

DEPARTMENT OF EDUCATION

STATE TENURE COMMISSION

STATE TENURE COMMISSION RULES

Filed with the secretary of state on February 6, 2020

These rules take effect immediately upon filing with the secretary of state unless adopted under section 33, 44, or 45a(6) of the administrative procedures act of 1969, 1969 PA 306, MCL 24.233, 24.244, and 24.245a. Rules adopted under these sections become effective 7 days after filing with the secretary of state.

(By authority conferred on the state tenure commission by section 4 of article IV, section 1 of article VI, and section 10 of article VII of the teachers' tenure act, 1937 (Ex. Sess.) PA 4, MCL 38.104, 38.121, and 38.140, and section 63 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.263)

R 38.139, R 38.144, R 38.163, R 38.165, and R 38.171 of the Michigan Administrative Code are rescinded and R 38.131, R 38.132, R 38.133, R 38.135, R 38.141, R 38.142, R 38.143, R 38.145, R 38.146, R 38.147, R 38.148, R 38.149, R 38.151, R 38.152, R 38.153, R 38.155, R 38.156, R 38.157, R 38.161, R 38.162, R 38.172, R 38.173, R 38.174, R 38.174a, R 38.175, R 38.176, R 38.177, and R 38.179 are amended as follows:

PART 1. GENERAL PROVISIONS AND DECLARATORY RULINGS

R 38.131 Definitions.

Rule 1. (1) As used in these rules:

(a) "Act" means 1937 (Ex. Sess.) PA 4, MCL 38.71 to 38.191, which is commonly known as the teachers' tenure act.

(b) "Commission" means the state tenure commission created by the act.

(c) "Electronic submission" means submission by email, by facsimile, or by any other electronic means approved by the commission.

(d) "Person" means an individual, partnership, association, corporation, limited liability company, limited liability partnership, governmental subdivision, or public or private organization of any kind, other than the commission.

(2) The terms defined in the act have the same meanings when used in these rules.

R 38.132 Meetings of commission; hours of commission office.

Rule 2. The chairperson of the commission or a majority of its members may call a meeting of the commission. Subject to state holidays, the hours of the office of the commission are 8 a.m. to noon and 1 p.m. to 5 p.m. Monday to Friday.

R 38.133 Office of commission.

Rule 3. The office of the commission is in the office of the state superintendent of public instruction. The address of the commission is: State Tenure Commission,

May 10, 2019

Michigan Department of Education, P.O. Box 30008, 608 W. Allegan Street, Lansing, Michigan 48909. The email address of the commission is: MDE-AdminLaw@michigan.gov, and the facsimile number of the commission is: 517-241-6987. The telephone number of the commission is: 517-241-6986, and the web address of the commission is: www.michigan.gov/adminlaw.

R 38.135 Request for declaratory ruling.

Rule 5. (1) An interested person may request that the commission issue a declaratory ruling on how a statute administered by the commission or a rule or order of the commission applies to an actual state of facts.

(2) An interested person shall file a request for a declaratory ruling in the office of the commission by personal delivery, by mail as defined in R 38.146(2), or by electronic submission as defined in R 38.131. A request may include a brief and must contain all of the following:

(a) A clear and concise statement of the actual state of facts on which the commission would base a ruling.

(b) A precise statement of the legal question or issue.

(c) A citation of any statute or administrative rule at issue.

(d) The signature of the person making the request.

(e) The name, address, telephone number, and email address of the person making the request.

(3) A person who requests a declaratory ruling shall deliver a copy of the request personally or by certified mail (return receipt requested) to any person known by the requesting party to have an interest in the matter and shall file with the commission a proof of service with the request for a declaratory ruling. The commission may require the person requesting a declaratory ruling to serve the request on any other interested person identified by the commission and to file proof of that service.

(4) Not later than 60 days after receiving a request for a declaratory ruling and all proofs of service, the commission shall notify the person who made the request and any other interested person receiving the request under subrule (3) of this rule if the commission will grant or deny the request.

(5) If the commission denies the request, it shall issue a concise written statement of the legal or factual reasons for denial.

(6) If the commission grants the request, it shall notify all persons identified in subrule (3) of this rule that any interested person may, within the time established by the commission, submit a brief of the legal authority on which the person believes the commission should base the declaratory ruling.

(7) A declaratory ruling must include all of the following:

(a) The actual state of facts on which the commission bases the ruling.

(b) The conclusions of law and the legal authority on which the commission relies for the ruling.

(c) The ruling.

R 38.139 Rescinded.

PART 2. APPEAL PROCEDURES

R 38.141 Representation; appearance; withdrawal.

Rule 11. (1) A party may represent himself or herself before the commission or an attorney in good standing with the State Bar of Michigan may represent a party.

(2) An attorney who represents a party before the commission shall file a written appearance on or before the time of the filing of the claim of appeal or the answer, whichever is applicable, at the office of the commission. An attorney who has filed an appearance with the commission may withdraw only by order of the administrative law judge or the commission.

R 38.142 Form of pleadings and documents; signature.

Rule 12. (1) A party or the attorney representing a party shall file all pleadings and other documents with the commission.

(2) If a party or attorney files a pleading or other document with the commission by personal delivery or by mail, he or she shall file an original and one copy of the pleading or document. If a party or attorney files a pleading or other document with the commission by electronic submission, the commission shall consider the electronically submitted pleading or document to be the original and the party or attorney shall not file any copies.

(3) A pleading must include the names of the parties, and the signature, address, and telephone number of the party or the attorney representing the party.

(4) The signature of an attorney or party constitutes a certification by the signer of all of the following:

(a) He or she has read the pleading.

(b) To the best of his or her knowledge, information, and belief formed after reasonable inquiry, facts and either existing law or a good faith argument for a modification of existing law support the pleading.

(c) The signer is not filing the pleading to harass, to cause unnecessary delay or needless increase in the cost of the proceedings, or for any other improper purpose.

R 38.143 Claim of appeal.

Rule 13. (1) To contest a controlling board's decision over which the commission has jurisdiction, an appellant shall do both of the following not later than 20 days after receipt of the controlling board's decision and notice of tenure rights:

(a) On or before the close of business on the final day of the 20-day period, file a claim of appeal with the commission by personal delivery, by mail as defined in R 38.146(2), or by electronic submission as defined in R 38.131. In all cases, the commission shall receive the claim of appeal in its entirety before the close of business on the final day of the 20-day period.

(b) On or before the close of business on the final day of the 20-day period, serve a copy of the claim of appeal on the controlling board by personal delivery, by mail as defined in R 38.146(2), or by electronic submission as defined in R 38.131, with a statement that the controlling board shall file an answer to the claim of appeal not later than 10 days after service of the claim of appeal.

(2) A claim of appeal must contain all of the following:

(a) A statement showing that the commission has jurisdiction to consider the claim of appeal, including when and where the appellant earned tenure.

(b) A clear and concise statement in separate numbered paragraphs of specific allegations of fact that reasonably inform the controlling board of the nature of the appellant's claim.

(c) A clear and concise description in separate numbered paragraphs of specific allegations of error that reasonably inform the controlling board of the nature of the appellant's claim.

(d) A statement of the relief requested.

(e) The date of the claim of appeal.

(f) The signature of the appellant or attorney.

(g) The name; complete physical address and, if different, mailing address; telephone number; facsimile number, if available; and email address of the appellant or attorney.

(3) A template of a claim of appeal is available on the commission's website at: www.michigan.gov/adminlaw.

(4) As applicable, an appellant shall attach to the claim of appeal a copy of the charges and a copy of the written decision of the controlling board.

(5) An appellant shall file with the commission a proof of service, as described in R 38.146(3), showing compliance with subrule (1)(b) of this rule.

R 38.144 Rescinded.

R 38.145 Filing.

Rule 15. (1) A party shall file pleadings and other documents under these rules with the commission, which shall receive pleadings and other documents in their entirety before the close of business on the last day of the time limit, if any, for the filing.

(2) A party shall file pleadings and other documents with the commission by personal delivery, by mail as defined in R 38.146(2), or by electronic submission as defined in R 38.131.

(3) If the commission receives a pleading or other document in whole or in part in the office of the commission after 5 p.m., the commission shall consider it filed on the next business day.

R 38.146 Service; mail; proof of service.

Rule 16. (1) A party shall serve pleadings and other documents on an attorney or on a party not represented by an attorney by personal delivery, by mail as defined in subrule (2) of this rule, or by electronic submission as defined in R 38.131.

(2) Filing by mail or service by mail means enclosing in a sealed envelope with first-class mail postage fully prepaid, addressed to the commission or to the person served, and depositing the envelope in the United States government mail.

(3) A party shall provide proof of service by filing with the commission written acknowledgment of service, an affidavit of the person making service, or other proof satisfactory to the commission.

R 38.147 Answer.

Rule 17. (1) Not later than 10 days after service of a copy of a claim of appeal, an appellee shall file an answer with the commission and shall serve a copy of the answer on all parties.

