; or
  - (5) other position the local school board requires to hold a teaching certificate.
- b. An individual cannot acquire classroom teacher tenure in an administrative position for which teacher certification is not required.

4. Tenure Rights in Non-Classroom Positions

- a. Teachers who are employed in non-classroom positions may acquire a separate tenure status commonly known as “tenure in position” or “administrative tenure” provided that they are certificated and serve the required probationary period. *Belanger v Warren Consolidated School District Board of Education*, 432 Mich 575 (1989).

- b. School counselors who are members of the same collective bargaining unit with regular classroom teachers are deemed to be “classroom teachers” for purposes of tenure in position. Thus, counselors are not entitled to tenure in position. *Belanger v Warren Consolidated School District Board of Education*, 430 Mich 575 (1989). This holding should also apply to school librarians.
- c. A school board may prevent a person from obtaining tenure in position by specifically excluding that tenure status in an employment contract issued to the holder of the non-classroom position or in a collective bargaining agreement that covers the employment position at issue. See MCL 38.91(7).

**E. Individualized Development Plan and Performance Evaluations for Probationary Teachers**

- 1. The school district must provide the probationary teacher with an annual Individualized Development Plan (IDP) developed by administrative personnel in consultation with the individual teacher. But see *Van Gessel v Lakewood Public Schools*, 220 Mich App 37 (1996), holding that probationary teachers, in their first year of employment, need not be provided with an IDP pursuant to MCL 38.83a, as such teachers are not yet “employed by the district for at least one (1) full school year”.
  - a. The Tenure Act provides that the IDP is to be developed by “appropriate administrative personnel in consultation with the individual teacher.” MCL 38.83a. However, only minimal consultation with the individual teacher is required. In *Cummings v Board of Education of Center Line Public Schools*, (98-18), the Tenure Commission found that the school district complied with the “consultation” requirement when it presented an IDP to the teacher and, after allowing the teacher an opportunity to read it, asked if she had any questions. Teachers should take advantage of such opportunities to offer input on their IDP. An IDP need not be written. *Korri v Norway-Vulcan Area Schools* (01-06)
  - b. Contracts should require the presence of an association representative to minimize concerns related to individual bargaining. The master teacher/mentor (see Section F., below) may act as the association representative in cases where he/she is a bargaining unit member.
- 2. There must be an annual year-end performance evaluation based on at least two classroom observations held at least 60 days apart (unless a

shorter interval is agreed upon between the teacher and the administration) and must include at least an assessment of the probationary teacher's progress in meeting the goals of the IDP.

- a. The annual year-end evaluation must be conducted within a reasonable time-frame of the May 1 notice of non-renewal deadline. *Korri v Norway-Vulcan Area Schools* (01-06)
3. A collective bargaining agreement may provide for more performance evaluations or classroom observations for probationary teachers.
4. The Act does not impose or prescribe a particular manner or method for conducting a performance evaluation, classroom observation, or developing and IDP. MCL 38. 83a(1).
5. Failure of a school district to provide an IDP or annual performance evaluation is conclusive evidence that the probationary teacher's performance for that school year was satisfactory. MCL 38.83a(2).

**F. Professional Development under Master Teachers**

1. The Revised School Code mandates professional development for teachers in the first three (3) years of employment in classroom teaching.
2. Section 1526 of the Revised School Code provides:

For the first 3 years of his or her employment in classroom teaching, a teacher shall be assigned by the school in which he or she teaches to 1 or more master teachers, or college professors or retired master teachers, who shall act as a mentor or mentors to the teacher. During the 3-year period, the teacher shall also receive intensive professional development induction into teaching, based on a professional development plan that is consistent with the requirements of . . . [the Teachers' Tenure Act] . . . , including classroom management and instructional delivery. The intensive professional development induction 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.

3. Who will be a "master" teacher?
  - a. Constitutes bargaining unit work; therefore, bargain regarding who can serve as a master teacher;

- b. Do not let master teacher become a supervisor -- under PERA, supervisors are to be excluded from bargaining units containing non-supervisory personnel.
- c. Do not let master teacher become evaluator. Such a role would have a chilling affect on the open and frank relationship required for an effective mentor-mentee relationship.

**G. Termination of Probationary Teachers**

1. Board Actions to Prevent Probationary Teachers from Obtaining Tenure Status

- a. A teacher obtains tenure by operation of law, and no affirmative action by the school board is necessary. School boards can not confer tenure upon a teacher who has not satisfied the probationary requirement of the Act. A board of education may keep a teacher from obtaining tenure status only by properly terminating the services of a probationary teacher.

2. Procedure for Terminating a Probationary Teacher for Unsatisfactory Service

- a. A board of education may terminate the services of a probationary teacher by providing a written statement of unsatisfactory service to the probationary teacher at least 60 days before the close of the school year.
  - (1) The decision to terminate a probationary teacher must be made by the board of education and cannot be delegated to the school administration.
  - (2) While the exact words, "unsatisfactory service" need not be used in the notice to the teacher, the plain meaning of the notice must be that the teacher's services have been unsatisfactory. *Commeret v Jenison Public Schools*, 75 Mich App 115 (1977).
  - (3) The notice of unsatisfactory service must actually be received by the probationary teacher more than 60 days before the close of the school year. *Weckerly v Mona Shores Board of Education*, 388 Mich 731 (1970). For all Michigan school districts, the "close of the school year is June 30. *Ajluni v Bloomfield Board of Education*, 397 Mich 462 (1976). Thus, actual delivery to the probationary



teacher must occur on or before May 1. The teacher must also be provided with a copy of the school board's resolution terminating the teacher's services, and must be advised of his or her rights to appeal the board's decision under the Tenure Act.

- (4) A school district is not relieved of its statutory obligation to provide a probationary teacher with timely written notice of nonrenewal by employing a teacher on an annual contract in which the teacher automatically "agrees" to "resign" at the end of the year as a condition of employment. Such agreements violate the anti-waiver provisions of Article X, Section 2 of the Tenure Act and are, therefore, void. *Waits v Ann Arbor Public Schools*, 221 Mich App 193 (1997).

### 3. Special Rules For Anniversary Date Teachers

- a. For anniversary date teachers (those who begin employment after the start of the school year), the 60 day notice of non-renewal requirement means 60 days before the anniversary of their start date. *See, e.g., Rodgers v Reading Community Schools* (TTC 01-8), in which an anniversary date teacher was given notice of non-renewal given 66 days before the end of the school year, to be effective at the end of the school year. Although the notice came 9 months before the her next employment anniversary date, it was deemed legally sufficient to terminate her services at the end of the school year because it was received by the teacher at least 60 days before her anniversary date.
- b. 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 to an 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.

### 4. Layoff and Recall of Probationary Teachers

- a. A probationary teacher may be laid off, rather than discharged, without the need for the board of education to provide a statement of unsatisfactory service. *Boyce v Royal Oak Board of Education*, 407 Mich 312 (1979). Thus, the collective bargaining agreement will generally provide greater layoff and recall rights to a probationary teacher than the Tenure Act.

- b. While probationary teachers are to be laid off ahead of tenured teachers, the Tenure Act does not prescribe the procedure for determining which probationary teachers are to be laid off. However, teachers who have successfully completed their last probationary year must be treated as if they are tenured teachers. Consequently, fourth-year probationary teachers will be favored over first-year probationary teachers in layoff and recall situations.
- c. First through third-year probationary teachers have no legal standing to question a school board's authority in layoff situations; therefore, if they are laid off, they have no statutory right to a hearing before either the local board or the Tenure Commission.
- d. The only recall right that a probationary teacher has under the Tenure Act is that the layoff may not be a subterfuge by the controlling board to avoid the fact that the controlling board did not properly provide the sixty (60) day notice for termination based upon unsatisfactory service.

5. Mid-Tear 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." An interest in property subject to due process.
  - (1) Collective bargaining agreements with public employers which grant "just cause" employment to probationary teachers create a property interest in continued public employment. Procedural due process is required if such teachers are to be deprived of that property interest.
  - (2) Individual employment contracts signed by teachers (tenured and probationary, alike) typically state 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.”)

