In the Matter of Arbitration

between

The City of Austin, Texas
Austin Fire Department

and

Austin Firefighters Association
Local 975

The Question of
Sick Leave Use

before

John B. Barnard
Arbitrator

For the City	Mr. Michael L. Cronig, Esq. Assistant City Attorney
For the Association	Mr. Matt Bachop, Esq. Deats, Durst, Owen & Leavy P.L.L.C.

June 9, 2016
Austin City Office

The Issue(s)

The Association,

1. Did the change to section III A.1.e. of General Order E.103.3 violate Article 12, Section 2 (Sick Leave Use) of the CBA between the parties?

2. Did the change to section III.A.1.e of General Order E103.3 violate Article 27 (Maintenance of Standards) of the CBA between the parties?

The City,

> ...Bottom line, did the changes the chief made, did they violate Article 12 in that we didn't negotiate over those changes... and I think the primary issue is on the second policy...
> (t pp 8, 9)

Authority

Collective Bargaining Agreement
Effective June 4, 2018

Article 12
Leave Provisions

Section 2 Sick Leave Use

A. The use of such leave will be allowed in case of health care appointments, personal illness, or physical incapacity of an employee. It will also be allowed when a Fire Fighter is required to care for a member of his/her immediate family who is ill or incapacitated due to a medical condition.

B. Sick leave may be taken in intervals of one quarter hour for all time that the employee is absent during a regular word day.

Article 27
Maintenance of Standards

Section 1 Scope of Article

Subject to Section 2 below, all economic benefits, privileges, and working conditions which are properly and lawfully in effect in the Austin Fire Department as to matters

subject to mandatory bargaining under Local Government Code Chapter 174, and enjoyed by the Fire Fighters of the bargaining unit as of the effective date of this Agreement, but which are not included in this Agreement, shall remain unchanged for the duration of this Agreement.

Section 2 Operational Needs of the Department

Department management may change those benefits, privileges, and working conditions which it determines, in accordance with this subsection, to interfere with the operation of the Department. Any such changes must be made in good faith, must be consistent with the spirit and intent of the relevant provision or practice, must be reasonable and not discriminatory, must be reasonably related to the safe and orderly operations of Fire Department, and must not conflict with any state or federal law, governmental regulation or provision of this Agreement.

Background

This case is in regard to a 2016 change in the AFD Leave Policy regarding modified duty. The specific policy at issue is E103.3, which took effect on February 22, 2016. The policy in effect prior to February 22, 2016 was, a member whose use of Sick Leave extended past the tenth consecutive shift or twenty consecutive working days must provide a MODS (Medical Order/Duty Status Form), to their Battalion Chief/Section Supervisor. The member shall continue to submit a MODS every ten shifts or twenty working days thereafter until they return to full duty, and have been evaluated by the Wellness Center. Additionally, the member is expected to provide a MODS anytime there are changes to the member's physical condition that may result in change in duty status.

Effective then on February 22, 2016, the following policy revisions became effective, (the relevant changes are underlined)

A member whose use of sick leave extends past the tenth consecutive shift, or

twenty consecutive working days, must provide a MODS to their Battalion Chief/Section Supervisor. If a member's use of sick leave extends to twenty consecutive shifts or forty consecutive work days (and every subsequent ten shifts or twenty consecutive working days after that). members are required to have their personal physician asses them for a possible modified duty assignment. The objective of this will be to assist the member to return to full duty or, for the completion of a Chapter 143 Fitness for Duty assessment if, deemed warranted by the Fire Chief. The member shall continue to submit a MODS every ten shifts or twenty working days thereafter until they are cleared to return to full duty by both their personal physician and by the Wellness Center. Additionally, the member is expected to provide a MODS (Medical Order/Duty Status Form) anytime there are changes to the member's physical condition that may result in a change of duty status.

