

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KIMBERLY ROBERTS, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 261
No. 73183
PA(adv)-407

DECISION NO. 35025-A

KIMBERLY ROBERTS, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 272
No. 73224
PA(adv)-422

DECISION NO. 35063-A

Appearances:

Kimberly M. Roberts, 7772 County Highway H, Fremont, Wisconsin, appearing on her own behalf.

William H. Ramsey, Deputy Legal Counsel, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin, Department of Corrections.

DECISION AND ORDER

Kimberly M. Roberts, formerly a social worker at the Wisconsin Department of Corrections Redgranite Correctional Institution in Redgranite, Wisconsin, appeals a letter of

reprimand in lieu of a one-day suspension, a ten-day suspension, and her discharge. Hearings in the matter were held on September 4, 5, 8, 26 and October 3, 20 and 24, 2014, before Examiner Stuart D. Levitan of the Commission's staff.¹ The parties filed written arguments, the last of which was received on January 12, 2015. On July 17, 2015, Examiner Levitan issued a proposed decision rejecting the reprimand in lieu of suspension, affirming the ten-day suspension and modifying the discharge to a lengthy suspension. The parties filed written objections to the proposed decision, the last of which was received on August 17, 2015.

The Commission, being fully advised in the premises, hereby makes and issues the following:

FINDINGS OF FACT²

1. The Department of Corrections (DOC) is the Wisconsin state agency responsible for the maintenance and operation of adult correctional facilities, including the Redgranite Correctional Institution (RGCI) in Redgranite, Wisconsin. DOC maintains an inmate risk assessment tool known as Correctional Offenders Management Profiling for Alternative Sanctions or "COMPAS," which is used by social workers and other staff at RGCI and throughout DOC.

2. At all times material, Appellant Kimberly M. Roberts was a social worker at RGCI, with permanent status in the classified civil service.

3. DOC maintains work rules, executive directives and policies, which, among other things, proscribe employee insubordination, the failure to comply with written policies and procedures, negligence or failure to exercise good judgment and dishonesty or failing to provide truthful and complete information.

4. Roberts did not violate a DOC work rule in October 2013 when she wrote "all COMPAS information" on a form DOC-1163, which was otherwise necessary for the release of certain information to an inmate's mother.

5. Roberts violated DOC work rules by: knowingly and willingly refusing to comply with a directive of November 4, 2013 to complete two COMPAS assessments or enter an explanatory note as to why they were not completed; refusing to follow a directive regarding the use of COMPAS to record a note on November 18 and December 2, 2013; and

¹ The September 26 and October 3 hearings were held at the Commission offices in Madison; all others were held at RGCI.

² We have modified the examiner's proposed findings of fact to eliminate findings that were not "ultimate" or which were not supported by the record. We have amended his proposed conclusions of law and order to reflect our determinations.

disobeying a supervisor's directive and making unauthorized contact with the Waushara County District Attorney on December 10, 2013. Roberts did not violate DOC work rules by sending an email to the director of DOC's Victim Services Office on November 13, 2013.

6. Roberts violated DOC work rules in March and April 2014 by knowingly making false statements concerning purported requests from the staff of the Green Bay Sexual Offender Residency Board (GBSORB) for COMPAS information. Roberts did not commit misconduct by making inaccurate statements about the sequence of her contact with staff of the GBSORB.

Based on the above and foregoing Findings of Fact, the Commission hereby makes and issues the following:

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction over this appeal pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin, Department of Corrections did not have just cause within the meaning of § 230.34(1)(a), Stats., to discipline Kimberly M. Roberts with a letter of reprimand in lieu of a one-day suspension for the conduct described in Finding of Fact 4.

3. The State of Wisconsin, Department of Corrections had just cause within the meaning of § 230.34(1)(a), Stats., to discipline Kimberly M. Roberts with a ten-day suspension for the conduct described in Finding of Fact 5.

4. The State of Wisconsin, Department of Corrections had just cause within the meaning of § 230.34(1)(a), Stats., to discharge Kimberly M. Roberts for the conduct described in Finding of Fact 6.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission hereby makes and issues the following:

ORDER

1. The letter of reprimand in lieu of a one-day suspension issued by the State of Wisconsin, Department of Corrections to Kimberly M. Roberts is rejected and such discipline shall be removed from her employment record.

2. The ten-day suspension imposed by the State of Wisconsin, Department of Corrections on Kimberly M. Roberts is affirmed.

3. The discharge imposed by the State of Wisconsin, Department of Corrections on Kimberly M. Roberts is affirmed.

Dated at the City of Madison, Wisconsin, this 19th day of January 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., provides in pertinent part the following as to certain employees of the State of Wisconsin:

An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

Section 230.44(1)(c), Stats., provides that a State employee with permanent status in class:

... may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission ... if the appeal alleges that the decision was not based on just cause.