(2) An answer must contain a specific admission or denial of each material allegation of fact contained in the claim of appeal and a statement of facts and affirmative allegations on which the appellee relies for defense.

R 38.148 Amendments.

Rule 18. The administrative law judge may permit a party to amend a pleading before, during, or after the conclusion of the hearing on terms that are just and consistent with due process.

R 38.149 Joinder or dismissal of parties and consolidation of cases.

Rule 19. In the exercise of discretion, the administrative law judge may order joinder or dismissal of parties or consolidation of cases.

PART 3. MOTION PRACTICE

R 38.151 Motions, general provisions.

Rule 21. (1) A request to the administrative law judge or the commission for an order in a pending action must be by written, signed motion unless made during a hearing. The motion must include the particular grounds on which the moving party bases the motion, citations of supporting authority, the particular relief or order sought, and the signature of the party or the party's attorney. The moving party may file with the motion a supporting brief and affidavits and a request for a hearing date.

(2) At the time a party files a written motion, the party shall serve on the opposing party a copy of the motion and, if filed, the brief, affidavits, and request for a hearing date; and a notice that the rules of the commission require a response to the motion not later than 10 days after service of the motion. The moving party shall file proof of service with the commission.

(3) A respondent opposing a motion shall file a response not later than 10 days after service of the motion unless the administrative law judge or the commission otherwise orders, shall serve a copy of the response on the moving party, and shall file proof of service with the commission. The response must include citations of supporting authority and the signature of the respondent. The respondent may file with the response a supporting brief and affidavits and a request for a hearing date.

(4) The administrative law judge or the commission may limit or dispense with oral arguments on motions.

(5) An affidavit filed under this rule must meet all of the following requirements:

(a) Be made on personal knowledge.

(b) State with particularity facts admissible as evidence establishing or denying the grounds stated in the motion.

(c) Show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

(6) The administrative law judge shall set the time, manner, and place for a hearing on a motion. However, the hearing on a motion must not cause a delay in the date for the

conclusion of the hearing as set forth in section 4 of article IV of the act, MCL 38.104, or in the due dates of exceptions or cross-exceptions.

(7) If the record does not establish the facts necessary for resolution of a motion, the administrative law judge may hear the motion on affidavits or may hear the motion wholly or partly on oral testimony or deposition.

(8) The administrative law judge may direct that a hearing on a motion be held in Lansing, Detroit, or the county of the appellee.

R 38.152 Motion for more definite statement.

Rule 22. If a claim of appeal or answer does not reasonably inform the opposing party of the nature of the claim or defense, the opposing party may move for a more definite statement at any time. The motion must specify the claimed defects. If a party does not comply with an order granting a motion under this rule within 10 days of the order or within such other time as the administrative law judge sets, the administrative law judge may strike the challenged claim of appeal or answer or enter an order the administrative law judge deems just.

R 38.153 Motion to strike.

Rule 23. On motion made by a party or on the administrative law judge's own initiative, the administrative law judge may issue an order striking redundant, immaterial, impertinent, scandalous, or indecent matter from pleadings.

R 38.155 Motion for summary disposition.

Rule 25. (1) A party may move for summary disposition on all or any part of a claim of appeal at any time. The motion must identify which of the following grounds supports the motion:

(a) The appellant has failed to state a claim on which the commission can grant the requested relief.

(b) The controlling board has failed to state a valid defense.

(c) There is no genuine issue as to a material fact except as to the relief and the moving party has the right to judgment as a matter of law.

(d) The commission lacks jurisdiction of the subject matter.

(e) The claim of appeal is untimely.

(f) The claim of appeal cannot proceed because of some other disability of the appellant or other disposition of the claim.

(2) The administrative law judge may consider only the pleadings when the motion for summary disposition is under subrule (1)(a) or (b) of this rule.

(3) A party filing a motion based on subrule (1)(c) of this rule shall file supporting affidavits, depositions, admissions, or other documentary evidence and the motion must specifically identify the issues as to which the moving party believes there is no genuine issue of material fact. When considering a motion under subrule (1)(c) of this rule, the administrative law judge shall consider the supporting documents and the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties. If a party makes a motion under subrule (1)(c) of this rule and supports the motion as provided in this subrule, an adverse party may not rest on the mere allegation or denial of pleadings but shall, by affidavits, depositions, admissions, or other

documentary evidence, set forth specific facts showing that there is a genuine issue for hearing. If the adverse party does not respond, the administrative law judge shall enter summary disposition, if appropriate. The administrative law judge shall enter summary disposition if the pleadings show a party's entitlement to summary disposition as a matter of law or if the affidavits or other proof shows that there is no genuine issue of fact. If it appears that the opposing party, rather than the moving party, has the right to summary disposition, the administrative law judge may enter summary disposition in the opposing party's favor without a motion.