## **H. Legal Challenges to the Termination of a Probationary Teacher**

1. There are generally two (2) types of legal challenges to the termination of a probationary teacher:
  - a. The IDP/evaluation process and/or notice of termination for unsatisfactory service was not legally adequate;
  - b. The decision of the controlling board to terminate the probationary teacher was arbitrary and capricious.
2. Depending on the type of legal challenge, either the Tenure Commission or Circuit Court has jurisdiction over the claim.
  - a. The Tenure Commission has jurisdiction over claims involving the IDP/evaluation process or notice of termination if the teacher arguably has tenure status based on the alleged improper action. If not, the claim should go to the Circuit Court. In other words, a teacher must be in the last year of probation to invoke the jurisdiction of the Tenure Commission.

b. The Circuit Court has jurisdiction over claims challenging the termination as arbitrary and capricious.

(1) Non-renewal of teachers not yet in the last year of probation

(a) The courts have consistently held that a controlling board has a considerable amount of discretion in deciding whether to retain the services of a probationary teacher.

(b) However, the courts will not look beyond the timeliness of a notice on unsatisfactory performance. If the notice is timely, the courts will not question the district's determination that the teacher's performance was unsatisfactory. *Lipka v Brown City Schools*, 403 Mich 554 (1978).

(2) Mid-year dismissal of probationary teachers

(a) 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.

(b) 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 . . . .

**I. Contract Protection for Probationary Teachers**

1. Due to the limited rights granted to probationary teachers under the Tenure Act, the collective bargaining agreement may often provide the greatest protection.
2. If the applicable collective bargaining agreement limits the right of a board of education to terminate a probationary teacher, the grievance and arbitration procedure should be utilized when the termination was without just cause.
3. Unfortunately, many of the collective bargaining agreements that provide for just cause for all bargaining unit members exclude terminations of probationary teachers from being arbitrated.
4. When the language of the collective bargaining agreement relative to “just cause” can be read as applying to the nonrenewal of a probationary teacher and arbitration is not available, the termination may be pursued in Circuit Court depending on the strength of the case.

**J. Rights of Tenured Teachers**

1. Evaluation of Tenured Teachers, MCL38.93
  - a. A school district must provide a tenured teacher with a performance evaluation at least once every three years. If the teacher has received a less than satisfactory performance evaluation, the school district must provide an IDP developed by appropriate administrative personnel in consultation with the individual teacher.
  - b. The performance evaluation must be based on at least two (2) classroom observations conducted during the period covered by the evaluation and, if the teacher has an IDP, the evaluation must contain an assessment of the teacher’s progress in meeting the goals of the IDP.
  - c. The Tenure Act does not preclude a collective bargaining agreement from providing for more performance evaluations or classroom observations than required by the Tenure Act.

- d. Failure of a school district to provide an appropriate performance evaluation or, if necessary, an IDP within the three-year period, is conclusive evidence that the teacher's performance during that period was satisfactory.

2. Layoff and Recall of Tenured Teachers

- a. A tenured teacher shall be appointed to the first vacancy in the school district for which the teacher is certificated and qualified for a period of three (3) years after the effective date of the termination of the teacher's services.
  - (1) A “vacancy” is defined as any teaching position that is not currently held by a tenured teacher and to which a tenured teacher does not have a guaranteed right of return. Thus, a vacancy under the Tenure Act not only includes positions to which no individual has yet been assigned, but also positions that are held by probationary teachers (unless a tenured teacher has a guaranteed right to return to the position the probationary teacher is temporarily holding).
  - (2) “Certificated” means that the laid off teacher must hold the appropriate certification or meet certification requirements for the particular position.
  - (3) The term “qualified” means something above and beyond the certification requirements for a particular position. Qualifications for teaching positions may be found in collective bargaining agreements or may be unilaterally promulgated by a controlling board if a local association has not demanded to bargain over the qualifications. A controlling board’s established qualifications must not be unreasonable, arbitrary or capricious.
- b. In reviewing a layoff situation, it is important to remember that the rights to recall attach as of the time of layoff. Thus, if there are any vacancies for which the teacher is certificated and qualified at the time of layoff, the failure to place the teacher in such a vacancy is a violation of the Tenure Act.
- c. A controlling board is granted a considerable amount of discretion by the Tenure Act in establishing class schedules. A controlling board has no legal obligation to rearrange class schedules in order to facilitate the recall of a laid off tenured teacher. *Wogerman v Branch Intermediate School District*, (81-42). Similarly, a

