

***Health & Hospitals Corp. (Jacobi Hospital Ctr.)
v. Cooper***

OATH Index No. 1748/12 (Sept. 17, 2012)

In a default proceeding, a special officer is charged with insubordination for refusing to work mandatory overtime on 42 occasions. 45-day suspension recommended.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**HEALTH AND HOSPITALS CORPORATION
(JACOBI HOSPITAL CENTER)**
Petitioner
-against-
ERNEST COOPER
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

The Health and Hospitals Corporation brought this disciplinary proceeding pursuant to section 7:5 of its Personnel Rules and Regulations. Respondent Ernest Cooper, a special officer at Jacobi Medical Center, is charged with insubordination for refusing to work mandatory overtime, when directed to do so on 42¹ occasions (ALJ Ex. 2).

A hearing was held before me on August 16, 2012. Upon respondent's failure to appear, proper proof of personal service and service by certified and regular mail of the charges and the notice of hearing were submitted (Pet. Ex. 1). Petitioner's evidence established the jurisdictional prerequisites for finding respondent in default and an inquest was held.

For the reasons set forth below, I find that charges have been sustained and recommend that respondent be suspended for 45 days.

¹ Although petitioner alleged 43 instances of refusing to work mandatory overtime during the hearing, the evidence submitted demonstrated that there were actually 42 instances.

ANALYSIS

Respondent was charged with insubordination for refusing to work overtime on 42 occasions, on the following days:

11/24/10	01/24/11	05/04/11	10/06/11	02/06/12	03/16/12
12/08/10	02/25/11	08/19/11	10/28/11	02/08/12	03/19/12
12/13/10	03/21/11	08/22/11	11/28/11	02/10/12	04/02/12
12/16/10	03/29/11	08/24/11	12/02/11	02/14/12	04/07/12
12/20/10	04/04/11	09/20/11	12/07/11	02/23/12	04/13/12
01/04/11	04/22/11	09/26/11	01/04/12	02/26/12	04/16/12
01/05/11	04/27/11	10/05/11	01/11/12	03/06/12	04/18/12

Petitioner submitted 42 overtime forms for the above listed dates. The overtime form is divided in half, the top half is for voluntary overtime and the bottom is for mandatory overtime. The mandatory overtime portion of the form reads as follows:

<u>MANDATORY OVERTIME</u>
Name: _____ you are hereby ordered to work
Mandatory overtime on Tour _____ on _____.
<u>**Failure to comply with this mandate will result in a request to Labor Relations for disciplinary action to be initiated against you.**</u>
POST: _____
Officer DID OR DID <u>NOT</u> Refuse Mandatory Overtime. (Supv. Circle One)
Date: _____
Time Mandated: _____
Officer's Signature: _____
Supervisor's Signature: _____
ALL OVERTIME WILL BE COMPENSATED IN COMP. TIME CASH AT TIME AND ONE HALF IN EXCESS OF 40 HOURS REGARDLESS WHETHER THE OVERTIME WAS VOLUNTARY OR MANDATORY

(Pet. Exs. 3, 4, 5).

Each of the forms submitted for the 42 days in question, includes respondent's name and the date and time of the mandatory overtime assignment. All of the forms have the word "DID" circled, indicating that respondent refused mandatory overtime. Both respondent and a supervisor signed each of the 42 forms acknowledging that respondent refused the mandatory overtime assignments (Pet. Exs. 3, 4, 5). Petitioner also submitted copies of respondent timesheets for the dates in question. The timesheets corroborate that respondent did not work overtime on the mandated dates (Pet. Exs. 6, 7, 8, 9).

An employer must prove three elements to establish a charge of insubordination: (1) that an order was communicated to the employee and the employee heard and understood the order; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey the order. *Health & Hospitals Corp. (Queens Health Network) v. Smith*, OATH Index No. 2019/08 at 3 (Oct. 17, 2008); *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007); *Dep't of Homeless Services v. Ferguson*, OATH Index No. 1611/02 at 6 (Jan. 22, 2003), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 04-27-M (May 24, 2004). The language on the mandatory overtime form is clear and unambiguous. Indeed, it states, "you are hereby ordered to work" (Pet. Exs. 3, 4, 5). Furthermore, it cautions the employee that a failure to comply with the mandate may result in disciplinary action. The evidence submitted demonstrated that 42 orders for mandatory overtime were communicated to respondent and that he willfully refused to obey the order. Respondent signed each of the forms acknowledging receipt and his refusal to work overtime on 42 occasions.

