

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

\*\*\*\*\*

In the Matter of the Arbitration

between

**Oswego Firefighter's Association, Local 2707**

and

**City of Oswego**

OPINION

AND

AWARD

PERB Case: A2009-506

\*\*\*\*\*

Before:  
Ronald E. Kowalski, Ph.D.  
Arbitrator

**APPEARANCES**

**For the City**

Mary M. Roach, Esq. Attorney for the City

**For the Union**

Mimi C. Satter, Esq. Attorney for the Union

A hearing on the above-referenced matter was adjourned and the parties elected to submit Memorandums of Law to the Undersigned who had been appointed as Arbitrator in accordance with the parties' Collective Bargaining Agreement and the rules and procedures of the New York State

Public Employment Relations Board. Briefs were submitted as agreed by the parties.

### **ISSUE**

The parties were unable to agree to the issue in this Arbitration.

The Arbitrator would frame the issue as follows:

Did the City violate Article 26.1 of the Collective Bargaining Agreement when it refused to pay the employee cost in the New York State Police and Fireman's Retirement System for employees hired after January 1, 2010?

If so, what shall the remedy be?

### **BACKGROUND FACTS**

The City of Oswego (hereinafter "City") and the Oswego City Firefighters Association, Local 2707 (hereinafter "Union") are parties to a Collective Bargaining Agreement governing terms and conditions of employment. The Agreement includes a section, Article 26, titled *New York State Retirement*. (Joint Exhibit 1)

In 2009 New York State amended its Retirement and Social Security Law establishing a new tier of membership for employees hired on or after January 1, 2010. Employees in the new tier are required to contribute three percent (3%) of annual wages to the retirement system in which they have membership.

The City hired two firefighters after January 1, 2010. These firefighters were placed in the new Tier 5 and three percent of wages was deducted and sent to the State as the contribution to the retirement system. The Union filed a grievance over the deduction alleging Article 26 and the Retirement Law Amendment provides the City should pay the three percent. The grievance was pursued through the contractually provided procedures to this Arbitration.

### **RELEVANT CONTRACT PROVISIONS**

The relevant contract provisions are found in Article 26.1 of the Collective Bargaining Agreement, as follows:

- 26.1 The City will pay an Employee's cost in the New York State Police and Fireman's Retirement System under the current and existing plans of which they are a member. Effective January 1, 1995 the City agrees to add Plan 384-d (20 year) to the current plans available to Employees in the unit.

## **POSITION OF THE PARTIES**

### **Union**

The Union argues the City violated the Collective Bargaining Agreement, Article 26.1, when it failed to contribute the three percent required of new firefighters hired after January 1, 2010 as members in Tier 5 of the New York State Retirement System. The contract provides that the City will make such a contribution.

New York State amended the Retirement Law in 2009 to provide that firefighters hired on or after January 1, 2010 must contribute 3% of their wages toward their retirement benefits. Article 26.1 clearly provides that the "City will pay an employee's cost in the New York State Police and Fireman's Retirement System under the current and existing plans of which they are a member." (Joint Exhibit 1) The language is clear and unambiguous and requires the City pay any such contributions which in this case is 3% of wages.

The fact that Tier 5 did not exist at the time Article 26.1 was negotiated in 1993 does not alter the requirement set out that the City pay the contribution. A Collective Bargaining Agreement is a living document which is applied to changing circumstances and must be treated as having meaning. The only reasonable application of the clear language in

Article 26.1 is that the City must pay the employee's cost which is the 3% for Tier 5.

The Union further contends that the 2009 Retirement Law Amendment allows in Section 8 that employees covered by a Collective Bargaining Agreement which provides for coverage under other plans are effectively grandfathered in by such a provision even if hired after January 1, 2010. They cannot be placed in a contributory plan.

The Union therefore submits the grievance has merit. The Union requests the Arbitrator sustain the grievance and as remedy make the affected firefighters' whole of the 3% contribution they paid into the System.

### **City**

The City argues there was no violation of the Collective Bargaining Agreement in having firefighters hired on or after January 1, 2010 pay three percent (3%) of wages as their contribution to the New York State Retirement System. The new Tier 5 of the Retirement System which commenced on January 1, 2010 requires by law that employees hired on or after January 1, 2010 contribute 3% of wages to the System.

The City contends that Article 26.1 first negotiated in 1993 was to allow employees to elect an alternative 20-year retirement provided by Section 384-d of the New York State Retirement and Social Security Law.

