671 020.1

ADMINISTRATIVE RULES: The Rules Governing the Certification of Michigan Teachers.
CONSTITUTIONAL LAW: Legislative rules and procedural rules.

Administrative rules promulgated by the State Board of Education are subject to the provisions of Article IV, Section 37 of the 1963 Michigan Constitution and Act 88, P.A. 1943, as amended.

An administrative rule is promulgated when the agency files the rule with the Secretary of State.

The Legislative Joint Committee on Administrative Rules is without lawful authority to suspend "The Rules Governing the Certification of Michigan Teachers" certified by the Governor on June 27, 1967, pursuant to Section 5 of Act 88, P.A. 1943, and filed with the Secretary of State on July 6, 1967.

Legislative rules and procedural rules are subject to the provisions of Article IV, Section 37 of the 1963 Michigan Constitution and Act 88, P.A. 1943, as amended. Interpretive rules are not subject to the provisions of Article IV, Section 37 of the 1963 Michigan Constitution and Act 88, P.A. 1943, as amended.

No. 4601 October 20, 1967.

Hon. Robert J. Huber, Chairman
Joint Committee on Administrative Rules
Room 129
The Capitol
Lansing, Michigan

You have requested my opinion on the following four questions:

1. Are rules promulgated by the State Board of Education subject to the provisions of Article IV, Section 37, Michigan Constitution of 1963, and Act 88, P.A. 1943?

2. Is an administrative rule proposed by an agency, board or commission promulgated at the time of:

(a) Preliminary adoption by the agency, board or commission?

(b) Formal adoption by the agency, board or commission?

(c) Signed by the Governor where immediate effect is desired or necessary?

(d) Filing with the Secretary of State?

(e) Publication in the Quarterly Supplement which becomes the effective date of the rules?

(f) The effective date of the proposed rules where such date is different than the publication date?

3. Does the Joint Committee on Administrative Rules have the power to suspend "The Rules Governing the Certification of Michigan Teachers" certified by the Governor on June 27, 1967, and filed with the Secretary of State on July 6, 1967?

4. Are guidelines, statements of policy, interpretation of statutes, standards or any written statement of procedure or practice that imple-

ment, interpret or prescribe law or policy, rules subject to the provisions of Article IV, Section 37, Michigan Constitution of 1963 and Act 88, P.A. 1943?

Your initial inquiry must be treated by reference to the following relevant constitutional and statutory provisions.

Article IV, Section 37 of the 1963 Michigan Constitution provides:

"The legislature may by concurrent resolution empower a joint committee of the legislature, acting between sessions, *to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session.* Such suspension shall continue no longer than the end of the next regular legislative session." (Emphasis supplied)

Article VIII, Section 3 of the 1963 Michigan Constitution provides in part:

"Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith. . . ."

Act 287, P.A. 1964, as amended, being M.S.A. 1965 Cum. Supp. and Cur. Mat. § 15.1023(1) et seq.

"Sec. 10. The state board of education shall have the following powers and duties:

(a) Determination of the requirements for, and issuance of, all licenses and certificates for teachers in the public schools of this state. . . ."

"Sec. 15. *The state board of education shall prescribe rules and regulations that it deems necessary to carry out the provisions of this act, in accordance with Act No. 88 of the Public Acts of 1943, as amended,* being sections 24.71 to 24.82 of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948." (Emphasis supplied)

Act 88, P.A. 1943, as amended, being M.S.A. 1961 Rev. Vol. and 1965 Cum. Supp. § 3.560(7) et seq.

"Sec. 8f (1) The joint committee on administrative rules is created which may meet during sessions of the legislature and during the interims between sessions and to which shall be referred all rules promulgated pursuant to this act.

* * *

"(d) The committee shall consider all rules referred to it and shall conduct hearings on such rules as it deems necessary. *If authorized*

> *by concurrent resolution of the legislature, the committee may suspend any rule or regulation promulgated subsequent to the adjournment of the last preceding regular session of the legislature.* The committee shall notify the promulgating state agency and the secretary of state of any rule it suspends, which rule shall not be published in the administrative code or supplement while so suspended . . ." (Emphasis supplied)

Senate Concurrent Resolution No. 33, Michigan Senate Journal, March 14, 1967, p. 443, and Michigan House Journal, May 5, 1967, p. 1580. The relevant portion of the text is found in the Michigan Senate Journal, March 2, 1967, p. 341:

> "That . . . the Joint Committee on Administrative Rules is hereby empowered, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session; . . ."