Kimberly Roberts had permanent status in class at the time of her discipline and her appeal alleges that the disciplines in dispute were not for just cause.

The State has the burden of proof to establish that the employee was guilty of the misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v Personnel Board*, 53 Wis.2d 123 (1971); *Safransky v Personnel Board*, 62 Wis.2d 464 (1974).

Roberts was a social worker at DOC's Redgranite Correctional Institution (RGCI) in Redgranite, Wisconsin, responsible for programming and treatment needs of inmates housed there. Her performance throughout her 23 years with DOC was generally satisfactory, and she had never been placed on a concentrated performance review.

Correctional Offenders Management Profiling for Alternative Sanctions (COMPAS) is an automated actuarial online risk and needs assessment system used by DOC. It is also the program into which social workers enter various notes (general, program, assessment, and case plan) about inmates which may include federally restricted personal health information (PHI), personally identifiable information, and other confidential material. Inmates do not sign an authorization to have their information entered into COMPAS.

Through the time of hearing in this matter, Roberts believed that entry of her social worker notes into COMPAS violated various federal and state privacy laws, DOC policies, and ethical standards for social workers. DOC maintains that entry of information into and use of COMPAS in no way violates such laws, policies, or standards. Roberts was the only one of the eleven RGCI social workers who refused to use COMPAS as directed.

As of September 2014, there were 4,947 DOC staff (out of about 10,000 total DOC employees) with access to the COMPAS system, plus 314 external users in county juvenile or adult corrections agencies, all of whom were required to undergo certified training for use of the system. Roberts has aggressively challenged RGCI management over COMPAS and filed formal complaints with various state and federal agencies and against various DOC personnel, none of which had been validated as of the hearing.

WRITTEN REPRIMAND IN LIEU OF ONE-DAY SUSPENSION

On January 21, 2014, RGCI Warden Michael Dittman issued Roberts a letter of reprimand in lieu of a one-day suspension for violating DOC Work Rule #1 (“insubordination, disobedience, or refusal to carry out directives or assignments”).

On August 20, 2013, Corrections Unit Supervisor Sharon Harter directed Roberts to not use a release of information form (such as form DOC-1163) for COMPAS. Roberts had received two prior written reprimands. Sometime prior to October 24, 2013, Treatment Director Kalen Ruck informed Roberts that an inmate might soon be requesting that Roberts complete a release of information form so his mother could be informed about his programming assessments and needs. On October 24, 2013, Roberts prepared for that inmate’s signature a copy of form DOC-1163 to authorize DOC to release various information to the inmate’s mother. Under the section “other,” Roberts added, “All COMPAS information.”

Although Roberts had by this point expressed her disagreement with recording information in COMPAS, she reasonably believed that it was appropriate to include “All COMPAS information” on a form which gave permission for DOC staff to release information to an inmate’s mother. Roberts did not use the release of information form for COMPAS specifically against her employer’s direction. She completed a general release of information form for an inmate’s mother to have access to a wide amount of information, including that which may be recorded in COMPAS.

DOC has failed to prove that Roberts committed misconduct by her actions. Therefore, DOC did not have just cause for the imposition of this discipline.

TEN-DAY SUSPENSION

On February 14, 2014, Dittman imposed a ten-day unpaid suspension on Roberts for purportedly violating DOC Work Rules #1 (insubordination, disobedience, or refusal to carry out oral or written directions or assignments), #2 (failing to comply with written policies or procedures), #4 (negligence, or failure to exercise good judgment) and #7 (making false, inaccurate or knowingly malicious statements about DOC, its employees or inmates) for four separate purported occurrences of misconduct:

1. Failing to complete assessments, or document that the assessments were not completed;
2. Violating a supervisor's directive not to investigate COMPAS during work hours;
3. Refusing a directive to document in COMPAS an inmate's special family visit; and
4. Contacting the Waushara County District Attorney without permission.

As to allegation 1, on Monday, November 4, 2013, Harter forwarded a November 1 email to Roberts (which Roberts also received on November 1) and directed her to determine if reentry assessments were completed for inmates Morgese or Schultz. She further directed Roberts to enter a case note if the assessments were not completed so the Division of Community Corrections would know why the assessments were not completed. Roberts replied by email later that morning, stating, "Will do. I thought that was taken care of as these are releases I picked up in the middle and notes suggested all was done."

Roberts did not complete an assessment for either Morgese or Schultz that day or enter a case note into COMPAS explaining why their assessments had not been done prior to their release. As of November 17, 2013, Roberts had neither conducted the assessment nor made the explanatory entry (beginning on November 18, Roberts was away from work and without access to COMPAS for an extended period of time on either paid leave or while serving the ten-day suspension).