It is well settled that once an order has been given, an employee must abide by the principle of "obey now, grieve later." This means that an employee is required to obey the order when it is given and subsequently challenge it through formal grievance procedures if there are any substantive or procedural objections. *See Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855 (1984); *Strokes v. City of Albany*, 101 A.D.2d 944 (3d Dep't 1984); *Dep't of Correction v. Shabazz*, OATH Index No. 111/03 at 6 (Aug. 21, 2003); *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Gordon*, OATH Index No. 1843/98 at 8-9 (Nov. 2, 1998). This principle has three recognized exceptions including orders that are unlawful, *Alper v. Gaffney*, 73 A.D.2d 644 (2d Dep't 1979), clearly beyond the authority of the supervisor to make *Ferreri*, 62 N.Y.2d at 856-57, or imminently threaten the health or safety of the employee or others, *Reisig v. Kirby*,

62 Misc. 2d 632 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969). In this case, none of the recognized exceptions apply. The orders were lawful and within the supervisor's authority. *See Ferreri*, 140 A.D.2d 295 (1984) (order to work mandatory overtime found to be within the supervisor's authority). Additionally, there was no evidence that the orders threatened respondent's health or safety. As a consequence, respondent was required to work the mandatory overtime and reserve his objections for a formal grievance afterwards. Respondent's repeated refusal to work mandatory overtime constituted misconduct.

Accordingly, I find that respondent was insubordinate on 42 occasions for willfully refusing to work mandatory overtime.

FINDINGS AND CONCLUSIONS

1. Respondent was properly served with the charges and notice of hearing.
2. Petitioner established that respondent was insubordinate on 42 occasions by refusing to work mandatory overtime as directed.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record provided to me by the Hospital. Respondent was appointed to his position as a security officer on June 10, 2002. During his nine-year tenure with the Hospital, he has been formally disciplined on two prior occasions. Respondent was charged with abandonment of post, insubordination for not returning to his post as directed, and unprofessional misconduct for using profanity and threatening a co-worker in February 2006. As a consequence, respondent was suspended for 10 days. In July 2006, respondent was suspended for two weeks for abandonment of post and insubordination for not returning to his post as directed and refusing to turn over his memo book.

Petitioner requested that respondent be suspended without pay for 45 days. In similar cases where an employee has refused to work mandatory overtime the penalties have varied depending on the employee's disciplinary history. *Dep't of Correction v. Keyes-Alston*, OATH Index No. 468/05 (Feb. 1, 2005) (30-day penalty for refusal to work overtime on one occasion and being discourteous, where officer had six prior disciplinary penalties, including a 60-day

penalty for being out of residence); *Health & Hospitals Corp. (Coler-Goldwater Hospital) v. Hinkson*, OATH Index No. 163/04 (Nov. 21, 2003) (15-day suspension imposed for refusal to work mandatory overtime on two occasions, where respiratory therapist had two prior disciplinary penalties for time and leave violations); *Dep't of Correction v. Buissereth*, OATH Index No. 365/97 (Feb. 8, 1997) (18-day penalty imposed for refusal to work mandatory overtime on one occasion, where officer had a significant disciplinary history).

Unlike the above cases which involved one or two instances, here, respondent refused to work overtime on 42 occasions. In light of our prior case law and respondent's failure to appear for the hearing to provide a defense or mitigation, the requested penalty is reasonable.

Accordingly, I recommend that respondent be suspended without pay for 45 days.

Kara J. Miller
Administrative Law Judge

September 17, 2012

SUBMITTED TO:

WILLIAM P. WALSH
Executive Director

APPEARANCES:

JEFFREY SMODISH, ESQ.
Attorney for Petitioner

No Appearance for Respondent