Within the framework of the above quoted provisions, O.A.G. 1963-64, No. 4161, at pp. 153-154, should be examined. This opinion held that Article IV, Section 37 of the 1963 Michigan Constitution was not applicable to rules and regulations adopted by constitutional bodies such as the Civil Rights Commission. However, a careful reading of that opinion, including the authorities cited therein, reveals that the holding is limited to constitutional bodies that derive their rule-making authority, express or implied, from the Constitution.

Article VIII, Section 3 contains no express grant of rule-making power to the State Board of Education. The second paragraph of Article VIII, Section 3 reads as follows:

> "The state board of education shall appoint a superintendent of public instruction whose term of office shall be determined by the board. He shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies. He shall be the principal executive officer of a *state department of education which shall have powers and duties provided by law.*" (Emphasis supplied)

I need not pass on whether the State Board of Education has rule-making power under Article VIII, Section 3 of the Constitution as the rules in question were authorized by legislation.

The State Board of Education has rule-making authority in the area of teacher certification pursuant to the legislative delegation of such power found in Sections 10 and 15 of Act 287, P.A. 1964, supra. Section 15 provides that the rules and regulations be in accordance with Act 88, P.A. 1943, as amended, supra. Section 8f of Act 88, P.A. 1943, as amended, supra, together with Senate Concurrent Resolution No. 33, implement Article IV, Section 37 of the 1963 Michigan Constitution. Thus, it is my opinion that rules promulgated by the State Board of Education are subject to Article IV, Section 37 and Act 88, P.A. 1943, as amended, supra.

Your second inquiry poses the problem of determining what stage in the rule-making process can be said to be the point of time at which a rule is

promulgated within the meaning of Article IV, Section 37 of the Constitution.

Burdick v. Secretary of State, 373 Mich. 578, 584 (1964) stands for the proposition that debates of the framers of a constitution may be utilized in interpreting the document. Turning to the debates leading to the adoption of Article IV, Section 37, we find no specific discussion of the meaning of "promulgated" as used in the relevant constitutional provision. However, during the debates references were made to an opinion of one of my predecessors in office that placed constitutional limitations on the authority of the legislature, or a committee thereof, to oversee administrative rules. It was made clear that this prior opinion necessitated the adoption of Article IV, Section 37 if the legislature, through a committee, were to have this suspension power. Official Record, Constitutional Convention 1961, Vol. II, pp. 2419-25.

Although the prior opinion was not referred to by number, undoubtedly O.A.G. 1957-58, Vol. II, No. 3352, p. 246, is the opinion in question. This opinion dealt with Act 88, P.A. 1943, as amended, supra, which is the statute that had always been relied upon by the legislature in its attempts to exercise control over administrative rules. Thus, it is clear that the drafters of the Constitution were aware of the historical context which gave rise to the proposal that became Article IV, Section 37.

Turning to other sources for a definition of promulgate, we find case law authority indicating that the gist of the meaning is to "make known." *United States v. Louisville and N.R. Co.*, 165 F 936, 940 (1908), *Brown v. Democratic Parish Committee of St. Bernard Parish, et al*, 165 So. 167, 168 (1935). The same basic definition is found in Webster's Third New International Dictionary, 1964, p. 1816.

Next, since Act 88, P.A. 1943, as amended, supra, is part of the historical context from which this constitutional provision arose, and has subsequently been amended to implement the provision, we examine it to see when an administrative rule is made known.

