STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CHARTER TOWNSHIP OF KINROSS,
Public Employer-Respondent,

Case No. C10 I-237

- and -

AFSCME COUNCIL 25,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Fahey Schultz Burzych Rhodes PLC by Stephen O. Schultz, for the Respondent

Kenneth J. Bailey, for the Charging Party

DECISION AND ORDER

On February 8, 2012, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

KINROSS CHARTER TOWNSHIP,
Public Employer-Respondent,

Case No. C10 I-237

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) COUNCIL 25,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Fahey Schultz Burzych Rhodes, P.L.C., by Stephen O. Schultz, for Respondent

Kenneth J. Bailey, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, a hearing was held in this case in Lansing, Michigan on June 9, 2011 before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on or before August 11, 2011, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

AFSCME Council 25 filed this charge against Kinross Charter Township on September 22, 2010. On December 14, 2009, Charging Party filed a petition for representation election in a unit of previously unrepresented employees of Respondent. Charging Party was certified as the bargaining representative for these employees on July 6, 2010. The charge alleges that between the date the petition was filed and the date Charging Party was certified, Respondent unlawfully interfered with its employees' exercise of their rights under Section 9 of PERA, in violation of Section 10(1)(a) of the Act, by announcing and implementing a requirement that employees pay a share of their health insurance premiums.

Findings of Fact:

The record in this case consisted of ten exhibits introduced by Respondent and the testimony of one Respondent witness, Respondent Board member and Treasurer Julie Munro. Charging Party presented no evidence.

Respondent has about fifty full-time regular employees. Approximately twenty-three of these employees are in Charging Party's bargaining unit. It is not clear from the record whether any of the remainder are represented by a union or if any of Respondent's employees were in bargaining units in December 2009. When Charging Party filed its petition in December 2009, Respondent's employees received health insurance benefits, including prescription drug coverage, through Blue Cross Blue Shield. Respondent covered the entire cost of the premium for the base health plan. Employees could elect plans with better benefits by paying the additional cost and buy vision and dental coverage through Respondent by paying the premiums for these plans. Employees could also take cash payments in lieu of health insurance.

April 1 is the beginning of Respondent's fiscal year. Respondent's Blue Cross plan year is also April to April, and, each April 1, Respondent signs a new contract with Blue Cross for health insurance coverage for that year. Since at least 2005, it has been Respondent's practice to review its health insurance coverage each year before signing a new contract and as part of the process of formulating the new year's budget. According to Board minutes entered into the record, Respondent did not change the health care coverage of unrepresented employees in 2005 or 2006. In 2007, according to Board minutes, the Board approved a "twenty dollar reimbursement for name brand drugs and no reimbursement for generic drugs," although it is not clear from the record whether this represented an increase or decrease in existing prescription benefits. It is also not clear from the record whether any changes to health care coverage were made in 2008.

It is also Respondent's practice to decide in the spring whether to give unrepresented employees a cost of living wage (COLA) increase on April 1 and, if so, how much of an increase. In 2005, unrepresented employees received a COLA increase of three percent. In 2007, they received a COLA increase of $.25 per hour. It was not clear from the record whether the employees received COLA increases in 2006 or 2008.

Julie Munro was elected Respondent's Treasurer and a member of Respondent's Board in the fall of 2008. Munro ran for office in part on the proposition that Respondent's employees should pay twenty percent of the cost of their health insurance premiums. Munro testified that she believes that Respondent should require a twenty percent contribution because, according to Munro, this is the standard for employees in the business sector. After Munro's election, she became part of the Board's three-member personnel committee.

Respondent had an operating deficit in every fiscal year between 2004-2005 and 2010-2011. In the years prior to 2009-2010, Respondent reduced its budget by postponing repairs, reducing the planning commission's budget, reducing department budgets and eliminating health benefits for Board members. However, it did not reduce employee compensation or lay off

employees. During the fiscal year ending on March 31, 2009, Respondent's total revenues dropped while its expenditures increased. At a meeting held on March 9, 2009, the Board's personnel committee, including Munro, discussed ways to save money on employee compensation during the upcoming fiscal year. Among the options discussed were requiring employees to pay twenty percent of their health insurance premiums and not paying any cost of living increase. At its March 9, 2009 meeting, the personnel committee adopted a resolution recommending that the Board pay cost of living increases effective April 1 on a sliding scale, with lower paid employees receiving a higher increase. It also recommended that employees pay twenty percent of their health insurance premiums. At a meeting of the full Board on March 16, the personnel committee presented recommendations that also included eliminating merit raises and the payment of extra compensation for performing outside duties. According to the minutes of the Board meeting, the Board discussed the personnel committee's recommendations and voted to table "the elimination of extra pay for extra duties and cost share of health insurance as well as COLA." The budget passed by the Board at that meeting did not include premium sharing or any reduction in health insurance benefits. The employees received COLA increases on April 1, 2009 that were different from those recommended by the personnel committee and were not based on a sliding scale.