Under Section 384-d a public employee and public sector union may agree to this enhanced plan and the parties could agree the public employer will pay the employees contribution to the 384-d plan. The language in Article 26.1 states the City will pay an employee's cost was for just that plan not future tier contributions by employees required by law.

The City further argues Section 201.4 of the New York Civil Service Law, the Taylor Law, clearly make State retirement plans a prohibited subject of bargaining including payment of the employee's contribution percentage as noted in Town of Niagara, 14 PERB 3049 (1981). The Retirement System after reviewing the Collective Bargaining Agreement also advised the City that firefighters hired after January 9, 2010 will be contributors. (Joint Exhibit 3)

The City therefore submits the grievance is without merit. The City requests the Arbitrator deny the grievance in its entirety.

### **OPINION**

The issue before the Arbitrator in the instant matter is a question of contract interpretation and application. The facts are not in dispute in the instant case. The issue is whether the provisions of Article 26.1 of the Collective Bargaining Agreement require the City to pay the employee's contribution to the new Tier 5 State Retirement Plan. The Union contends

the language in Article 26.1 requires such a payment on the part of the City. The City argues the languages intent was not to pay for future employee contributions and the State Retirement System has stated new employees hired on or after January 9, 2010 must contribute 3%. The Arbitrator is of the opinion the evidence submitted by the parties supports the right of new employees to elect the alternative plan in Article 26.1 with no contribution if that has been negotiated for other employees but requires that if they remain in Tier 5 they are responsible for the 3% contribution and not the City.

Article 26.1 was negotiated as part of the 1993-1995 Collective Bargaining Agreement. The language incorporated an alternative retirement plan, Plan 384-d (20 year), to be made available to employees as well as the Tier plans already in place. At that point in time the language referring to the City's obligation to "pay an employee's cost in the New York Police and Fireman's Retirement System under current and existing plans" referenced the existing Tier plans which were noncontributory and the new Plan 384-d which the City would pay any employee contribution. Its clear intent was only to provide payment for the employee contribution to the new alternative 20-year plan not to address the Tier plans. If in fact it was intended to provide payment for future required employee contributions to new tier plans it would have been in violation of Section 201.4 of the New York Civil Service Law. It is

a well established principle of contract interpretation that if two interpretations are possible and one makes the agreement valid and lawful and the other makes it unlawful the former must prevail. The parties are assumed to have intended a valid lawful contract. (See Arbitrators Shearer, 75 L.A. 1038, 1040; Snow, 71 L.A. 109, 112-113). However, the provisions of Article 26.1 as originally negotiated do have application with respect to the alternate plan for employees hired on or after January 1, 2010.

The 2009 Retirement Law Amendment creating a new Tier 5 for employees hired on or after January 1, 2010 does allow for a Collective Bargaining Agreement to provide an alternative or special retirement plan that such employees may avail themselves of if it exists in the Agreement. This provision is set forth in Section 8 of the 2009 Retirement Law Amendment. Article 26.1 provides for such a special plan and hence employees hired after January 1, 2010 still may elect that plan under Article 26.1. If other employees have no contribution as a result of negotiations and the provisions of Article 26.1 new employees would be covered by these terms as well.

For the reasons set forth above, the Arbitrator would therefore adjudge that the City did not violate Article 26.1 of the Collective Bargaining Agreement when it refused to pay the employee's cost in the New York State Police and Fireman's Retirement System, Tier 5, for

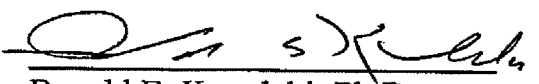


employees hired after January 1, 2010. However, such employees are eligible under the provisions of Article 26.1 and the Law to elect the alternative 20-year plan set forth in the Article with the City paying for any contributions as negotiated under the provisions and as currently paid for other members of the Unit.

**AWARD**

The City did not violate Article 26.1 of the Collective Bargaining Agreement when it refused to pay the employee's cost of the New York State Police and Fireman's Retirement System, Tier 5, for employees hired after January 1, 2010. However, such employees are eligible under the provisions of Article 26.1 and the Law to elect the alternative 20-year plan set forth in the Article with the City paying for any contribution as negotiated under the provisions and as currently provided and paid for other members of the Bargaining Unit.

12/6/2010  
Date

  
Ronald E. Kowalski, Ph.D.  
Arbitrator

State of New York        )  
                                  ) SS:  
County of Onondaga     )

I, Ronald E. Kowalski, Ph.D., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

12/6/2010