Sections 4, 5, 6, 8d and 8f of the relevant act, provide as follows:

> "Sec. 4. (1) *No rule made by a state agency shall become effective until an original and 2 duplicate copies thereof have been filed in the office of the secretary of state and until such rule has been published in the supplement to the Michigan administrative code, as provided in section 6.* Each rule so filed shall include a citation of the authority pursuant to which it, or any part thereof, was adopted and, if an amendment, a reference to the original rule.
>
> "(2) The secretary of state shall indorse on the original and duplicates of each rule so filed the time and date of filing thereof and *shall maintain a file of such rules for public inspection.*
>
> "(3) No rule made by any state agency shall be filed with the secretary of state until it has been approved by the legislative service bureau as to form and section numbers and the attorney general as to legality and has been subsequently confirmed and *formally adopted by the promulgating state agency in accordance with law.*" (Emphasis supplied)

"Sec. 5. The provisions of section 4 of this act requiring publication may be dispensed with in cases in which the governor shall certify that because of an emergency or other compelling extraordinary circumstances the public interest requires that the rule become effective without the delay required for the prior publication of the rule. In such cases the rule together with a copy of the certification of the governor shall be published in the next available issue of the supplement to the Michigan administrative code, provided for in section 6 hereof."

"Sec. 6 (a) The secretary of state shall:

(1) Compile, index and publish all administrative rules filed under this act, in a publication to be known as the Michigan administrative code . . ."

"Sec. 8d. The secretary of state shall transmit to the legislative service bureau a sufficient number of copies of all rules and regulations filed in the office of the secretary of state from the time of the short adjournment of the last regular session of the legislature and during the interim until the next regular session thereof, for the use of the joint committee on administrative rules."

"Sec. 8f . . . (3) *The committee shall consider* all rules referred to it and shall conduct hearings on such rules as it deems necessary. If authorized by concurrent resolution of the legislature, the committee may suspend any rule or regulation promulgated subsequent to the adjournment of the last preceding regular session of the legislature. The committee shall notify the promulgating state agency and the secretary of state of any rule it suspends, which rule shall not be published in the administrative code or supplement while so suspended." (Emphasis supplied)

A careful reading of these sections, together with Article IV, Section 37, indicates that the administrative agency adopting the rule, rather than the Secretary of State, is the one that promulgates the rule. Section 4(3) provides that agencies shall not file rules with the Secretary of State until they have been approved by both the Legislative Service Bureau and the Attorney General and "formally adopted by the promulgating state agency." Further, Section 4(2) reveals that once a rule is filed with the Secretary of State it is kept on file for public inspection. Thus, this is the stage at which the adopting agency makes the rule known. In addition, Section 8f (3) provides that promulgated rules which have been suspended shall not be published. Finally, under Section 8d, it is clear that the Joint Committee on Administrative Rules first has an opportunity to act upon a rule after it has been filed. Therefore, it is my opinion that an administrative rule is promulgated when it is filed with the Secretary of State.

In the particular case you inquire about, the emergency provisions of Section 5 were invoked. The rules in question were certified by the Governor on June 27, 1967, and filed with the Secretary of State on July 6, 1967. Consequently the rules regarding teacher certification became effective without prior publication. However, my reading of Section 5 is that only prior publication is dispensed. The statute still contemplates filing to make the certified rules effective, as the rules are not available for public inspection

or eventual publication until they are filed. Thus, it is my opinion that where Section 5 of the act is invoked promulgation still occurs when the adopting agency files the rule with the Secretary of State.

Your letter of request states that at the time of certification and filing of the rules dealing with teacher certification the legislature was still in regular session. Article IV, Section 37 is expressly limited, in terms of committee suspension authority, to rules promulgated "subsequent to the adjournment of the last preceding regular legislative session." Further, as concluded above, a rule is promulgated when it is filed with the Secretary of State. Since the rules in question were filed while the legislature was still in regular session, my answer to question three must be that the Joint Committee on Administrative Rules is without lawful power to suspend the Teachers' Certification Code.

The last question you pose concerns the meaning of the word "rule" as it appears in Article IV, Section 37 of the 1963 Michigan Constitution and Act 88, P.A. 1943, as amended, supra. Article IV, Section 37, set out above, contains no definition of the word in question. Section 1 of Act 88, P.A. 1943, as amended, supra, contains the following definition:

> "Section 1. As used in this act: * * *
>
> "(2) 'Rule' includes every rule or regulation amendments thereto or revocation thereof, made by any state agency, except a rule, regulation or order which:
>
> (a) Relates only to the organization or internal management of the state agency;
>
> (b) Establishes or fixes rates or tariffs;
>
> (c) Pertains to game and fish; or
>
> (d) Relates to the use of public works, including streets and highways, under the jurisdiction of any state agency, when the effect of such order is indicated to the public by means of signs or signals."