(4) The administrative law judge may order an immediate hearing on disputed questions of fact and may enter summary disposition if the proofs show that the moving party has the right to summary disposition or the administrative law judge may postpone the hearing on the motion until the hearing on the claim of appeal.

(5) If a motion for summary disposition is under subrule (1)(a), (b), or (c) of this rule, the administrative law judge shall give the parties an opportunity to amend their pleadings unless the evidence before the administrative law judge shows that amendment would be futile.

R 38.156 Motion for adjournment or continuance of hearing.

Rule 26. An administrative law judge may grant a request for adjournment or continuance of a hearing for good cause. Any adjournment or continuance is subject to the mandatory date for the conclusion of the hearing as set forth in section 4 of article IV of the act, MCL 38.104.

R 38.157 Lack of progress or repeated failure to follow statute or rule.

Rule 27. After a party, the administrative law judge, or the commission notifies a party of an alleged deficiency and an opportunity to respond or comply within 10 days, the administrative law judge or the commission may dismiss an appeal or deny a discharge or demotion for a party's lack of progress or for a party's repeated failure to comply with the procedures specified in section 4 of article IV of the act, MCL 38.104, or these rules. A party may move to set aside an order under this rule within 10 days of the issuance of the order. The administrative law judge shall not grant a motion to set aside an order under this rule unless the moving party shows good cause and files an affidavit of facts showing a meritorious claim or defense.

PART 4. PREHEARING CONFERENCE

R 38.161 Scope of prehearing conference.

Rule 31. Unless, in the exercise of discretion, the administrative law judge determines that a prehearing conference is unnecessary, the administrative law judge shall direct the parties and their attorneys to participate in a prehearing conference, either in person or by telephone, to do the following:

(a) State and simplify the factual and legal issues involved and consider the amendment of pleadings.

(b) Consider the resolution of motions before hearing, the consolidation of the case with another, admissions of fact and of the authenticity of documents, stipulations to the

admissibility of evidence, and limitations on the number of witnesses and the nature and extent of the relief demanded.

- (c) Determine dates for the exchange of all proposed documentary evidence.
- (d) Determine dates for the exchange of a list of possible witnesses.
- (e) Set the date or dates for the hearing.
- (f) Discuss the possibility of settlement.
- (g) Determine whether and when the parties shall file pre-hearing briefs.
- (h) Consider all other matters that may aid in the disposition of the claim of appeal.

R 38.162 Prehearing summary.

Rule 32. The administrative law judge shall prepare and serve on the parties a summary of the results of the prehearing conference within 5 days after the prehearing conference. The parties, within 5 days of service of the summary, may file objections to the summary.

R 38.163 Rescinded.

R 38.165 Rescinded.

PART 5. HEARINGS, EXCEPTIONS, AND CORRECTION OF MISTAKES

R 38.171 Rescinded.

R 38.172 Conduct of evidentiary hearing; stipulations of fact; objections; rules of evidence; rules of privilege; official notice.

Rule 42. (1) An administrative law judge shall conduct a hearing for the purpose of taking evidence on a claim of appeal.

(2) A party may call, examine, and cross-examine witnesses and introduce into the record documentary or other evidence.

(3) The administrative law judge may admit stipulations of fact into evidence.

(4) A party may make an oral or written objection to the conduct of the hearing, including an objection to the introduction of evidence, and shall describe the grounds for the objection.

(5) The administrative law judge shall apply the rules of evidence that apply in a nonjury civil case in circuit court as far as practicable, but the administrative law judge may admit and give probative effect to evidence of a type on which reasonably prudent people commonly rely in the conduct of their affairs.

(6) The administrative law judge may exclude irrelevant, immaterial, or unduly repetitious evidence.

(7) The administrative law judge shall apply the rules of privilege recognized by law.

(8) The administrative law judge may take official notice of judicially cognizable facts and may take notice of general, technical, or scientific facts within the commission's specialized knowledge.

(9) For matters that these rules do not specifically address, R 792.10101 to R 792.10137, the Michigan court rules, and chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.288, apply.

R 38.173 Subpoenas.

Rule 43. (1) The administrative law judge shall sign and issue a subpoena to a party requesting it for a witness or documentary or physical evidence. The requesting party shall fill in the subpoena before service.

(2) A subpoena must state the title of the matter and must command attendance and testimony or production of documentary or physical evidence at a time and place specified in the subpoena.

(3) A party shall serve a subpoena in the manner prescribed by statute or the Michigan court rules for subpoenas in civil actions unless the administrative law judge allows service in another manner reasonably calculated to give the person actual notice of the subpoena.

(4) On motion at or before the time specified in a subpoena for compliance, the administrative law judge may quash or modify the subpoena if it is unreasonable or oppressive.

(5) Witnesses subpoenaed before the commission shall receive the same fees and mileage that witnesses in circuit courts receive. The party at whose request a witness appears shall pay the witness fees and mileage to the witness.

(6) The prevailing party may recover witness fees and mileage as costs if the commission so directs.

R 38.174 Discovery.

Rule 44. There may be discovery on leave of the administrative law judge or on stipulation of all parties. A party shall not file a motion for discovery unless the party has requested the discovery unsuccessfully. The parties shall complete all discovery before the commencement of the hearing.

R 38.174a Physical and mental examination.

Rule 44a. (1) If the appellant places his or her mental or physical condition in controversy, the administrative law judge, on motion for good cause with notice to the appellant and all parties, may order the appellant to submit to a physical or mental examination by a physician or other appropriate professional. The order must specify the time, place, manner, conditions, and scope of the examination and the name of the examiner or examiners.

(2) On request of the appellant or his or her attorney, the party who requested the examination under subrule (1) of this rule shall deliver to the appellant or his or her attorney a copy of a detailed written report of the examiner or examiners setting out the findings, including all test results, diagnoses, and conclusions, and all reports on earlier examinations pertaining to the same condition, and shall make available for inspection all diagnostic aids.

(3) After delivery of the report specified in subrule (2) of this rule, the party who requested the examination shall, upon request, receive from the appellant a similar report of any examination previously or thereafter made pertaining to the same condition and to a similar inspection of all diagnostic aids.

(4) If an appellant refuses to deliver a report requested under subrule (3) of this rule, the administrative law judge, on motion and notice, may enter an order requiring delivery on

just terms. If an examiner refuses or fails to provide a report required under this rule, the administrative law judge may order the examiner to appear for a discovery deposition.

(5) By requesting and obtaining a report on an examination ordered under this rule or by taking the deposition of the examiner, the appellant waives any privilege he or she may have in the action, or another action involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the person as to the same mental or physical condition.

(6) Subrule (2) of this rule applies to an examination made by agreement of the parties, unless the agreement expressly provides otherwise.

(7) Subrule (2) of this rule does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner under any other statute or rule.

R 38.175 Briefs.

Rule 45. The administrative law judge may require the parties to file briefs, may limit the length of the briefs, and shall designate the manner of and time for filing and serving the briefs.

R 38.176 Exceptions, cross-exceptions, statement in support of preliminary decision and order, supporting briefs.

Rule 46. (1) Within the time allowed by the act and in the manner required by R 38.142(2), a party shall file a statement of exceptions, statement of cross-exceptions, or statement in support of the preliminary decision and order, and supporting brief.

(2) Except by order of the commission, briefs must not exceed 50 double-spaced pages using margins of at least 1 inch and type of at least 12-points, exclusive of tables, indexes, appendices, and title page. Single spacing of quotations and footnotes is permissible.

(3) A brief under this rule must contain, in the following order, all of the following:

(a) A table of contents listing the exceptions or cross-exceptions in the order of presentation, with the page number where the argument related to each exception or cross-exception begins in the brief.

(b) An index of authorities listing in alphabetical order all authorities cited, with the page numbers where they appear in the brief.

(c) A statement of facts supported by specific page references to the record.

(d) The arguments, which must correspond to each exception or cross-exception.

(e) The relief requested.

(f) The signature of the party or attorney.

(4) If, on its own initiative or on a party's motion, the commission finds that a brief does not substantially comply with the requirements in this rule, the commission may order the party who filed the brief to file a supplemental brief within a specified time correcting the deficiencies. If the party does not comply with the order, the commission may strike the nonconforming brief.

R 38.177 Decision or order.

Rule 47. (1) A decision or order of the commission is effective only if a majority of the members of the commission vote on it.

(2) The commission shall serve a written decision or order by certified mail on the parties or on their attorneys.

R 38.179 Correction of mistakes.

Rule 49. The commission may correct clerical mistakes in judgments, orders, or other parts of the record and mistakes arising from oversight or omission at any time on its own initiative or, after notice, on motion of a party.