At an investigatory interview, Roberts confirmed she: (1) had attended COMPAS training; (2) was aware of the COMPAS reentry assessment requirements; (3) was the assigned social worker for the two named inmates who were released on November 5; and (4) neither completed their assessments, entered a case note explaining why not nor looked in COMPAS to confirm whether the required assessment had been completed.

Roberts was insubordinate and negligent when she failed to complete risk assessments for two inmates about to be released and alternatively failed to enter a note into COMPAS regarding why the assessments were not completed. She was told to complete one or the other of those tasks. She did not. The inmates were about to be released to the Division of Community Corrections and DOC established that the assessments or the notes were necessary for use in that process. Roberts' failure to follow the instructions given to her may adversely affect DOC's operations in the release of the inmates.

As to allegation 2, on November 9, 2013, Roberts emailed Coleen Jo Winston, then the Director of DOC's Office of Victim Services & Programs, from a private email address while at home. She subsequently continued the conversation with Winston from her DOC email address on November 13, 2013, after Winston requested any suggestions from Roberts.

DOC has not proven that Roberts violated DOC's directive to not "investigate" COMPAS during work hours. The text of Roberts's email to Winston indicates that she was responding to a request from Winston for suggestions on how to improve COMPAS. It was reasonable that Roberts used her DOC computer and email account to respond to Winston. DOC has not proven that Roberts was insubordinate.

As to allegation 3, on November 15, 2013, Unit Supervisor Brian Miller and Ruck informed Roberts that the warden had approved a special visit she had requested for an inmate. Written DOC directives required a note to this affect be added to COMPAS. Roberts told Miller and Ruck that she would put the note in WICS (a DOC computer system used for such notes prior to DOC's mandated use of COMPAS). Miller subsequently found that Roberts put a note regarding the special visit in WICS and not in COMPAS. Miller and Ruck spoke with Roberts again on November 18, 2013, and, after providing her with suggested wording for a simple note for the COMPAS file, directed Roberts to put the note into COMPAS. Roberts said she would not comply with Miller's directive. Miller again ordered Roberts to enter the note regarding the special visit into COMPAS on December 2, 2013. Roberts refused.

Roberts admits that she refused to enter a note into COMPAS regarding an approved visit for an inmate. She also admits that in doing so she refused to obey the directions of her superiors at RGCI. She committed the misconduct alleged by DOC. Her insubordination adversely affects DOC's operations. First, it is unacceptable for an employee to disobey her employer's instructions. This is perhaps the most elemental aspect of the employer-employee relationship. Such conduct alone is often sufficient to justify the discharge of an employee. Second, by refusing to record information regarding an inmate in the system implemented by DOC for consolidation of inmate records, Roberts defeats the purpose of the system.

As to allegation 4, prior to December 9, 2013, Miller and Deputy Warden Scott Eckstein directed Roberts not to contact the local district attorney during work hours without supervisor approval regarding her belief that two sexual assaults had been committed in the past. After comparing the birthdates of mothers and children, Roberts came to believe that the inmate(s)-father(s) had illegal sexual contact with the mothers in order to conceive the children. DOC reviewed the allegations previously and determined no further action was warranted.

On December 10, 2013, Roberts called Waushara County District Attorney Scott Blader to discuss matters which he memorialized in a letter that day and which he provided via a blind carbon copy to RGCI Security Director Steve Schueler. In his letter, Blader summarized the information Roberts reported to him and why he would not and / or could not act upon the information.

Roberts willfully disobeyed her superiors when she contacted the Waushara County district attorney without their permission. Roberts argues that her action in contacting the district attorney is protected despite her superior's instructions. She, however, fails to prove that the elements necessary to protect her conduct were present. Her misconduct is therefore not protected. Roberts was again insubordinate and, as discussed above, such insubordination adversely affects DOC's operations.

A ten-day suspension was not excessive given the three acts of misconduct committed by Roberts. Discounting the alleged act of insubordination for "investigation" of COMPAS on work time that was not proven by DOC, DOC still had just cause to impose a ten-day suspension against Roberts. As noted above, following the instructions of one's superiors is one of the most basic duties an employee owes to her employer. Any one of Roberts' proven acts of misconduct in the fall of 2013, alone, may have justified her discharge. Taken together the three acts of misconduct certainly may have justified discharge. For that reason it cannot be said that a ten-day suspension was excessive discipline.

DISCHARGE

On May 23, 2014, Warden Michael Meisner, Dittman's replacement at RGCI, notified Roberts she had been terminated from her position as a DOC social worker at RGCI for violating DOC Work Rule #6, for purportedly providing untruthful and inaccurate information about who initiated contact with Mary Sue Banks (a legal secretary to the Green Bay City Attorney and support staff for the GBSORB) and what information Banks requested, and for purportedly being evasive and failing to provide direct answers about what Banks requested.