Neither the constitutional nor the statutory provision precisely defines the word "rule." Research has failed to uncover any Michigan case law that interprets either provision in this respect. In view of this lack of specific authority, and analysis of the problem should begin with a discussion of the general topic of administrative rules.

In a recent exhaustive study of state administrative law,[1] Professor Frank E. Cooper makes the point that there are three general categories of administrative rules. While the categories are imprecise with some overlapping, they still provide a useful and accurate framework for any discussion of this topic.

One type of administrative rule is procedural. These rules contain the methods by which an agency will carry out its designated functions. Procedural rules have the effect of law, being binding on both the agency and the parties respondents. Authority to adopt procedural rules is almost always express or implied in the statute granting the agency the function to be performed.

[1] Cooper, State Administrative Law, Bobbs-Merrill Company, Inc., 1965, Vol. I. The following discussion of the three general categories of administrative rules is taken from pp. 173-177 and pp. 263-267, including the authorities cited therein.

A second type of administrative rule is interpretive. These rules reflect the opinion of the agency regarding the meaning of the statute under which they operate. These rules state the interpretation of the statute the agency will follow unless a contrary interpretive decision is issued by a court. Any sanction imposed is for violation of the statute which the rule only interprets. Sometimes interpretive rules are statements of general policy or standards an agency will follow in administering a broadly worded statute. Agencies, regardless of specific statutory authority, clearly have the power to make known their interpretation of the statutes which they administer.

Legislative rules are those adopted by an agency, pursuant to a delegation of legislative power by statute, that are intended by the terms of the statute to have authoritative force. These rules, within the limits of the delegating statute, implement the statute. Any sanction involved attaches to violation of the rule, as a substantive provision with authoritative force, rather than to the governing statute. For an agency to issue legislative rules, it should have an express grant of statutory authority.

O.A.G. 1957-58, Vol. II, No. 3352, p. 246, which dealt in part with Act 88, P.A. 1943, as amended, supra, used this classification of administrative rules. That opinion, at page 252, indicated that procedural rules, although subject to the provisions of Act 88, P.A. 1943, as amended, supra, will seldom need to be disapproved by the legislature. This is true because Act 197, P.A. 1952, as amended, being C.L.S. 1961 § 24.101 et seq., and M.S.A. 1961 Rev. Vol. § 3.560(21.1) et seq., sets out the requirements for procedural rules.

Section 1 (2) of Act 197, P.A. 1952, as amended, supra, contains a definition of rule which reads in part as follows:

> "'Rule' includes every regulation, standard or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public, . . ."

This sweeping definition of the word "rule" must be read in light of the basic purpose of Act 197, P.A. 1952, as amended, supra. That purpose is to require agencies to adopt procedural rules for the protection of the public in contested cases before state agencies.

Section 10 of Act 197, P.A. 1952, as amended, supra, states that it "shall be supplemental to and shall not be in derogation of Act No. 88 of the Public Acts of 1943, as amended, . . ." Given the purpose and supplemental nature of Act 197, P.A. 1952, as amended, supra, I must conclude that it only be read to illuminate the meaning of "rule" in Act 88, P.A. 1943, as amended, supra, in the realm of procedural rules.

Opinion No. 3352, at pp. 252-53, supra, states, in substance, that interpretive rules are not subject to the terms of Act 88, P.A. 1943, as amended, supra. The reasoning is that as interpretive rules are merely the agency's

opinion of the meaning of a statute, they do not have legal force as a rule. O.A.G. No. 4586, issued July 13, 1967, at pp. 7, 8, amplifies this reasoning as follows:

> "Though it has never been formally so adjudicated, the intent of said Administrative Code clearly appears to be to give the effect of law to an administrative rule duly adopted under its provisions."

Thus, since Act 88, P.A. 1943, as amended, supra, contemplates that rules coming under its provisions will have legal effect, and interpretive rules have no legal effect, it is my opinion that interpretive rules are not within the meaning of "rule" as that term is used in Act 88, P.A. 1943, as amended, supra.