controlling board does not have a legal obligation to split a teaching position so that a laid off tenured teacher may be recalled to the newly created part-time position. *Valesano v White Plains School District*, (78-47).

- d. The Tenure Commission has held that on staff teachers have priority over laid off teachers for available vacancies. *Page v Harper Woods Public Schools*, (73-60) (holding that vacant position must be offered to on staff teacher as opposed to teacher on layoff status); *Helsom v Board of Education of the Northwest School District*, (84-42) (holding that on staff teacher had priority even though laid off teacher had more seniority under collective bargaining agreement).
- e. A controlling board has an obligation under the Tenure Act to offer a part-time vacancy to a tenured teacher laid off from a full-time position and to offer a full-time vacancy to a tenured teacher laid off from a part-time position. However, the tenured teacher has the right to refuse recall to a position incompatible to the teacher's former position. Thus, once a tenured teacher laid off from a full-time position rejects recall to an incompatible part-time position or vice versa, the controlling board no longer has an obligation to notify the laid off teacher of future vacancies of the same type. *Federspiel v Meridian Public Schools*, (81-71).
- f. Nothing prevents a school district from re-employing a teacher after the three-year statutory period has elapsed. Do not agree to rollback more expansive contractual rights to recall merely to "make the contract consistent with the Tenure Act."
- g. The layoff of a tenured teacher is generally not considered to be a discharge and, thus, the tenure procedures for discharge or demotion need not be followed. However, when there is evidence that the "layoff" of a tenured teacher is not a necessary reduction in personnel, but rather a subterfuge to terminate the tenured teacher without following the proper discharge procedures, such a "layoff" is improper.
  - (1) Although a subterfuge claim has been raised numerous times in layoff situations, the Tenure Commission has only found on two occasions that the layoff was actually a subterfuge to terminate a tenured teacher. *Freiberg v Board of Education of Big Bay de Noc School District*, 61 Mich App 404 (1975) (holding that manipulation of class schedules in order to layoff a tenured teacher whom board

members and superintendent did not like, but knew they could not discharge for reasonable and just cause, violated the Tenure Act); *Bush v Board of Education of Zeeland Public Schools*, (87-30) (holding that board action in manipulating class schedules to keep from recalling a laid off tenured teacher violated the Tenure Act).

- h. When a laid off tenured teacher declines recall, the controlling board has a continuing obligation to offer future vacancies to the laid off teacher, unless the controlling board advises the teacher that it considers the refusal to accept recall as an abandonment of employment. The tenured teacher has the right to a decision by the Tenure Commission as to whether the refusal to accept recall constitutes an abandonment of employment. Language in a collective bargaining agreement allowing a teacher to decline recall for certain reasons will prevent a controlling board from finding abandonment.
- i. The layoff and recall of tenured teachers involves the interplay between layoff and recall procedures contained in the collective bargaining agreement and layoff and recall rights granted by the Tenure Act. Generally, the order of layoff and recall established by a collective bargaining agreement controls, unless the procedure violates the tenure rights of one or more teachers involved in the layoff or recall. When there is a conflict between the layoff and recall procedure of a collective bargaining agreement and rights granted by the Tenure Act, generally the Tenure Act will prevail.

3. Abandonment of Employment by Tenured Teachers

- a. Typically, abandonment of employment arises from the failure of a tenured teacher to accept recall. However, this doctrine is not limited to that circumstance and may apply whenever a tenured teacher fails to report for work without appropriate justification.
- b. The Tenure Commission has held that there are two elements to a claim of abandonment, both of which must be proven by the controlling board:
  - (1) the teacher must be physically absent from work; and
  - (2) there must be an intent by the teacher to permanently relinquish the assigned position, as demonstrated by his/her actions or inactions.



- c. The controlling board must notify the tenured teacher of its claim that the teacher has abandoned employment. The teacher may appeal this decision to the Tenure Commission.
- d. If it is determined that a tenured teacher has abandoned employment, the teacher loses his/her rights to employment with that controlling board, but abandonment does not constitute revocation of tenure status. Thus, if the teacher obtains employment with another Michigan school district, the teacher need serve no more than a two-year probationary period.
- e. A claim of abandonment may best be avoided by including language in the collective bargaining agreement allowing a laid off tenured teacher to refuse recall under particular circumstances.

4. Resignations by Tenured Teachers

- a. The Tenure Act provides that a tenured teacher may not resign without the consent of the controlling board less than 60 days prior to September 1<sup>st</sup> of a school year. A tenured teacher who fails to provide notice of resignation by at least July 2<sup>nd</sup> (60 days prior to September 1<sup>st</sup>), may have his/her tenure status revoked by the controlling board.
  - (1) The Tenure Commission has determined that the loss of tenure status for failure of a tenured teacher to give timely notice of resignation is not automatic. The controlling board must pass a resolution at a public board meeting specifically revoking the teacher's tenure status. A teacher whose tenure status is revoked in this manner has the right to challenge the appropriateness of that action before the Tenure Commission. *Stevens v DeWitt Public Schools*, (77-35). However, the Tenure Commission's review in such cases is limited to a review of the procedures followed by the school board in revoking the teacher's tenure. *Peterson v Holton Public Schools*, (94-44).
  - (2) If the teacher's tenure status is revoked by the controlling board, there are two ramifications:
    - (a) if the teacher is ever reemployed by that same controlling board, he/she would have to serve an additional four year probationary period; and

- (b) if the teacher is employed by another Michigan school district, he/she will be required to serve a four year probationary period, rather than a two year probationary period.

5. Leaves of Absence by Tenured Teachers

- a. The Tenure Act provides that a controlling board, upon the written request of a tenured teacher, may grant a leave of absence for a period not to exceed one year, subject to renewal at the will of the board. The Tenure Act further provides that no leave of absence shall serve to terminate continuing tenure.
  - (1) The Tenure Act does not place any limitations on the discretion of the controlling board whether to grant a particular request for a leave of absence. Thus, to the extent the local association desires that certain reasons be automatic grounds for granting a leave of absence, such a requirement must be included in the collective bargaining agreement.
  - (2) Once the leave has been granted, the Tenure Act provides that the terms of the leave become a binding contract between the controlling board and the tenured teacher. Thus, if a leave of absence is granted for a one year period, neither the controlling board or the teacher may unilaterally terminate the leave of absence at an earlier time. The leave may be shortened only by mutual consent of the tenured teacher and the controlling board. *Hambouz v Brandywine Public Schools*, (75-30).
- b. Once the term of a voluntary leave of absence expires, a tenured teacher must be returned to active employment, unless the controlling board acts to:
  - (1) proceed with tenure charges against the teacher;
  - (2) place the teacher on an involuntary leave of absence; or
  - (3) notify the teacher of layoff.
- c. While a controlling board may not unilaterally extend a voluntary leave of absence, the Court of Appeals has held that prior leave of absence status may be a criterion in determining order of layoff. *Smith v Wyoming Public Schools Board of Education*, 128 Mich App 746 (1983).

- (1) If a controlling board has an established past practice of not returning an individual on voluntary leave status when returning the teacher would necessitate the layoff of another teacher, the local association must include language in its layoff and recall procedure providing that order of layoff shall be applied after first returning all tenured teachers whose leave of absence has expired. Otherwise, a controlling board may lawfully layoff those who have been on leave of absence, regardless of seniority.
- d. The Tenure Act specifically authorizes a controlling board to place a tenured teacher on an involuntarily leave of absence because of physical or mental disability for a period not to exceed one year.
- (1) The controlling board must formally take action to place a tenured teacher on involuntary leave of absence status. While the preparation and delivery of the notice of such action may be delegated to the school administration, the actual decision must be made by the board.
  - (2) The board may take such action without a prior hearing. However, the Tenure Act grants the tenured teacher the right to a hearing after the involuntary leave decision has been made. In addition, the tenured teacher must be given notice of the anticipated action and an opportunity to respond prior to the controlling board taking any formal action. This notice and right to respond is granted by the Due Process Clause of the United States Constitution, not the Tenure Act. Thus, a legal challenge to the failure of a controlling board to provide these rights must be filed with a state or federal court, not the Tenure Commission.
  - (3) The teacher may appeal the controlling board's decision placing him/her on involuntary leave of absence status to the Tenure Commission. If the Tenure Commission, upon appeal, finds that placement on involuntary leave of absence was in error, the tenured teacher is entitled to reinstatement with all pay lost.

6. Discharge and Demotion of Tenured Teachers
- a. A tenured teacher may not be discharged or demoted without reasonable and just cause, notice, charges, and a hearing.
  - b. A demotion involves either:
    - (1) a reduction in compensation for a particular school year by more than an amount equivalent to three days compensation; or
    - (2) a transfer to a position carrying a lower salary.
  - c. A suspension without pay for three (3) days or less is not considered a demotion under the Tenure Act. Thus, while a suspension without pay for three (3) days or less may be challenged pursuant to a grievance procedure of a collective bargaining agreement, it may not be challenged under the Tenure Act.
  - d. A reduction in compensation as the result of a necessary reduction in personnel is not a demotion under the Tenure Act. The Tenure Commission analyzes these situations as a layoff with an immediate recall to a lower paying position.
  - e. Continuing tenure does not apply to an annual assignment of extra duty for extra pay. Thus, removal of a tenured teacher from an extracurricular assignment does not constitute a discharge or demotion under the Tenure Act.

**K. Arbitration of Tenure Disputes and Election of Remedies**

- 1. When a teacher seeks to challenge an action of the controlling board, one of the first decisions to be made is whether to challenge the action pursuant to the Tenure Act or the grievance-arbitration procedure of the collective bargaining agreement.
- 2. When rights afforded by the collective bargaining agreement are in addition to or beyond those provided by the Tenure Act, the sole remedy for a violation of those additional rights is through the grievance-arbitration procedure of the collective bargaining agreement.
- 3. In situations where the challenged action of the controlling board is arguably a violation of both the collective bargaining agreement and the Tenure Act, the grievance-arbitration procedure of the collective

bargaining agreement must be carefully examined to determine whether there is an “election of remedies” clause.

4. There are generally two types of election of remedies clauses:
  - a. the type that allows the teacher to choose either to pursue the arbitration remedy or the remedy pursuant to the Tenure Act; or
  - b. the type that dictates which remedy must be pursued.
5. The first type of election of remedies clause is the preferred one and should be bargained into collective bargaining agreements if possible.
6. Advantages of Using Arbitration over the Tenure Act
  - a. The most important reason to use the arbitration process over the procedures afforded by the Tenure Act is that arbitration produces much quicker results. A tenure case can take several years to go through all of its appeals, while arbitrations are usually completed in a matter of months.
  - b. In addition, although the Tenure Commission has the authority to reduce a penalty imposed by a controlling board, it very rarely does so, while arbitrators on a regular basis will reduce the penalty imposed upon an employee for alleged wrongdoing. Thus, under circumstances where the tenured teacher may have engaged in some wrongdoing, but based upon the teacher’s length of service and the overall circumstances, discharge is not appropriate, the teacher has a much better chance of continuing his/her employment with the controlling board by using the arbitration process.
7. Advantages of Using the Tenure Act over Arbitration
  - a. The main reason for using the Tenure Act, rather than pursuing arbitration of an issue, is the many procedural protections afforded to tenured teachers.
  - b. In addition, the length and cost of a tenure case often encourages a controlling board to settle a case on terms more favorable to the tenured teacher than a matter subject to arbitration.
  - c. Also, the Tenure Commission is bound by precedent and, therefore, when the issue is one that has already been decided by a Michigan court or the Tenure Commission, the tenure process is preferred, because the Tenure Commission must follow the

holdings of the Michigan Supreme Court and the Court of Appeals and usually follows its own holdings as well. By contrast, arbitrators are not bound by other arbitrator's decisions.

#### **L. Procedure for the Discharge of a Tenured Teacher**

1. The Tenure Commission and Michigan courts have taken a hard-line approach to procedural errors in discharging tenured teachers.
  - a. If the procedural error is one which can be cured, then the Commission and the courts have held that the procedural error should be cured, rather than reinstate the discharged tenured teacher. *Pounder v Harper Woods Board of Education*, 402 Mich 91 (1977).
  - b. Even under circumstances where the procedural error cannot be cured, the Tenure Commission is obligated to review the merits of the discharge prior to deciding the appropriate remedy. *Ferrario v Escanaba Board of Education*, 426 Mich 353 (1986).
  - c. Thus, under all circumstances, the merits of the discharge will be considered. This does not mean that the procedural rights of tenured teachers should not be aggressively protected, but it does mean that the tenured teacher subject to discharge must be advised that the merits of the grounds for discharge will be the determining factor in the ultimate resolution of the case.
2. All tenure charges must be in writing, signed by the person or persons making the charges, and filed with the secretary, clerk, or other designated officer of the controlling board and a copy of the charges shall be provided to the teacher.
  - a. Tenure charges may be filed by any person with the controlling board. Although typically tenure charges are filed by school administrators, nothing in the Tenure Act prohibits parents or other individuals from filing charges.
  - b. The controlling board must provide the affected teacher with a copy of the charges before it acts upon them. *Falzetti v Plymouth-Canton Bd of Ed*, (96-10).
  - c. The charges must be specific enough to place the teacher on notice of what the teacher is being called on to defend. If the charges are vague, the teacher has a right to a bill of particulars or more definite statement further specifying what the teacher is being

called on to defend. The charges must also provide a proposed outcome of either discharge or a specific demotion of the teacher.

3. The controlling board shall decide whether to proceed upon the charges or may modify the charges and decide to proceed upon them as modified, within ten (10) days after the charges are filed with the controlling board. If the controlling board decides to proceed with the charges, the charges shall be furnished to the teacher within five (5) days after deciding to proceed upon them, along with a statement of the teacher's rights under the Tenure Act.
  - a. The decision to proceed on the charges must be made by a majority of the controlling board and reduced to writing. The disciplinary action which the controlling board intends to impose must be included in the vote to proceed.
  - b. The tenured teacher has the right to request that the controlling board consider the tenure charges in closed session under Section 8(a) of the Open Meetings Act, MCL 15.268(a). However, the actual vote to proceed upon the tenure charges may be lawfully taken in public session and the name of the tenured teacher may be disclosed as a part of that vote. *Halm v Board of Education of the Dansville Agricultural Schools*, 174 Mich App 520 (1988).
4. A teacher may contest the controlling board's decision by filing a Claim of Appeal with the Tenure Commission within twenty (20) days of receipt of the board's decision and notice of tenure rights. If the teacher fails to properly appeal, the teacher shall be considered to have waived any right to contest the discharge or demotion under the Tenure Act and the discharge or demotion shall take effect.
5. The Board must file its answer within 10 days after its receipt of the Claim of Appeal.
6. An administrative law judge employed by the Department of Education shall hold a hearing within sixty (60) days of the controlling board's answer to the teacher's Claim of Appeal.
7. The hearing shall be concluded no later than ninety (90) days after the teacher's Claim of Appeal was filed with the Tenure Commission.
8. Post-hearing briefs must be filed with the administrative law judge within fifty (50) days of the conclusion of the hearing.