As a result of the changes made by the Department on February 22, 2016, the Association filed a grievance dated March 11, 2016. Such grievance states in part,

> Remedy sought. The Association requests immediate rescission of the amendments to section III.A. i.e. of General Order Number E 103.3
>
> Steps taken by the grievance
> to resolve the issue. I met with Chief Kerr and Chief Dodds on February 17, 2016, to discuss proposed Leave Policy changes. I noted that their proposals contemplated a change to long standing practice and urged that they are required to be negotiated. I recommend that we wait until the normal bargaining cycle next year to discuss changes, but I also offered to reopen the CBA to negotiate over leave policy sooner.
>
> The specific right or practice
> That is the basis of the complaint For many years, Austin fire fighters suffering from illness or injury that prevents them from performing their normal job duties have been allowed to choose whether to apply for modified duty assignments or to use sick leave until they are sufficiently recreated to perform the duties of their regularly assigned position. (AFA President Bob Nicks)

In turn, AFD responded to the grievance on March 25, 2016. Such states in part,

> The goal of the Department and the Wellness Center is to return an injured/ill member to some form of modified duty as soon as possible taking into consideration any limitations imposed by the treating physicians... The revisions to General Order E103.3 does not conflict with any current Article of the CBA nor does it change a practice of the Department that is a mandatory subject of bargaining...

Such matter is now properly before the arbitrator.

Discussion and Conclusions

To this, the Association mentions that the language contained in Article 12, Section 2A was first included in the parties' CBA in 2009. Ever since then, the parties have interpreted this to mean that employees who are too ill or injured to perform their regular job duties have the right to choose to use sick leave as long as they have accrued sick leave.

In contrast, the new section III A.i.e. of E103.3 provides that after using 20 shifts of sick leave, members are required to have their personal physician assess them for a possible modified duty assignment, leading up to possible approval of a modified duty assignment. This modified duty assignment could be compelled against the fire fighter's wishes. The chief made clear that she does believe that she can compel modified duty under this new policy language.

As such, under the new policy, the Chief can prohibit the use of sick leave by employees who have had the right to use sick leave under the CBA language, as the parties interpreted it ever since its inclusion in the contract. Plainly, policies governing matters outside the CBA can impinge on rights created by the CBA. The new policy thus violates Article 12, Section 2.

There is no serious argument that sick leave is not a mandatory subject of bargaining. There is no dispute that the new policy changes the past practice of guaranteeing employees to ill or injured to perform their regular duties the right to choose whether to use sick leave or apply for modified duty. Accordingly, all the elements of Article 27, Section 1 are met with respect to this working condition.

Article 27, Section 2 provides that any change made to a past practice that has been determined to interfere with the operations of the Department (although this past practice does not) "must not conflict with any... provision of this Agreement." As set out in Section 1 of this brief, this policy change does conflict with the Sick Leave Use provision in the CBA, Article 12, Section 2.A. The policy change cannot be justified under Article 27, Section 2.

The evidence showed that not a single fire fighter has been required to turn in a MODS form after 10 shifts of consecutive sick leave since Chief Kerr took office.

As the Chief admitted, overtime costs must be incurred for fire fighters performing modified duty just as they are incurred for fire fighters on sick leave. The City has not shown that having the ability to compel modified duty will affect the City's overtime costs in any way. The Department has failed to require employees using sick leave to turn in MODS forms and thus has underutilized its Wellness Center.

AFA requests that the Arbitrator sustain its grievance, rule that the amendment to section III.A.1.e. of General Order E103.3 violates Article 12, Section 2 and Article 27 of the parties CBA, and order the amendment to section III.A.1.e. of General Order E103.3 to be rescinded.

In turn, the City reasserts its motion made during the arbitration that the grievance is

invalid and should be dismissed in that it fails to allege a violation of the CBA. Specifically, the Association mandates the policy mandate a modified duty assignment if the firefighter is cleared for modified duty. The policy on its face does no such thing and specifically states the firefighter is being evaluated for possible modified duty assignment. The Chief believes she has that authority, but each case would be evaluated on an individual basis. Such grievance does not state a claim or raise an issue for which relief can be granted and should be dismissed.

Neither Article 12 nor any Article of the CBA addresses modified duty assignments. To read into Article 12, Section 2 of the right to remain on sick leave if approved for modified duty, or to read into it denying the Chief the right to evaluate a firefighter for a modified duty assignment and make that duty assignment commitment with any medical restrictions is creating a new contract provision that is specifically prohibited by Article 20. No one disputes a firefighter's right to use sick leave when he is legitimately sick or to care for an ill/injured family member, but Article 12 in no way gives that firefighters the right to choose to remain on sick leave when his own physician and the Wellness Center agree he is capable of returning to duty on a modified duty assignment.

As the Chief testified, AFD has no custom, policy, or practice of allowing a firefighter to remain on sick leave when his personal physician and the Wellness Center have approved him for a modified duty assignment. It is the Chief's expectation that if a firefighter can perform modified duty, and if his physician agrees, he will. The Chief testified she does not believe Article 22 in any way restricts her ability to assign a firefighter to modified duty. The Chief has the absolute right under the CBA to determine assignments that include modified duty assignments consistent with any

medical restrictions (Article 13, Section 5,) "Nothing in this Article shall be continued as limiting the Fire Chief's authority to determine personal assignments."

The Chief's testimony on cross that before February 22, 2016, firefighters who were ill or injured could choose whether to use sick leave or apply for a modified duty assignment must be taken in the context that no firefighter that has been able to perform modified duty has refused that assignment that she is aware of but that does not mean she did not have the authority to compel the modified duty assignment if the firefighter was offered and refused the assignment.

Assuming that Sick Leave is a benefit, and assuming that modified duty assignments affect that benefit, the Chief was within her authority under Article 27, Section 2 to unilaterally impose to change to Policy E103.

The Chief contends the use of sick leave is interfering with the operations of the Fire Department in several ways, the least of which is overtime costs associated with the fraudulent use of sick leave. Denying the chief the right to assign firefighters to a modified duty assignment interferes with her rights to assign personnel and carry out the Department's mission. It interferes with the Chief's ability to hold firefighters accountable and perpetuates conduct that is unilateral and dishonest. These reasons are the good faith justification for the change in policy and are related to the orderly operations of AFD.

This amended policy addressed modified duty assignments. There is no provision of the CBA that addresses modified duty or allows a firefighter the choice to remain on sick leave indefinitely even if his personal physician and the Wellness Center authorize his return to modified duty status. Given that fact this change in policy does not conflict

with any provision of this Agreement. In fact, it is consistent with the Chief's authority over personnel assignments under Article 15.

As stated, the Arbitrator's authority is limited to the interpretation and application of the CBA. Step 4, Section 3 specifically prohibits the Arbitrator from establishing new provisions of the CBA or modifying the present CBA. Since there is no Article specifically dealing with modified duty (except Article 13, Section 5, which gives Chief full authority to determine personnel assignments), the Arbitrator cannot create a new modified duty provision that denies the Chief the right to institute a process to determine if modified duty is an option and deny her right to assign a firefighter to a modified duty assignment consistent with his/her medical restrictions.

The Association has the burden of proof in this matter. AFD contends the Association has failed to meet its burden and any one of the three cited justifications alone or in concert justifies the change in policy. The City prays that the Arbitrator issue the following judgment,

1. There is no subject matter jurisdiction as the grievance falls to cite an issue in dispute;

2. Modified Duty Assignments are not a mandatory subject of bargaining;

3. Modified Duty Assignments are a retained management right and are within the Chief's authority to assign personnel under Article 15;

4. AFD does not have a custom policy, or practice that allows a firefighter to choose whether to accept a modified duty assignment.

5. The Fire Chief has the right to require that a firefighter be evaluated for a modified duty assignment after the prescribed number of shifts on sick leave and/or days of absence from work pursuant to the changes in E103 effective February 22, 2016;

6. In the event the Arbitrator that the Chief cannot mandate a modified duty assignment, at a minimum, the Chief has the right to require that a firefighter be evaluated for a modified duty assignment after the prescribed number of shifts on sick leave and/or absence from work;

7. If modified duty assignments are a mandatory subject of bargaining or if AFD does have a custom, policy or practice of allowing a firefighter to choose whether to accept a modified duty assignments, the Maintenance of Standards Article allows the Chief to make a change in this policy because the use of sick leave interferes with the operation of AFD and the change in reasonably related to the safe and orderly operation of AFD and does not conflict with any provision of the CBA or the law.

8. The Association's grievance is denied in its entirety and pursuant to Article 20, the non-prevailing party (the Association) is responsible for the entire Arbitrator's fee.

As to the question raised by AFD that there is no subject matter jurisdiction as the grievance fails to cite an issue in dispute, I must disagree.

I find the grievance filed on March 11, 2016 to be complete. The Association cites violation by AFD, specifically Article 12, 13, and 27. Further, the Association spells out a remedy sought, and even describes the steps taken to resolve the issue, and details the specific right or practice that is the basis of the complaint. Such grievance is well documented and comes the necessary point. Such grievance is valid, as is to be considered viable.

Sick leave, as described here, and contained in virtually any CBA, rests on the premise that sick leave is available to any covered employee who is legitimately sick, and unable to return to work due to an illness. In other words, under a sick leave policy, a company commits to pay an employee to be off work due to a legitimate illness. To stay at home, drawing a sick leave benefit, while all that time such employee is fully

capable and healthy enough to be at his place of employment in one way or another, should be considered fraudulent and an abuse of what sick leave is intended. Of note is that Article 12, Section 2 additionally allows AFD employees to be paid time off when a firefighter is required to care for a member of his/her immediate family who is ill or incapacitated due to a medical condition. I have yet to see such an additional benefit to employees in another CBA.

Adding then to the described legitimate premise is an employee who has been cleared by the necessary medical personnel to return to work from sick leave in some capacity, but is not as yet cleared to return to his regular job. In that instance, such employee is capable of going off sick leave and can be actively employed until being cleared to return to his normal duties. Of course, an employee returning as described probably would have some restrictions as to where he is placed until such restrictions would be lifted. Such described procedure then insures that the employee is well on the road to full recovery and that sick leave is not necessary or warranted. Such placement with temporary restrictions is a widely held course that typically is employed with companies that offer sick leave benefits to employees.

In the grievance, AFA President Bob Nicks describes the basis of the complaint,

> ...For many years, Austin fire fighters suffering from illness or injury that prevents them from performing their normal job duties have been allowed to choose whether to apply for modified duty assignments or to use sick leave until they are sufficiently recuperated to perform the duties of their regularly assigned position.

General Order Number E103.3, effective date of February 22, 2012, states in various sections,

A. <u>Sick Leave</u>

b. The Wellness Center physician will collaborate with treating physicians to determine if the member can safety perform his/her regularly assigned duties with or without a reasonable accommodation. While the treating physician is ultimately responsible for determining return to work status (i.e. Full Duty or a Modified Duty Status), the Wellness Center is charged with making medical recommendations to the Fire Chief concerning assignment status (i.e. Operations or non-Operations).

Of note here is that the preceding General Order also holds that the treating physician is ultimately responsible for determining return to work status.

The crux of General Order E103.3.3 (e), issued February 22, 2016 then centers with the following,

> ...If a member's use of sick leave extends to twenty consecutive shifts or forty consecutive work days (and every subsequent ten shifts or twenty consecutive working days after that,) members are required to have their personal physician assess them for a possible modified duty assignment. Consideration will then be given to assigning the member to the Wellness Center for evaluation and possible approval of a modified duty assignment...

The issue then becomes whether or not such reflected change to the 2016 General Order violates Article 12 or Article 27 of the CBA.

Article 12, Sick Leave in Section 2 states,

Section 2 Sick Leave Use

A. The use of sick leave will be allowed in care of health care appointments, personal illness, or physical incapacity of an employee. It will also be allowed when a Fire Fighter is required to care for a member of his/her immediate family who is ill or incapacitated due to a medical condition.

Such leave as spelled out in Section 2 is obviously intended for an employee's use when that employee is legitimately ill or to care for an ill or incapacitated family member. That benefit is not intended for an employee to choose to remain on that benefit of sick leave when such employee is capable of returning to work. Further, both General Orders give the firefighter the right to remain on sick leave as determined by the treating Physician. The Wellness Center is charged with only making a medical

recommendation. For an employee to draw sick leave benefits when not ill subjects that employee to the charge of fraud.

As such, a fair reading of Article 12, Section 2 does not contemplate an employee choosing to remain on sick leave when capable of returning to work. Such employee's treating physician is then ultimately responsible for determining return to work status, as contained in both General Orders, 2015 and 2016. An employee who chooses to remain on sick leave when that employee is legitimately not ill is merely committing fraud, and that is not what Article 12 is intended. The employee's treating physician is the legitimate answer to determining that employee's return to work status.

Article 29 Maintenance of Standards

Section 1 of Article 27 seems to be the typical language of a maintenance of standards article. That said, Section 2 then allows AFD to make changes in the benefits, privileges and working conditions as mentioned in Section 1. Such changes, determined by AFD department management to interfere with the operation of the Department. Further,

> ...Any such changes must be made in good faith, must be consistent with the right to intent of the relevant provisions or practice, must be reasonable and not discriminatory, must be reasonable related to the safe and orderly operation of the Fire Department, and must not conflict with any state or federal law, governmental regulation, or provisions of this Agreement.

Certainly then, Section 2 modifies Section 1, and mentions some reasons would allow changes to Section 1.

General order E103.3 dated February 22, 2016 of course rescinds E103.2. and additionally requires employees to have their personal physician assess them for a

possible modified duty assignment. Consideration will then be given to assigning the member to the Wellness Center for evaluation and possible approval of a modified duty assignment.

Such change is intended to facilitate the return of the employee to full duty or to some modified duty. E103.3 as mentioned earlier, holds that the treating physician then is ultimately responsible for determining return to work status (i.e., Full Duty or a Modified Duty Status). Further then, the Wellness Center is charged with making medical recommendations concerning assignment status.

Such changes to E103.3 were made in good faith, and are consistent with the spirit and intent of the relevant provision or practice. The intent of course is to get the firefighters returned to full duty as soon as possible, possibly using modified duty in the interim. That intent remains the same and E103.3 attempts to put that intent more in focus. The change must be reasonable and not discriminatory, and must be reasonably related to the safe and orderly operation of the Fire Department. Such change here is reasonable. The firefighter continues to have the wisdom of his treating physician to determine his return to work. Additionally, the Wellness Center is charged with then making a medical recommendation. That's reasonable for all parties. Note that E103.3 is not iron clad in this process,

> ...Consideration will then be given to assigning the member to the Wellness Center for evaluation and possible approval of a modified duty assignment...

Such policy does not mandate a modified duty assignment, and as the Chief testified, each case would be evaluated on a case by case basis. Finally, this change does not conflict with any state or federal law, governmental regulations, or provisions of this Agreement.

In sum then, this entire case rests upon the premise that the benefit of sick leave paid to employees is given with the provision that there is to be no abuse of such benefit, such as deciding to remain on sick leave by the employee even though such employee is capable of returning to work in either some capacity or to full duty. I don't see any objections to that premise from either the Association or the AFD.

As discussed earlier here, the revised General Order E103.3, dated February 22, 2016, gives the firefighter every protection that is fair. The employee can still rely on his treating physician for being responsible for his determination of the employee's work status. Then, consideration will be given to the employee's being assigned to the Wellness Center for evaluation and possible approval of a modified duty assignment. Such policy certainly does not mandate a modified duty assignment, and each case will be evaluated on a case by case basis. Articles 12 and 27 do not prohibit such change in policy, as discussed. As such, and based upon the totality of the testimony and evidence as presented, the grievance must be denied.

As an added note, Association President Bob Nicks testified that he had requested a private meeting with Chief Dodds and Chief Kerr, and,

> ...so basically put off the release of this policy a little bit so we could get together and talk about, what our concerns were in more of a private format...
>
> Q. And what was the response in that meeting?
>
> A. Within a week they released the policy as they intended... obviously the grievance followed...
> (t p 26)

I personally believe the better approach would have been for Chief Dodds and Kerr to discuss (not negotiate) this policy with President Nicks prior to it's release. President

Nicks, in testimony, seemed very sincere and willing to consider such subject. This private meeting possibly could have had some benefit for both parties. In any event, the parties can now bring this subject up in the upcoming negotiations.

Decision

Based upon the testimony and evidence as presented, there has been no violation of the Agreement between the parties. There has been no violation of Articles 12 and 27 in General Order E103.3.

As such, the grievance is denied.

August 23, 2016
Dallas, Texas

John B. Barnard, Arbitrator