Both opinions No. 3352 and 4586 make it abundantly clear that legislative rules, having the force of law, are within the meaning of "rule" as that term is used in Act 88, P.A. 1943, as amended, supra. This result is supported by *Unemployment Compensation Commission v. Vivian,* 318 Mich. 598, 600-604 (1947), where the Michigan Supreme Court applied the filing provisions of Act 88, P.A. 1943, as amended, supra, to a rule that was clearly legislative in nature.

In summary, regarding the term "rule" as used in Act 88, P.A. 1943, as amended, supra, it is my opinion that "rule" includes both procedural and legislative rules and excludes interpretive rules.

The final part of question four is whether the term "rule" has a different meaning as used in Article IV, Section 37 of the 1963 Michigan Constitution. As was earlier stated, the debates on this constitutional provision reveal that the framers were aware of the historical context, including Act 88, P.A. 1943, as amended, supra, and O.A.G. No. 3352, supra, that gave rise to the desire for this amendment.

The debates furnish no clear cut evidence of intent regarding the meaning of "rule" as used in Article IV, Section 37. Delegate Downs expressed the belief that it was a difficult word to define. Delegate Kuhn then read a definition of rule taken from Section 1 (2) of Act 197, P.A. 1952, as amended, supra, dealing with procedural rules. Further, he went on to state as follows:

> "But the main thing is: it is to carry out the intent of the legislature and to *implement* their *substantive* law." (Emphasis supplied)
>
> Official Record, Constitutional Convention 1961, Vol. II, p. 2423.

This is some evidence that the drafters intended "rule," as used in this constitutional provision, to include both procedural rules and legislative rules implementing substantive statutory provisions. In addition, some of the delegates expressed an awareness of O.A.G. No. 3352, supra, which said that interpretive rules were not subject to any form of legislative disapproval under Act 88, P.A. 1943, as amended, supra. No attempt was made in the debates to make it clear that "rule," as used in this constitutional provision, was to have an expanded meaning which would include interpretive rules.

These factors support the conclusion that the constitutional framers intended "rule," as used in Article IV, Section 37, to have the same meaning it has in Act 88, P.A. 1943, as amended, supra. Thus, it is my opinion

that the term "rule," as used in Article IV, Section 37 of the 1963 Michigan Constitution includes procedural and legislative rules but does not include interpretive rules.

FRANK J. KELLEY,
Attorney General.

671025.2

EMPLOYMENT: Wages – Discrimination based upon sex.

Insurance coverage can be considered for purpose of determining "wages" within meaning of § 556, Act 328, P.A. 1931, as amended.

No. 4168 October 25, 1967.

Mr. Thomas Roumell, Director
Department of Labor
Lewis Cass Building
Lansing, Michigan

The opinion is addressed to the following question:

> "Could the term 'wages' as used in section 556 of Act 328 of the Public Acts of 1931[1] be construed to include a group insurance policy conferring lesser benefits of coverage for females than for males similarly employed where the insurance policy was part of a 'package' settlement in lieu of a specified number of cents per hour as a result of collective bargaining?"

Section 556, referred to above, provides in pertinent part as follows:

> "Any employer of labor in this state, employing both males and females, who shall discriminate in any way in the payment of wages as between sexes who are similarly employed, shall be guilty of a misdemeanor. * * *. Any difference in wage rates based upon a factor other than sex shall not violate this section."

The term "wages" in the general sense is defined as compensation for labor or services.[2]

Wages may be in the form of money or other value given, such as board, lodging or clothing. *Pacific American Fisheries, Inc. v. United States,* 138 F 2d 464 (9th Cir. 1943). They may also be in the form of group insurance. *W. W. Cross & Co. v. NLRB,* 174 F 2d 875 (1st Cir. 1949).

In Michigan it has been held that benefits such as retirement pensions and insurance premium payments can be considered as part of an employee's compensation for purposes of determining whether such employee is receiving "like compensation" as other employees not receiving such benefits. *Kane v. City of Flint,* 342 Mich. 74 (1955).

The scope of section 556 is broad. It prohibits wage discrimination "in any way." I am, therefore, persuaded by the above authorities and the

[1] Section 556 was amended by Act 37, PA 1962 (MSA 1965 Cum. Supp. § 28.824).

[2] 92 C.J.S., p. 1035, et seq; Words and Phrases, Vol. 44A, p. 57, et seq.