9. Within sixty (60) days of the submission of the case for decision (*i.e.*, the filing of post-hearing briefs), the administrative law judge shall serve a preliminary decision and order in writing upon each party and the Tenure Commission. The administrative law judge may uphold, reverse, or modify the discharge or demotion imposed by the controlling board.
10. Within twenty (20) days thereafter, a party may file a statement of exceptions to the preliminary decision and order of the administrative law judge with the Tenure Commission. If no exceptions are filed, the preliminary decision and order become the Tenure Commission's final decision and order.
11. Within 10 days of being served with the other party's exceptions and brief, a party may file a statement of cross-exceptions responding to the other party's exceptions, or a statement in support of the preliminary decision and order of the administrative law judge.
12. The Tenure Commission must issue its final order no later than sixty (60) days after exceptions are filed. The Tenure Commission may adopt, modify, or reverse the preliminary decision of the administrative law judge.
13. Appeal from the Tenure Commission's decision is by leave to the Court of Appeals. *Watt v Ann Arbor Board of Education*, 234 Mich App 701 (1999). If the Court of Appeals takes the case, it may overturn the decision of the Tenure Commission only if it was based on an error of law or if the factual findings are not supported by competent, material, and substantial evidence on the whole record (known as the "substantial evidence test"). The Court of Appeals may not substitute its judgment for that of the Tenure Commission.
14. During the pendency of proceedings, a district may suspend the tenured teacher, but must do so with pay until one of the following occurs:
  - a. the teacher fails to file a Claim of Appeal in response to the decision of the controlling board;
  - b. a preliminary decision and order discharging or demoting the teacher is issued by the administrative law judge;
  - c. a final decision and order is rendered by the Tenure Commission resulting in the discharge or demotion of the teacher; or



- d. if the teacher is convicted of a felony, the controlling board may discontinue the teacher's salary effective upon the date of conviction.
15. A tenured teacher may appeal to the Tenure Commission any decision of a controlling board under the Tenure Act, other than a decision governed by the procedure for discharge or demotion, within twenty (20) days of the date of the controlling board's decision.
- a. Appeals from decisions of the Tenure Commission in non-discharge or demotion cases:
    - (1) Forum and procedure are currently being litigated.
    - (2) MEA's position is that such appeals are by right to the Circuit Court.

**M. Remedies Available Under the Tenure Act**

- 1. Reinstatement is a presumed remedy for a wrongfully discharged or demoted tenured teacher.
  - a. The reinstatement remedy means that the tenured teacher must be returned to an employment position the same as or substantially similar to the teacher's former position.
- 2. A wrongfully discharged or demoted tenured teacher is entitled to "back pay." This phrase has been interpreted to mean all salary and fringe benefits which the teacher lost as a result of the improper action, less those amounts which the teacher earned or reasonably could have earned through other employment. A wrongfully discharged or demoted tenured teacher is entitled to interest on the back pay award at the rate of 5% per year.
- 3. A wrongfully discharged or demoted tenured teacher has a duty to mitigate damages under the Tenure Act by making reasonable efforts to obtain other similar employment.
  - a. A tenured teacher will have deducted from his/her back pay award wages and fringe benefits which were earned in employment which was a substitute for employment with the controlling board.
  - b. The Tenure Commission has interpreted the mitigation requirement as imposing an obligation on a discharged or demoted teacher to apply for other teaching employment within a twenty-five (25) mile

radius of the teacher's employment with the controlling board or within the same distance that the teacher was commuting to employment with the controlling board, whichever is greater. *Sprick v Grandville Public Schools*, (74-40).

- c. The tenured teacher is not obligated to obtain non-teaching employment, nor is the tenured teacher obligated to accept substitute teaching employment because of the substantial wage differential between substitute teaching and regular employment as a teacher. *Bode v Roseville Public Schools*, (74-45).
- d. The teacher should, prior to or immediately upon loss of employment, submit applications to all other school districts within a 25-mile radius or within the same commuting distance. The teacher should further maintain a file containing copies of all applications for employment, along with notes regarding dates of interviews and copies of all correspondence from potential employers.