On March 17, 2009, the Board received a letter from one of its supervisory employees informing them that during its March 16 meeting union authorization cards were being distributed to its employees in the hallway outside the meeting room. On December 14, 2000, Charging Party filed its representation petition.

In September 2009, Respondent was told by its auditors that it would exhaust its fund reserves in approximately eighteen months, or early 2011, if spending was not significantly decreased. In early 2010, Respondent's Board began discussing the budget for the 2010-2011 fiscal year. On February 1, 2010, Respondent received notice from Blue Cross that its premium rates for the 2010-2011 year were going up by between three and eleven percent. During meetings in early 2010, the Board's personnel committee again discussed ways to save money on employee compensation. According to Munro, the committee considered recommending that Respondent switch to one of several cheaper base health insurance plans, but decided against it when it learned that some employees were strongly opposed to this. As it had in 2009, the personnel committee, including Munro, voted to recommend to the Board that employees be required to pay twenty percent of their health insurance premiums. The full board addressed the committee's recommendation and the 2010-2011 budget at a meeting on March 15, 2010. At this meeting, the Board passed a resolution to continue the current health insurance coverage, but require employees to pay half of the amount of the premium increase for the base plan. The Board also voted not to pay any COLA increase on April 1, 2010.

An election was held on June 25, 2010 pursuant to a consent election agreement. There is no evidence that Respondent conducted an anti-union campaign. Charging Party was certified as the bargaining representative on July 6, 2010.

Discussion and Conclusions of Law:

Both Respondent and Charging Party seem to agree that the question in this case is whether Respondent would have approved and implemented the premium share in the absence of an organizing drive. They disagree, however, on the burden of proof. Respondent maintains that the shifting burden standard that the Commission uses in analyzing allegations of unlawful discrimination under Section 10(1)(c) of PERA should be applied here. That is, according to Respondent, Charging Party must establish a prima facie case that union or other protected activity was at least a "motivating or substantial factor" in Respondent's decision to take an action adverse to the employee. The elements of a prima facie case of unlawful discrimination are: (1) employee union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility towards the employee's protected rights; and suspicious timing or other evidence that protected activity was a motivating cause of the alleged discrimination See e.g, *City of St Clair Shores,* 17 MPER 27 (2004). Under the shifting burden test, if the charging party is able to show that union activity is a motivating factor in the action, the burden then shifts to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. See, e.g., *Southfield Pub Schs,* 25 MPER 36 (2011); *Wright Line, a Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). Respondent asserts that there is no evidence of anti-union animus in this case and no evidence of a causal connection between the representation petition and the decision to implement the premium share. According to Respondent, the charge should be dismissed because Charging Party failed to establish a prima facie case of unlawful discrimination.

Charging Party maintains that it has no burden to provide evidence of unlawful intent because its allegation is that the implementation of the premium share interfered with employees' exercise of their Section 9 rights to organize in violation of Section 10(1)(a) of PERA. It points out that a violation Section 10(1)(a), like Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 USC 150 et seq does not normally require proof of unlawful intent. According to Charging Party, because Respondent had a duty to maintain the status quo during the pendency of a union organizing campaign, it has the burden of demonstrating that it acted the same way it would have acted had the petition not been filed. For this proposition, Charging Party relies on *Oakland Cmty College*, 1998 MERC Lab Op 34, in which the administrative law judge held that "during the pendency of a representation petition, an employer is obligated to act the same way as it would have had the petition not been filed, that is, an employer is obligated to maintain conditions of employment, otherwise known as the status quo." Charging Party also relies on two decisions arising under the NLRA, *Noah's Bay Area Bagels,* 331 NLRB 188 (2000), and *Abbey's Transportation Services v NLRB,* 837 F2d 575 (CA 2, 1988). According to Charging Party, Respondent should be found to have violated Section 10(1)(a) of PERA because it did not establish that it would have implemented the premium share had the petition not been filed.

Section 10(1)(a) of PERA is modeled on Section 8(a)(1) of the NLRA. Both Section 10(1)(a) and Section 8(a)(1) prohibit employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 9 of PERA or Section 7 of the NLRA, including the rights to form, join or assist a labor organization. In *NLRB v Exchange*

Parts, 375 US 405 (1964), the Supreme Court held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize under Section 7 of the NLRA and, therefore, violates Section 8(a)(1) of the NLRA.[1] Motive is typically irrelevant in analyzing an 8(a)(1) allegation, since the test is whether the conduct in question, it can reasonably be said, tends to interfere with the free exercise of employees rights under the Act. *American Freightways Co*, 124 NLRB 146, 147 (1959). However, the 8(a)(1) analysis under *Exchange Parts* is motive-based. *Network Dynamics Cabling Inc*, 351 NLRB 1423, 1424 (2007). The motive for the conferral of the benefit during the organizational campaign must be to interfere with—i.e., be an effort to influence—the union organizing campaign. *Manor Care of Eastern Penn*, 356 NLRB No. 39 (2010). However, absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the NLRB infers improper motive and interference with employee rights under the Act. *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992). In other words, it is an employer's burden to show that its decision to give a wage or other benefit increase during an organizing campaign was a legitimate business decision unrelated to the campaign. *Mercy Hospital*, 338 NLRB 545, 545-546 (2002).

A corollary to the *Exchange Parts* rule is that the withholding of new benefits from employees who are awaiting a Board election also violates the Act if the employees otherwise would have been granted the increases in the normal course of the employer's business. *Progressive Supermarkets*, 259 NLRB 512 (1981). As it is sometimes stated, the general rule is that an employer's legal duty during a pre-election campaign period is to proceed with the granting of benefits just as it would have done had the union not been on the scene. See, e.g., *American Telecommunications Corp*, 249 NLRB 1135 (1980). *Oakland Cmty College*, from which Charging Party quotes in its brief, was a decision of a Commission administrative law judge involving wage increases allegedly withheld from employees because an election petition had been filed. The administrative law judge found that the employer had not made a definite commitment to give a wage increase before the filing of the petition. She concluded, therefore, that although the employer told the employees that it would not discuss salaries during the pendency of the petition, the facts did not indicate that it had violated its legal duty to act in the same way that it would have had the petition not been filed.

Noah's Bay Area Bagels and *Abbey's Transportation* are also cases involving the granting or withholding of new benefits during an election campaign. In *Noah*, the employer's parent company announced the implementation of an unpopular company-wide change in employee health benefits three months before a petition was filed to represent employees at one of the employer's locations. Before the petition was filed, the employer began trying to persuade its parent company to reverse the changes. After the petition was filed and while it was pending, the employer restored the previous benefits. However, it excluded the employees covered by the petition, telling them that it could not restore the benefits for them because of the pending petition. The National Labor Relations Board (NLRB) held that the employer had established a legitimate business justification for announcing the restoration of the benefits for all employees during the election campaign, but that it had violated Sections 8(a)(1) and (3) by withholding the

[1] The Supreme Court said, at 409 "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."

benefits from the employees covered by the petition. In *Abbey's Transportation*, the employer was found to have violated Section 8(a)(3) by announcing, after an election petition was filed, that it could not implement previously scheduled wage increases. There was no question in either of these cases that the withholding of the new benefits was caused by the employees' union activities, since in both cases the employers announced that they could not grant the benefits because of the pending petitions.

This case does not involve either the granting of a new benefit during an election campaign or the withholding of a benefit previously announced because of the pendency of an election petition. Since Respondent's implementation of a premium share reduced employee health benefits, it was an adverse employment action which, if unlawfully motivated would constitute unlawful discrimination under Section 10(1)(c) of PERA. Charging Party has not cited any cases, and I have found none, explicitly placing the burden on an employer to establish that its reduction or elimination of existing employee benefits during a union organizing campaign was unrelated to that campaign. I agree with Respondent that Charging Party had the burden to show that the filing of the petition was at least a motivating cause of Respondent's decision to implement the premium share. However, I also find that whatever the burden of proof, the facts here do not establish a violation of PERA.

As Respondent points out, there is no direct evidence of anti-union animus in this case. However, anti-union animus can be established either by direct evidence or circumstantial evidence, including evidence of suspicious timing or pretext that fairly supports the inference that an employer's motive was unlawful. *City of Royal Oak*, 22 MPER 67 (2007) (no exceptions). While suspicious timing alone is insufficient to establish unlawful motive, I find that an employer's reduction in benefits for employees covered by an election petition in the middle of a union organizing campaign places an obligation on the employer to explain the timing of the reduction and produce a legitimate business reason for the action. I find that Respondent met its burden in this case.

The pertinent facts are as follows. Each year in April, Respondent signed a new contract with Blue Cross for health insurance coverage for the coming year. Respondent had an operating deficit for at least five years prior to 2010. However, although it cut its budget during those years, Respondent did not reduce employee health insurance benefits or other compensation. In 2009, after Julie Munro was elected to the Board and became a member of its personnel committee, the personnel committee recommended to the Board that it require employees to pay twenty percent of their health insurance premiums. This recommendation, however, was tabled by the full Board. It was not until 2010, when a union petition was pending, that the Board decided to implement a premium share. Between March 2009 and March 2010, however, Respondent's financial situation continued to deteriorate. In September 2010, Respondent was informed by its auditors that it would deplete its fund balance and run out of money in early 2011 if it did not cut expenditures significantly. In addition, Board member Munro continued to advocate for the implementation of premium share in her second year as a member of the Board's personnel committee.

I find that Respondent demonstrated that it had legitimate business reasons for implementing the premium share in April 2010 while Charging Party's petition was pending. I

conclude that the evidence, taken as a whole, does not support a conclusion that the filing of the election petition was a motivating cause of Respondent's decision to implement the premium share. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____