

# ***Dep't of Correction v. Hernandez***

OATH Index No. 106/16 (Mar. 23, 2016)

Correction officer's failure to report to duty during a snowstorm did not rise to the level of misconduct under the Civil Service Law. Petitioner's refusal to grant respondent personal emergency leave while an appropriate exercise of administrative discretion, is not binding on this tribunal in its determination of whether misconduct was committed under the law. ALJ recommends dismissal of charges.

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

*In the Matter of*  
**DEPARTMENT OF CORRECTION**  
*Petitioner*  
*- against -*  
**TAMIKO HERNANDEZ**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**SUSAN J. POGODA**, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Department of Correction ("Department"), pursuant to section 75 of the Civil Service Law, against respondent, Tamiko Hernandez, a correction officer ("CO"). The Department alleged that on or about January 27, 2015, respondent failed to report for her scheduled tour of duty without permission or authority and failed to notify her command as to why she failed to report to work (ALJ Ex. 1).

Over the course of a two day trial, petitioner relied on the testimony of Parmjit Singh, Captain Asia King and Deputy Warden of Administration Karen Lewis and offered documentary evidence. Respondent testified on her own behalf, and offered documentary evidence.

For the reasons provided below, I find that petitioner failed to prove by a preponderance of the credible evidence that respondent was guilty of misconduct under section 75 of the Civil Service Law, and recommend that the charges be dismissed.

### ANALYSIS

It is undisputed that respondent is a thirteen year Department employee with no record of formal discipline and was scheduled to work the midnight tour at the Rose M. Singer Center (“RMSC”) on Riker’s Island from 11:00 p.m. on January 26, 2015, to 7:31 a.m. on January 27, 2015. Respondent failed to report for duty, did not have permission to miss her tour, and was marked absent without leave (“AWOL”). It is also undisputed that respondent lives in the Town of Baldwin in Nassau County, New York. On January 26, 2015, in anticipation of a predicted major snowstorm, Governor Andrew Cuomo declared a State of Emergency in New York City, Nassau, Suffolk and other downstate counties and Mayor Bill de Blasio declared a local State of Emergency for New York City.

Petitioner contends that respondent was on notice of the impending snowstorm, was required to report to work during the snowstorm, and was aware of a Departmental issued teletype related to the weather. Respondent denies having seen the teletype and asserts that it was impossible for her to report for duty on the evening of January 26 and early morning hours of January 27 due to the extremely hazardous driving conditions near her home. Respondent also submits that in accordance with Department procedure, she called the command control room before and during her scheduled tour to explain why she could not report to work, and that she requested emergency leave, which was denied.

Parmjit Singh, the personnel director at RMSC, testified that in anticipation of the impending snowstorm, the acting Chief of Department issued a teletype order on January 26, 2015, at 8:00 a.m., advising the members of the Department that “A snowstorm with strong winds will move into the area and will impact New York City today and this evening” and reminding the officers of their obligation as essential staff to report for duty (Pet. Ex. 4; Tr. 21-22, 37). The teletype indicates that officers should monitor public service announcements for weather updates and was to be read to the officers at twelve consecutive roll calls, beginning with the January 26 morning roll call (Pet. Ex. 4; Tr. 22). Mr. Singh testified that these kinds of teletypes had been issued in the past when there was a big event like a snowstorm or Hurricane Sandy (Tr. 22).

According to Mr. Singh, respondent’s time sheet shows that she worked the midnight tour on January 25 to January 26 and signed out at 8:00 a.m. on January 26 (Pet. Ex. 2). Because teletypes are not read to the officers at the end of a tour, Mr. Singh testified that respondent could

not have received notice of the teletype during roll call on the morning of January 26 (Tr. 38-39). Mr. Singh later testified that respondent might have learned about the teletype because she was still at work at 8:00 a.m. on January 26 (Tr. 39). He acknowledged, however, that the Department does not have a procedure in place to inform officers who are not on duty when teletype orders such as this one are issued (Pet. Ex. 4; Tr. 38).

According to Department procedure, if an officer is not going to report for duty within three hours of a scheduled tour, she is required to call the command and request either a personal emergency day or "time due" from the tour commander (Tr. 20, 101). On January 27, however, personal emergency or time due requests were not granted because of the snowstorm (Tr. 20, 27). All uniformed members who were scheduled to report to duty on January 27 and failed to do so were written up as AWOL (Tr. 21, 101). Both Mr. Singh and Deputy Warden Lewis testified that respondent was considered essential staff and she was required to report to duty despite the snowstorm (Tr. 20-21, 99-100).

Captain King, who was supervising the B house at RMSC for the 11:00 p.m. to 7:31 a.m. tour on January 26 and the 7:00 a.m. to 3:00 p.m. tour on January 27, testified that at approximately 5:00 a.m. on January 27 she went to the control room to assist the other supervisors (Tr. 86 ). She denied receiving any phone calls from or speaking to respondent on either January 26 or 27 (Tr. 86). She conceded that respondent could have spoken to another captain (Tr. 95-96).

Deputy Warden Lewis acknowledged that due to the weather conditions, she expected that some officers would not report for duty on January 27 because they lived in different locations, and had different modes of transportation (Tr. 119-120). She noted that in the past, officers took measures to get to work during other weather related conditions, such as staying with a nearby family member, or leaving earlier for work. She stated that cots are available in the event of an emergency (Tr. 101). Deputy Warden Lewis testified that she worked on January 26 even though it was a scheduled vacation day because the Warden ordered her to report to duty (Tr. 98). She left her home three to four hours before her scheduled report time, even though it normally takes her about thirty to forty five minutes to drive to work (Tr. 99, 101).

Mr. Singh admitted that on January 27 approximately thirty uniformed officers assigned to RMSC did not report to work (Tr. 19, 25, 27). He testified that other uniformed officers had no problems driving to the facility, although some were stopped by police officers because the

roads were not safe, but allowed to continue once they produced their shields and identification. Others reported to work late (Tr. 25).

Coincidentally, Mr. Singh was one of the staff members who did not report to work on January 27, and was marked AWOL (Tr.33). He did not go to work because he was not considered essential personnel and the weather and road conditions were hazardous on Long Island and in Hicksville where he lives (Tr. 34-35). According to Mr. Singh, even though he shoveled his driveway twice there was still a lot of snow on the roads and the ground and it was “a bad day to be out there” (Tr. 35). After assessing the weather conditions in his area, Mr. Singh decided he was not going to drive anywhere (Tr. 36).

Respondent testified that she normally leaves her home in Baldwin at 10:00 p.m. to be at work by 11:00 p.m. (Tr. 63). On January 26, she went outside between 9:00 and 9:30 p.m. to clean off her 2004 Chevrolet Impala and to shovel the driveway to go to work, as it had been snowing on and off (Tr. 64- 66 ). She started the car, and drove about one or two feet but could not get out of her driveway because the snow was coming down and the streets had not been plowed (Tr. 64, 68). She went back into her house because it was cold, turned on the television, and heard that the Governor had declared a state of emergency due to the snowstorm and that the roads were dangerous (Tr. 64). The news reported that only emergency response vehicles were allowed on the roads and since she did not drive an emergency response vehicle, she thought that she could be stopped by the police and subjected to a \$500 fine and/or a misdemeanor (Resp. Ex. B; Tr. 64-66). Respondent was aware of at least one correction officer who had been stopped and fined for driving a non-emergency response vehicle (Tr. 65).

At approximately 10:30 p.m. on January 26, respondent called the control room at RMSC (Tr. 66). She testified that she spoke to Captain King for less than a minute, explaining that the weather was extremely bad, there was a state of emergency and she had tried to drive to work but could not get her car out of her driveway. Respondent requested a personal emergency but Captain King told her that no personal emergencies were being allowed (Tr. 66-68).

Respondent explained that because her request for a personal emergency had been denied, she attempted to drive to work again (Tr. 67). She cleaned her car and plowed and shoveled the driveway, but her car would not move more than a foot or two and the streets still had not been plowed (Tr. 67). At approximately 2:30 a.m., respondent called the control room again (Tr. 68). She testified that she spoke to Captain King for under a minute, informing her

that she was unable to get out of her driveway (Tr. 68). Respondent did not report for duty. Respondent submitted personal phone records showing that she made two telephone calls on January 26 and 27 to the control room phone number (Resp. Ex. A).

Respondent denied receiving notice of the January 26 Department issued teletype and could not recall when she became aware of the snowstorm other than seeing it on the news on January 26 (Tr. 76). She acknowledged she has friends and family who live in the five boroughs (Tr. 75).

Respondent testified she was physically unable to report for her January 26 to 27 tour of duty since she could not get her car out of her driveway; the roads were dangerous; the streets had not been plowed; there was no public transportation and the Governor had declared a state of emergency (Tr. 70, 74). When asked if she tried to call in sick, respondent replied, "Absolutely not because I'm not sick, so why should I call in sick" (Tr. 73-74).

***Failure to notify the command***

Petitioner has alleged that on or about January 27, 2015, respondent failed to notify her command about her reasons for not reporting to work (ALJ Ex.1). To the contrary, the evidence establishes that respondent notified the command and explained the reasons why she was unable to report for her January 26 to 27 tour. Deputy Warden Lewis acknowledged that the telephone number shown on respondent's personal phone log is the number for the control room. Thus, the phone call log corroborates respondent's testimony that she called the control room twice, once for 31 seconds before her tour began on January 26 and again, for 38 seconds, during her January 27 scheduled tour (Resp. Ex. A; Tr. 117-118). Indeed, based on respondent's phone records, Deputy Warden Lewis conceded that the failure to notify charge was incorrect (Tr. 118).

Respondent testified she explained her situation to Captain King, who she believed she spoke to on the two phone calls (Tr. 66-68). Respondent appears to have been mistaken about speaking to Captain King, because Captain King testified that she was not in the control room until 5:00 a.m. on January 27 (Tr. 94-95). This, however, does not detract from respondent's credibility, as it was a busy night and Captain King testified that respondent could have spoken to another captain (Tr. 96, 119).

Petitioner's attempt to discredit respondent's testimony by maintaining that respondent could not have explained why she was not coming to work in either a 31 second or 38 second

phone call to a supervisor is not supported by the record. Deputy Warden Lewis admitted since personal emergencies were not being granted for respondent's tour, it was conceivable that the calls could have lasted less than one minute (Tr. 118-121). Furthermore, petitioner failed to introduce any evidence to contradict respondent's testimony about the substance of her conversations with the control room. Therefore, this charge is not sustained and should be dismissed.

***Failure to report for duty***

Petitioner has also alleged that respondent failed to report to work for her January 26 to 27 tour of duty. Although it is undisputed that respondent did not report for her midnight tour of duty on January 26, 2015, the Department's refusal to grant respondent personal emergency leave, while a proper exercise of its administrative discretion, is not binding on this tribunal in its determination of whether misconduct was committed under Civil Service Law Section 75. *See Dep't of Correction v. Hertzog*, OATH Index No. 1881/01 at 4 (July 10, 2001); *Dep't of Correction v. Jones*, OATH Index No. 1266/96 at 13 (Aug. 16, 1996), *modified on penalty*, Comm'r Dec. (Sept. 19, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 99-70-D (July 9, 1999); *Dep't of Correction v. Woodyear*, OATH Index No. 167/86 at 12 (Sept. 2, 1986).

It is well settled law that not every absence without leave or authority constitutes misconduct *per se*. *See Dep't of Sanitation v. Torrence*, OATH Index No. 2515/10 at 5 (July 22, 2010) (strict liability runs contrary to the basic precept that a finding of misconduct requires some showing of fault on an employee's part); *Dep't of Sanitation v. Chaudhuri*, OATH Index No. 1674/08 at 6 (May 21, 2008) ("technical rule violations do not constitute misconduct absent a finding of fault"). Rather, an employer must prove by a preponderance of the credible evidence that either the employee acted willfully or intentionally, *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969) ("Misconduct and insubordination on the part of a civil service employee implies intentional and willful disobedience"), or negligently, *McGinagle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979). *See also Dep't of Correction v. Ellam*, OATH Index No. 873/03 at 6 (Jun. 17, 2003) (once the employee has been charged, the issue of whether respondent committed misconduct requires some showing of fault).

A case with strikingly similar facts, *Hertzog*, OATH 1881/01, is instructive. There, Administrative Law Judge Faye Lewis found that the Department did not prove that a correction officer committed misconduct by failing to report to work during a major snowstorm. Officer Hertzog, like respondent, was a long-term Department employee with no disciplinary record, and he lived on Long Island where a state of emergency was declared due to a snowstorm. Officer Hertzog had been aware of the snowstorm before the end of his tour the day before. There was no evidence that he knew what the extent of the storm would be and he did not make arrangements to stay in the city. The next day he saw it was snowing, turned on the radio, and heard about the heavy snow. He called the command several times before and after his tour was to begin, as did respondent. He informed the command that he was unable to get to work, that he could not shovel his driveway, and that public transportation was unavailable. He requested a personal emergency day which was denied and he was marked AWOL. Officer Hertzog testified, as did respondent, that he did not call in sick because he was not sick.

Here, similarly, petitioner did not establish that respondent was at fault for failing to report to her tour of duty on January 26 and 27. Respondent credibly testified that she could not travel to work because of the specific weather and road conditions. Respondent shoveled her driveway twice but could not move her car more than several feet. She testified that the roads were not plowed and were dangerous, that public transportation was not available, and that she was afraid of being stopped since she did not drive an emergency response vehicle. Petitioner did not show that respondent, who lives on Long Island, would have been permitted to travel on the roads in light of Governor Cuomo's order barring travel except for emergency response vehicles.

Moreover, respondent has an unblemished 13 year record with the Department and could have avoided disciplinary charges by calling in sick, but did not do so. When asked why she did not call in sick, respondent replied that she was not sick, which demonstrates honesty and integrity. Petitioner did not rebut respondent's credible testimony that she was unable to travel to work. Indeed, Mr. Singh's testimony supported respondent's assertion that the road conditions on Long Island were not safe.

Despite petitioner's claim, evidence that other correction officers may have reported to work on January 26 to 27 is not dispositive. No evidence was submitted as to where the other officers lived in relation to the facility, how they got to the facility, what types of vehicles they

drove, or whether the road and weather conditions they encountered were comparable to those experienced by respondent. Likewise, Deputy Warden Lewis was not asked what time she was scheduled to report for duty, where she lived, what kind of vehicle she drove, how long it took her to drive to the facility, or what the road conditions were during her commute on the evening of January 26 (Tr. 98). Moreover, Deputy Warden Lewis acknowledged that she did not expect every correction officer to report for duty on January 27, depending on where they lived and what their method of transportation was.

Petitioner contends that this charge should be sustained because: (1) it was conceivable that respondent received notice of the January 26 teletype before signing off her tour of duty at 8:00 a.m.; (2) respondent knew from previous weather related teletypes that essential personnel are required to report for duty and; (3) respondent did not take measures to ensure she reported for duty by arranging to stay with friends or family in New York City even though she was aware of the impending snowstorm (Pet. Exs. 4, 5, 6, 7; Tr. 24-25, 141-146).

I disagree. Respondent testified she was never informed about the winter snowstorm alert teletype that was issued on the morning of January 26, 2015 (Pet. Ex. 4; Tr. 74). I found her testimony to be credible. According to Mr. Singh, the teletype was issued at 8:00 a.m. on January 26, and would have been read to the officers during the January 26 morning and afternoon shift roll calls (Tr. 37-38). However, on cross examination Mr. Singh acknowledged that the information in the teletype would not have been conveyed to respondent because she was not scheduled to work until 11:00 p.m. on January 26 and there is no roll call at the end of a tour ( Tr. 37-38, 43).

Mr. Singh's testimony that respondent may have learned of the teletype order because she did not sign out of the facility until 8:00 a.m. on January 26 was also not persuasive. The teletype order was not issued at 8:00 a.m., as Mr. Singh testified, but at 8:08 a.m., after respondent had signed out of the facility (Pet. Ex. 4). Petitioner did not introduce any evidence to rebut respondent's credible testimony that she did not learn of the teletype before leaving the facility at the end of her tour on the morning of January 26 or before her 11:00 p.m. tour that evening. Thus, petitioner's contention that respondent was likely notified of the teletype is unsupported. Additionally, because the Department had no protocols in place to notify officers who were not on duty that a winter snowstorm alert teletype had been issued, there is no basis to conclude that respondent had notice of the teletype after she left the facility on the morning of

January 26. *Dep't of Sanitation v. Smyth*, OATH Index No. 753/15 (Jan. 21, 2015), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-0275 (July 17, 2015).

Petitioner also highlights that three prior Department hurricane (not snow-related) emergency preparedness teletype orders show that respondent knew she was considered essential personnel and required to report for duty during a weather related emergency (Pet. Exs. 5, 6, 7). Respondent did not deny that she was considered essential personnel in weather related situations or that she was scheduled to report for her tour of duty at 11:00 p.m. on January 26, 2015 (Tr. 75). In fact, respondent acknowledged that she reported to duty during other weather related emergencies such as Hurricane Sandy because she was physically able to drive to work (Tr. 73). However, the prior teletypes are not relevant to the issue of misconduct. Even though respondent is considered to be essential personnel, she is not strictly liable for her failure to report to work on January 26 and 27, 2015. As discussed, the credible evidence showed that she was unable to travel to work from her home on Long Island for this one tour of duty.

Finally, petitioner suggests that because respondent testified that she was aware that a major snowstorm was predicted for January 26 and 27, she should have made alternate arrangements so she could report for her scheduled tour of duty (Tr. 142). This was not compelling. The Department was aware of the extent of the impending snowstorm but did not issue the winter snowstorm alert teletype until 8:08 a.m. on the morning of the anticipated snowstorm, after respondent was off duty. The Department did not have a policy in place to inform officers who were not on duty of the snow emergency teletype (Tr. 25, 99). The Department presented no legal precedent that a failure of essential personnel to make alternate arrangements in anticipation of a snowstorm rises to the level of misconduct under the Civil Service Law.

Moreover, even assuming *arguendo* that respondent had some obligation to make alternate arrangements, there is no evidence that respondent knew what the extent of the snowstorm would be. There is no evidence as to when the snow began falling, and if it was snowing after respondent got off duty at 8:00 a.m. on January 26, either in New York City or on her way home to Long Island, such that she should have tried to make arrangements to stay closer to RMSC. *See Hertzog*, OATH 1881/01 at 9.

***Conclusion***

In sum, it is undisputed that respondent did not report for duty during a snowstorm on January 26 and 27, 2015. In reaching my recommendation I am cognizant, as was ALJ Lewis in *Hertzog*, OATH Index No. 1881/01, of the importance that order and security play in the efficient operation of the correctional facility. However, to prove misconduct, petitioner must establish some fault by respondent. Petitioner has not done so. Accordingly, this charge should be dismissed.

**FINDINGS AND CONCLUSIONS**

1. Petitioner did not prove that respondent failed to contact the command and explain why she could not report to duty on January 26 and 27, 2015.
2. Petitioner did not prove that respondent committed misconduct under the Civil Service Law by failing to report for duty during a snowstorm on January 26 and 27, 2015.

Susan J. Pogoda  
Administrative Law Judge

March 23, 2016

SUBMITTED TO:

**JOSEPH PONTE**  
*Commissioner*

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