STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

KENT COUNTY,
Respondent–Public Employer,

Case No. C05 H-192

- and -

UAW LOCAL 2600,
Charging Party–Labor Organization.
_____/

APPEARANCES:

Varnum, Riddering, Schmidt & Howlett, LLP, by John Patrick White, Esq., and Kurt M. Graham, Esq., for the Public Employer

Scheff & Washington, P. C., by George B. Washington, Esq., for the Labor Organization

DECISION AND ORDER

On May 12, 2006, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

KENT COUNTY,
Respondent–Public Employer,

Case No. C05 H-192

- and -

UAW LOCAL 2600,
Charging Party–Labor Organization.
_____/

APPEARANCES:

Varnum, Riddering, Schmidt & Howlett, LLP, by John Patrick White, Esq., and Kurt M. Graham, Esq., for the Public Employer

Scheff & Washington, P. C., by George B. Washington, Esq., for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Lansing, Michigan, on January 12, 2006, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.216. Based on the record and the parties' post-hearing briefs filed by April 4, 2006, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charge:

Charging Party UAW Local 2600 represents approximately 1500 Kent County employees in four separate bargaining units. On August 29, 2005, Charging Party filed an unfair labor practice charge on behalf of its general unit alleging that Respondent County violated PERA when it unilaterally announced a change in a negotiated pension plan by changing the vendor with substantially increased costs to employees.

Facts:

Charging Party and Respondent are parties to a collective bargaining agreement that expired on December 31, 2003. They mutually agreed to extend the contract during negotiations for a successor agreement. The contract contains a management rights clause as well as a waiver clause that provides, *inter alia*, that the contract governs their entire relations and each party "voluntarily and unqualifiedly waives the right, and each agree that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement."

The agreement provides for two retirement benefit plans for employees: a defined benefit pension plan and a deferred compensation plan. Under the deferred compensation plan, which has been available to employees since 1972, employees may direct that a portion of their gross pay be invested in one or more investment funds. The funds accumulate tax-free. Employees can stop contributions at designated times each quarter, but can only withdraw funds upon separation from the County or upon a showing of hardship. When a withdrawal is permitted, employees who have participated in the plan for less than five years incur an 8 percent surrender charge, while employees who have participated in the plan for five to ten years incur a 4 percent surrender charge. Historically, Charging Party members have represented approximately 39% of the plan's participants and 30% of the funds invested.

The first reference in the parties' contract to the deferred compensation plan appears in a 1997 letter of agreement that established a minimum contribution of $25 per pay period. In the 2001-2003 collective bargaining agreement, the parties included the $25 minimum contribution as Section 15.2.

For many years, Lincoln National Life Insurance was the deferred compensation plan's sole fund administrator. In 1997 or 1998, Respondent proposed to Charging Party that Aetna be included as an additional option. Charging Party agreed and Aetna, which later changed its name to ING, served as fund administrator for employees who invested with it. The deferred compensation summary plan description provides that Respondent serves as the plan administrator with the responsibility and discretionary authority for interpreting its terms, determining eligibility for participation and benefits, making contributions, appointing and removing trustees or the fund administrators, and amending and terminating the plan.

In September 2004, Respondent sent a letter to Virginia Smith, Charging Party's president, indicating that a consultant had been retained to analyze proposals for the December 2004 selection of a new deferred compensation plan fund administrator that would begin administering the plan in April 2005. Respondent advised Charging Party that employees would be notified before the change was implemented and that they would not incur surrender charges that might be charged for transferring their funds to the new vendor.

In December 2004, Respondent sent a similar letter to all Kent County employees advising them that a new fund administrator would be selected in January 2005 and would be administering the deferred compensation plan in May 2005. Employees were also told that they would not incur surrender charges.1 In January or early February, Respondent narrowed its search to Nationwide and Citistreet and began exploring ways to pay the surrender fees that would be incurred for transferring participants' funds to a new vendor.

On June 9, 2005, Respondent entered into a contract with Nationwide to serve as the new fund administrator, effective September 12, 2005. The contract, as amended on July 13, 2005, provides that if Lincoln and ING did not agree to waive or reduce surrender charges associated with transferring the funds to Nationwide, Respondent would pay the surrender charges and Nationwide would assess plan participants a surrender charge reimbursement fee plus 4 percent interest until the surrender fees were recouped.

1Smith, who is a Kent County employee, testified that she did not "remember that letter."

In July and August 2005, Charging Party and Respondent discussed the selection of Nationwide as the new fund administrator during several labor-management meetings. Charging Party raised the issue of surrender fees that employees might be required to pay. Respondent explained that plan participants would be "better off" with Nationwide and that the change would not adversely affect the employees. Respondent also rejected Charging Party's suggestion that Respondent continue to maintain funds with Lincoln and ING and add Nationwide as a third investment option. Charging Party claimed that it was unfair to impose surrender fees on any of its members, but especially those who had been plan participants for more than 10 years.

Charging Party filed a grievance on August 17, 2005, and its instant unfair labor practice the next day. Charging Party also filed an action in the Kent County Circuit Court to prohibit the transfer of funds from Lincoln and ING to Nationwide pending resolution of the grievance and the unfair labor practice charge. The Court refused to issue an injunction.

In September 2005, when the funds were transferred to Nationwide, Respondent paid Lincoln approximately $500,000 in surrender fees that Lincoln charged employees to transfer their funds. The change from Lincoln and ING to Nationwide resulted in a cost savings for the plan participants. Nationwide's 1.21 percent administrative fee, which includes a 0.3 percent surrender charge reimbursement fee and 4 percent interest to repay Respondent, is less than the administrative fees previously charged by Lincoln and ING, as well as the 1.38 percent and 1.73 percent administrative fees that Lincoln and ING, respectively, proposed to charge if they were retained as fund administrators.2 Nationwide also agreed to eliminate the 0.3 percent surrender charge reimbursement fee as soon as the $500,000 surrender fee paid by Respondent was recouped and to reduce its administrative fee by an additional 15 basis points when plan assets reached $50 million.3 Both events were expected to occur in the fourth or fifth year after the transfer.

Conclusions of Law:

It is well settled that "public employers have a duty to bargain over 'wages, hours, and other terms and conditions of employment. . . . '"*Port Huron,* 452 Mich 309, 317 (1996), quoting M.C.L. § 423.215(1). An employer may not alter a term or condition of employment unless it has bargained about the issue or unless the union has waived its right to bargain about it. *Id.* at 317-318. A employer must bargain before altering a mandatory subject of bargaining if the issue is "covered by" the collective bargaining agreement and, if not, whether the union waived its right to bargain. *Id.* at 318-319.

I agree with Respondent's assertion that this case is governed by *Gogebic Cmty College*, 1999 MERC Lab Op 28, *aff'd* 246 Mich App 342 (2001). In *Gogebic*, the agreement did not specify a dental insurance carrier that the employer was required to provide. Rather, it merely required employees to pay premiums, specified the deductibles and co-pays that employees were required to pay, and contained a broad waiver clause acknowledging that the parties "each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law

2Although the funds were transferred to Nationwide, employees have not been charged surrender charge reimbursement fees pending resolution of the grievance and this charge.

330 basis points is equivalent to .03 percent.

from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement." The Commission concluded that because the issue of dental coverage was "covered by" the collective bargaining agreement, the union had exercised its right to bargain on the issue and could have negotiated for more specific terms, if it wished to do so. The Commission also held concluded that the union failed to demonstrate that any substantive changes had been made in the dental insurance program that would give rise to a bargaining duty. *Taylor Sch Dst*, 1976 MERC Lab Op 693. The employer, therefore, had a unilateral right to select the dental insurance carrier.

I reach the same conclusion in this case. I find that the issue of the deferred compensation plan is "covered by" the parties' agreements. The agreements specify the minimum contribution that plan participants are required to make. It also contains a waiver clause providing that the contracts govern the parties' entire relationship and that each party voluntarily and unqualifiedly waives the right to bargain regarding any subject or matter referred to, or covered in them.

Charging Party would have this tribunal believe that Respondent's unilateral change in the deferred compensation plan's fund administrator unfairly imposed surrender fees on employees. The record, however, does not support this assertion. The record demonstrates that Respondent paid the surrender fees that Lincoln charged to transfer employees' funds to Nationwide. The 1.21 percent administrative fee, which incorporates the 0.3 percent surrender charge reimbursement fee and interest to recoup the surrender fees paid by Respondent, is less than the administrative fees that fund participants previously paid to Lincoln and ING, as well the administrative fees that Lincoln and ING proposed to charge if either of them were selected as the new fund administrator. Moreover, in four to five years when the surrender fee paid by Respondent is estimated to be recouped, Nationwide has agreed to eliminate the 0.3 percent surrender charge reimbursement fee and interest from its administrative fee. At about the same time, when plan assets are projected to reach $50 million, Nationwide has also agreed to further reduce its administrative fee by 15 basis points.

Based on the above finding of fact and conclusions of law, I conclude that Respondent did not violate PERA by unilaterally selecting a new fund administrator with substantially increased costs to employees as Respondents allege. I have carefully considered all other arguments advanced by the parties and conclude that they do not warrant a change in the result. I recommend that the Commission issue the order set forth below:

Recommended Order

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated: _____