

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

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The Teachers' Tenure Act has historically provided little or no protection for probationary teachers. Amendments to the Act in 1993 imposed additional obligations upon employing school districts regarding the evaluation of probationary 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. Rights and Protections of Probationary Teachers Under the Act, as Amended**

### A. Length of probationary period.

1. Four years. MCL 38.81(1)
2. A teacher may 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. Non-renewal of probationary teachers.

1. At least 60 days before the close of the school year, the controlling board must provide the probationary teacher with a definite written statement that the teacher's work had been unsatisfactory. MCL 38.83.
  - a. 60 day requirement.
    - i. The "close of the school year" for all Michigan school districts is June 30. *Ajluni v Bloomfield Board of Education*, 397 Mich 462 (1976).
    - ii. Thus, a notice of non-renewal must be received by the probationary teacher no later than May 1 of the current school year for the non-renewal to be effective for the following year. *Weckerly v Mona Shores Board of Education*, 388 Mich 731 (1971).
    - iii. 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.

- iv. 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.
- v. For anniversary date teachers (those who begin employment after the start of the school year), the 60 day notice requirement means 60 days before the anniversary of their start date. *See, e.g., Rodgers v Reading Community Schools* (TTC 01-8), in which notice given 66 days before the end of the school year, but 9 months before the teacher's next employment anniversary date, was deemed timely and effective because it was received by the teacher at least 60 days before her anniversary date.

b. Statement of unsatisfactory performance.

- i. The board is not required to explain its reasons for finding the teacher's work unsatisfactory.
- ii. 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 even be true.**

- iii. Failure to provide the teacher with a written statement of unsatisfactory performance is conclusive evidence that the teacher's work was satisfactory.

C. Development and Evaluation of probationary teachers. MCL 38.83a(1)

- 1. **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.

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

- i. First-year probationary teachers are not entitled to an IDP.

- ii. The court focused upon the language of MCL 38.83a(1) requiring that an IDP be provided to each probationary teacher “employed by a school district for at least one full year.” The court found it “inconceivable to require that school districts prepare meaningful and constructive IDPs for total strangers in a vacuum . . . .” Further, the court stated that, “It appears evident that the development of an effective IDP would require substantial familiarity with the teacher for whom it is designed.” Thus, a meaningful IDP cannot be developed for a first-year teacher. Consequently, IDPs are not required for first-year probationary teachers.

b. *Cummings v Centerline Schools* (TTC 98-18)

- i. Development “in consultation with the individual teacher” requires only minimal input from the teacher.
- ii. The teacher was handed a copy of her IDP by an administrator, 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 was consulted regarding that document. Consequently, the Commission held that the district had complied with the consultation requirement of the Act.
- iii. 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.
- iv. 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 an IDP. 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* (TTC 01-06) the Commission ruled that the goals of an IDP can be developed orally and formalized (*i.e.* reduced to writing) at a later date.

- 2. **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 shall be based upon at least two classroom observations held at least 60 days apart.

It shall include at least an assessment of the teacher's progress in meeting the goals of his/her IDP.

- a. In *Cummings v Centerline Schools* (TTC 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 were also conducted in November of 1997, which were also considered in development of the year-end evaluation.
  - b. The Commission noted that the issue was not whether the observations occurred more than 60 days apart, but whether the final performance 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.
3. The statute does not impose a particular method for conducting a performance evaluation or classroom observation, or for providing an IDP. MCL38.83a(1)
  4. 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).
  5. In *Korri v Norway-Vulcan Area Schools* (TTC 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."
  6. 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* (TTC 01-8).
  7. 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.

## **II. Concurrent Amendments to the Revised School Code Affecting Probationary Teachers**

- A. New teachers are to be assigned a mentor or master teacher for the first three years of employment in classroom teaching.
- B. During the three year period, the teacher must receive 15 days of professional development in areas including classroom management and instructional delivery. This training must be based on a professional development plan that meets the requirements of an IDP under the Tenure Act.
- C. There is no enforcement mechanism for the mentor and professional development requirements.

## **III. 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* (TTC 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* (TTC 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. Consequently, 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.

#### **IV. 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 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 such teachers are to be deprived of that property interest.
  - 2. Individual employment contracts.
    - a. Teachers (tenured and probationary, alike) typically 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. 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 . . . .

- D. 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).

## V. 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 an IDP or the evaluation of probationary teachers who are not claiming tenure.
- 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, and are likely unenforceable.