On March 6, 2014, DOC Community Corrections Agent Melody Gottowski directed Roberts to have an inmate, who was a sex offender seeking to reside in Green Bay after his release, fill out a form and contact the GBSORB herself to set up a telephone conference for the inmate and GBSORB. On March 7, Roberts called Banks. The record is unclear whether Roberts reached her immediately or left a message which Banks soon returned. On Monday, March 10, Roberts emailed Miller stating, "I have a guy getting close to release that needs a COMPAS assessment and GBSORB would like a copy of the assessment." Miller and Eckstein met with Roberts on March 11 and, according to Eckstein and Miller, Roberts told them that Banks asked for a copy of the inmate's COMPAS information and specifically for his risk rating.

Miller called Banks (who did not testify at the hearing in this matter). Miller testified that Banks informed him that she did not request any information and has never heard of COMPAS. On March 19 and 20, Roberts was questioned by DOC investigators regarding the purported request for COMPAS information from the GBSORB and regarding the sequence of her contact with Banks (specifically, who initiated the contact). Roberts originally said that Banks had called her. Ultimately, Roberts said that they may have played phone tag, but

Roberts made the first call after receiving Gottowski's direction to call GBSORB. She also acknowledged that Banks had not identified COMPAS as an item of interest. Roberts was otherwise evasive and at times inconsistent, especially about Banks' alleged interest in a risk assessment for the inmate.

Corrections Management Services Director Wendy Monfils contacted Banks again. Monfils testified that Banks only informed Roberts the inmate would need to fill out a form available on the internet and provide a letter from a property owner who will permit the inmate to reside at the property. Monfils further testified that Banks said she did not ask for any risk assessment information and that she does not know what COMPAS is.

In her pre-disciplinary meeting on April 11, Roberts stated that "I at no time thought I was implying she (Banks) had requested COMPAS information." This is directly contradicted by Roberts' own words in her March 11 email to Miller. During her pre-disciplinary hearing, Roberts was evasive and combative with Monfils regarding whether or not Banks had requested COMPAS or risk assessment information. Roberts was similarly evasive and combative at the hearing in this matter when questioned by DOC's attorney about whether Banks asked for COMPAS information or a risk assessment during the March phone call. Roberts's equivocation on this point, both at the pre-disciplinary hearing and the Commission's hearing, serve to effectively corroborate the testimony of Miller and Monfils regarding what Banks told them.

The record in this matter establishes that Roberts provided untruthful information about what information Banks requested from her on behalf of GBSORB. Additionally, the record establishes that Roberts was evasive and misleading when questioned by DOC about what information Banks requested. Roberts's dishonesty was misconduct in violation of DOC's Work Rules.³

Roberts's dishonest statements about what information Banks requested from her and her subsequent evasive and misleading statements about the same interfered with DOC's operations. From the record it is clear that Roberts used her contact with Banks as a vehicle to further her personal disagreement with DOC's treatment of PHI in COMPAS. She manufactured a scenario in which someone outside of DOC, who otherwise did not have access to COMPAS or training regarding confidentiality of information viewed in COMPAS,

³ Roberts was inaccurate in her first communications with her superiors regarding whether it was she or Banks that initiated contact with the other. When she was subsequently questioned, Roberts clarified that she made the first attempt to contact Banks, but after playing phone-tag, their substantive conversation may have occurred in a call that was placed by Banks to Roberts. While Roberts' initial statement regarding the sequence of her contact with Banks may have been inaccurate, her error was reasonable in the context of summarizing her communications and, more importantly, corrected and explained when she was questioned about it. Roberts' inaccurate statement about the sequence of contact with Banks was not misconduct in violation of DOC's Work Rules.

ostensibly requested a COMPAS-generated risk-assessment. Roberts' superiors were forced to then needlessly spend time determining what information Banks and GBSORB needed.

Discharge was not excessive discipline. As of February 2014, Roberts was at the penultimate step in DOC's system of progressive discipline, a ten-day suspension. As noted above, some of the offenses committed by Roberts in the fall of 2013, individually, could have warranted her discharge. She was disciplined in February 2014 in part for her willful disobedience of her superiors' directives with regard to COMPAS. Her dishonesty in March and April of 2014 was again related to COMPAS. Roberts had been warned that misconduct will be disciplined. She was specifically and repeatedly warned to discontinue her attacks against DOC's use of COMPAS. Roberts failed to heed those warnings at her own peril.

DOC had just cause to discharge Roberts from her employment.

Dated at the City of Madison, Wisconsin, this 19th day of January 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner