

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JULIE K. SMITH, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0064

Case Type: PA

DECISION NO. 35748-A

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**Appearance:**

William R. Rettko, Rettko Law Offices, S.C., 15460 W. Capitol Drive, Suite 150, Brookfield, Wisconsin, appearing on behalf of Julie K. Smith.

Amesia N. Xiong, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

**DECISION AND ORDER**

This is an appeal by Appellant Julie K. Smith from the decision by Respondent State of Wisconsin, Department of Corrections to terminate her employment. The matter was heard on October 27 and 28, 2015, before James R. Scott who was acting as an examiner with final authority pursuant to an order of the Wisconsin Employment Relations Commission entered on July 1, 2015. The parties filed post-hearing briefs which were received by December 28, 2015.

Being fully advised in the premises, the Commission makes and issues the following:

**FINDINGS OF FACT**

1. Respondent Department of Corrections is an agency of the State of Wisconsin responsible for the operation of adult correctional facilities, including the Kettle Moraine Correctional Institution ("KMCI") located in Plymouth, Wisconsin.

2. Appellant Julie K. Smith had been employed for approximately nine years as an Alcohol or Other Drug Abuse Social Worker at KMCI until her discharge on March 23, 2015.

3. On or about March 19, 2014, Smith provided coworker Chad Birkholz with a written statement concerning information she learned from inmate Trammel Watson.

4. On April 6, May 5 and July 10, 2014, Smith was questioned about what if any information she provided to Birkholz.

5. In November of 2014, DOC learned that Smith had provided Birkholz with a written statement concerning information she had acquired from Watson.

6. Smith was the subject of investigative interviews on December 17, 19 and 23, 2014.

7. Smith was discharged by DOC for failing to provide truthful, accurate, and complete information and for disclosing confidential inmate treatment information.

8. At all times during Smith's investigative interviews, she provided truthful and accurate responses to DOC's inquires.

9. Smith did not disclose confidential inmate treatment information.

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

### **CONCLUSIONS OF LAW**

1. The Wisconsin Employment Relations Commission has jurisdiction to review this matter 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 discharge Julie K. Smith.

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

### **ORDER**

1. The State of Wisconsin, Department of Corrections shall reinstate Julie K. Smith to the position she previously held without loss of seniority or status.

2. The State of Wisconsin, Department of Corrections will compensate Julie K. Smith for any loss of wages and benefits incurred from the date of discharge until the date of reinstatement, less any interim earnings.

Signed at the City of Madison, Wisconsin, this 11th day of February 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

**MEMORANDUM ACCOMPANYING DECISION ORDER**

**Background.**

Julie K. Smith worked as an Alcohol or Other Drug Abuse (“AODA”) social worker in the Kettle Moraine Correctional Institution (“KMCI”) located in Plymouth, Wisconsin. The facility is a medium security prison. Smith ran a lengthy regular AODA group, the successful passage of which facilitated the transfer of inmates to minimum security facilities.

In March of 2014, two correctional officers, Tim Benike and Denise Doying, were investigated for allegedly failing to strip search inmate Trammel Watson upon his return from medical treatment off site.<sup>1</sup> Watson was an ongoing participant in an AODA group being conducted by Smith. During a general comment period in the group session, Watson reported that he had been interviewed by Captain Thelen about the failure to strip search issue. He commented that he felt intimidated by Thelen and that he also feared retaliation by correctional officers who supported the officers who had failed to conduct the strip search.

Smith recorded the information in her notebook. She also orally passed on the information to correctional officer Birkholz who was assisting Benike with his defense on the failure to strip search issue. Watson himself discussed the matter with Birkholz and possibly Benike. Smith provided Birkholz with a written statement describing what Watson had relayed during the group session about the interview with Thelen. All of this activity was tangentially related to DOC’s “investigation” of Benike and Doying. Shortly thereafter the investigative focus turned to Birkholz and Smith. Over the course of the next several months, Smith was interviewed on April 16, May 15, and July 10, 2014. At the same time, Birkholz was fired for “interfering with the investigation of Benike.”

In November of 2014, the Commission scheduled a hearing on the appeal of Birkholz. Smith was subpoenaed by both sides to appear and testify. During the course of the hearing, the management of KMCI learned, allegedly for the first time, that Smith had provided Birkholz with a written statement regarding Watson’s claims.<sup>2</sup> Midway through the hearing, DOC settled the Birkholz matter and he was reinstated.

The warden at KMCI believed that the unexpected revelation of the statement “blindsided” the DOC and “greatly interfered” with DOC’s ability to pursue the case. A renewed investigation of Smith followed with investigative interviews conducted on December 17, 19, and 23, 2014. A pre-disciplinary hearing was held on February 6, 2015, and Smith was placed on administrative suspension. She was discharged on March 23, 2015.

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<sup>1</sup> The two officers were suspended and appealed the disciplinary actions to the Commission. *Benike v. DOC*, Dec. No. 35765 (WERC, 9/2015); *Doying v. DOC*, Dec. No. 35764 (WERC, 9/2015).

<sup>2</sup> KMCI officials knew that Smith had orally shared the information with Birkholz.

The first step in reviewing a decision to determine just cause is to examine whether the employee in fact engaged in the conduct that led to the discipline. The discipline letter here recites five general work rules purportedly violated by Smith. The cited rules themselves are so generic that they provide little guidance to an employee.<sup>3</sup> It would appear, at least in this case, that the DOC decides what conduct it does not like and then finds a rule or rules to apply to the conduct. While the application of such generic rules is troublesome, the termination letter clearly identifies that Smith was discharged because she prepared a written statement summarizing information she learned from Watson (R.Ex.101), provided it to Birkholz, and failed to disclose that fact prior to his hearing before the Commission. Collaterally, her disclosure (to Birkholz) allegedly violated various social worker confidentiality standards. A review of the evidence follows.

### Confidentiality Issue.

Smith is accused of violating “AODA Social Worker confidentiality agreements” by disclosing what Watson told her during a group session concerning his contact with Thelen. The primary problem with this charge is that Smith did not violate any such “agreements.” First of all no agreements were introduced into evidence in this proceeding. More importantly, Wis. Admin. Code ch. SPS 164 defines “Unprofessional Conduct Substance Abuse Professionals” as the disclosure of information about “a patient’s condition.” *Id.* at § 164.01(2)(k). The information Smith directly passed on to Birkholz (and indirectly to others) had nothing to do with Watson’s condition.

DOC argues that its own confidentiality guidelines contained in Executive Order 48 were violated by Smith’s disclosure. The primary focus of Executive Order 48 is to limit the confidentiality of inmate disclosures. It does state that treatment providers may share information with other DOC staff on “a need to know basis.” Treatment providers are allowed to discuss “confidential information” for “appropriate professional purposes” and with persons “clearly concerned with such matters.”

There is a significant question as to whether Watson’s disclosure was in fact a “confidential matter.” Furthermore, to the extent Watson may have had some privacy issues, he waived any such contention when he repeated the story to Birkholz and others.<sup>4</sup>

Smith contends that she told Birkholz about the Watson disclosure because of Watson’s concerns that correctional officers might retaliate against him for telling a member of management (Thelen) what happened.

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<sup>3</sup> For example, Rule 28 prohibits “interfering with, misleading or obstructing the Employer in the performance of official functions of the department, including investigations and audits.”

<sup>4</sup> As a practical matter, any right to confidentiality was Watson’s not DOC’s.

Witness Marlena Larson, Smith's clinical supervisor, testified that disclosure of information obtained during a group session which was unrelated to AODA treatment did not violate confidentiality standards. She did note that disclosing the fact that someone was in treatment could violate confidentiality standards but not at KMCI where the names of participants are posted on the wall.

In the final analysis, it would appear that the confidentiality issue was more of a "throw in" claim than a serious concern of DOC. I conclude that Smith's disclosure did not violate either of the cited bases.

#### Lack of Truth / Misleading Investigation.

Notably, the key factor behind the discharge was DOC's belief that Smith "failed to provide accurate and truthful information" regarding the document she prepared and provided to Birkholz. Among the problems with DOC's position is that Smith did in fact truthfully respond to DOC's interrogators. In her view the "statement" she gave to Birkholz about the incident was not the "notes" she took contemporaneously with the group session. DOC's inquiries were about her notes. DOC utilizes a type of investigative technique involving the preparation of questions ahead of time. Two supervisors are present and the employee is formally warned about the consequences of failing to cooperate. One supervisor questions the witness and the other records the responses either by hand or on a computer. The interviews are not mechanically recorded and the witness is not asked to sign or verify the accuracy. In this case, the questions were not open ended. The overall tone of the inquiries is not designed to exact broad responses. Employees and Smith in particular answer the question that is asked and nothing more. Perhaps the narrow guarded responses are in part due to the manner of investigation. It is likely that DOC suspected some form of document was provided to Birkholz by Smith. She was formally interviewed three times but no one bothered to simply ask an open ended question such as: "Have you provided anyone with a written statement about the Watson situation?" Smith could have volunteered the information but elected not to do so. Most importantly from the first interview on Smith openly acknowledged telling Birkholz about the incident.

While not referenced in the termination letter, DOC was obviously angry that the Smith statement showed up at the Birkholz appeal hearing before the Commission.<sup>5</sup> According to DOC, it was "blindsided" and Smith was "discredited" as a witness when the Smith statement was suddenly produced by Birkholz' attorney. I would note that parties are required by Wis. Admin. Code ERC § 93.02 to disclose exhibits at least three working days prior to the hearing. Additionally, DOC, acting through its attorney, could have engaged in discovery to obtain witness statements.<sup>6</sup> There was apparently no effort by the DOC lawyer in the Birkholz matter

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<sup>5</sup> Smith's Exhibit 14 is the statement submitted by DOC in the unemployment compensation proceedings. It chronicles DOC's unhappiness with the revelation of the statement at the Commission proceeding.

<sup>6</sup> The attorney who represented DOC in the Birkholz matter is not the counsel in this matter.

to interview Smith prior to the hearing even though she was subpoenaed to appear. There is simply no excuse for being “blindsided” in these matters assuming even minimal prehearing preparation.

As for Smith being “discredited” as a witness, the statement itself is consistent with what she told DOC investigators about the Watson matter. If Smith had varied from her version of events, it could have been used for impeachment purposes. Other than that, the statement is a hearsay document and not the best evidence when the witness is present.

DOC knew what Smith had learned from Watson. They also knew that she had relayed the information to Birkholz. The fact she prepared a written statement repeating the same information is irrelevant. In the end, the statement was of no help to Benike and despite their belief to the contrary would not have helped Birkholz.

DOC has failed to prove that Smith intentionally misled it or interfered with its investigation or was untruthful. At worst, Smith was guarded in her responses to DOC’s inquiries which, in the end, caused no harm. Accordingly, the discharge is rejected.

Signed at the City of Madison, Wisconsin, this 11th day of February 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman