

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BRENDAN WASHETAS, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0476

Case Type: PA

DECISION NO. 39272

Appearances:

Brendan Washetas, N9710 Foxglove Drive, Camp Douglas, Wisconsin, appearing on his own behalf.

Anfin Jaw, 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

On July 29, 2021, Brendan Washetas filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A telephone hearing was held on September 28, 2021. The parties made oral argument at the conclusion of the hearing.

On November 2, 2021, Examiner Jones issued a Proposed Decision and Order affirming the discharge by DOC. The parties did not file objections to the Proposed Decision by the deadline given of November 8, 2021.

Being fully advised on the premises and having considered the matter, the Commission makes and issues the following:

FINDINGS OF FACT

1. Brendan Washetas was employed by the State of Wisconsin Department of Corrections (DOC) as a correctional officer at the New Lisbon Correctional Institution (NLCI) and had permanent status in class when he was discharged.

2. DOC is a state agency responsible for the operation of various correctional facilities, including NLCI in New Lisbon, Wisconsin.

3. Washetas made numerous postings on Facebook that were disparaging and derogatory in nature.

4. DOC deemed the postings referenced in Finding 3 to be detrimental to the department. DOC also concluded that the postings impaired and adversely affected Washetas' ability to perform his job duties as a correctional officer.

5. DOC discharged Washetas for the postings referenced in Finding 3.

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 over this appeal pursuant to Wis. Stat. § 230.44 (1)(c).

2. The State of Wisconsin Department of Corrections had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Brendan Washetas.

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

ORDER

The discharge of Brendan Washetas by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 15th day of November, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., states in pertinent part:

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.

Washetas had permanent status in class at the time of his discharge and his appeal alleges that the discharge was not based on just cause.

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

This case involves Washetas' postings on Facebook. Some of the postings which were cited in Washetas' discharge letter are reviewed below.

- His Facebook cover photo featured a picture of Nazi leaders Adolf Hitler, Heinrich Himmler, Rudolph Hess and Joseph Goebbels with the caption "FRIENDS" written in the same style as the television show by that same name. Underneath the picture was a long post Washetas wrote which praised Hitler and denigrated Jews.
- Another post showed a picture of the World Trade Center burning on 9/11, to which Washetas had commented: "Thanks Israel."
- Another post showed a picture of Irish elementary school children in their school uniforms, to which Washetas had commented: "Diversity is a code word for white genocide/replacement".
- Another post was a picture of an anime white female child "curb stomping" a black person, to which Washetas had commented: "Let's try this again".
- Another post contained a collage of pictures of a transgender person transitioning over time. Washetas' comment was: "big oof. See this tragic tale all over Tinder. What a waste of a beautiful person. Fuck Marxism. Fuck liberalism. So, so sad. Never send your kids to public college or subject them to this poisonous culture."
- Another post was a video which mocks the appearance of a biracial child of a mixed race couple, to which Washetas had commented: "dead".

- Another post showed a picture of a dead black woman in a car to which Washetas had commented: “This is why blacks get killed. They don’t follow clear directives and they act erratically. By what’s seen in the bodycam footage, this was a justified use of force and, tragically, she has nobody to blame but herself. As Jesse says, the race hustlers will swarm to this story and make this woman out to be a pillar of the community who has been wrongly murdered by police. There will most likely be a lawsuit and some settlement. Remember, black criminals are never at fault for their own actions. It’ll always be Whitney’s (sic) fault because of muh (sic) racism. The future looks bleak.”

When Washetas was interviewed by DOC investigators, he admitted to posting all the matters just referenced.

In his appeal to the Commission though, Washetas changed his position and contended that some of the posts referenced above:

never existed, such as an alleged Facebook cover photo of Adolph Hitler and his top men with the caption “FRIENDS” paired with a long post praising his political movement. This is a detestable lie and is a distorted, twisted misrepresentation of evidence

The record facts belie this claim. During its investigation, DOC obtained hard copies of all the Facebook postings referenced above, including the one mentioned in the paragraph above. Given their existence in hard copy format and their inclusion in the record as DOC exhibits in this matter, we find that Washetas did indeed make all of the Facebook postings referenced above. He is hard pressed to deny the existence of same.

The Facebook postings speak for themselves. DOC decided that they (i.e., the postings) were disparaging and derogatory in nature. Building on that premise, DOC deemed the postings detrimental to the department. In the discharge letter, DOC opined on why Washetas’ Facebook postings were problematic for the department, and the connection/nexus between the postings and his duties as a correctional officer. It provided thus:

The effectiveness of the Department of Corrections depends, in part, on the respect and trust of the public, its employees and the persons in our care (PIOC) it supervises, that the DOC will conduct its affairs fairly, even handedly and without bias. Your postings are of a nature that tends to have detrimental effect on establishing and maintaining strong working relationships within a diverse workforce and with a diverse population. The DOC’s rehabilitative mission may also be impacted when PIOC’s become aware of apparent racial or religious animus on the part of DOC employees. PIOC’s may assume that the DOC’s actions are a product of bias, rather than well-founded and in pursuit of its

mission. Expression of animus of this nature additionally creates significant safety concerns in the institution.

Your continued employment creates a serious liability for the department. Your Facebook postings have diminished the Department's and the public's ability to trust that you are able to perform the duties of your position. Any report, such as an incident report or conduct report that you submit on any African-American PIOC cannot be taken seriously now that we know the disdain you have for African-American people.

The Commission concurs with that reasoning. Correctional officers are supposed to be role models who work with inmates of different races and religions. Washetas' Facebook postings referenced above impaired and adversely affected his ability to do that (i.e., perform his job duties as a correctional officer) and compromised both his own safety and his coworkers in the institution.

In so finding, it is expressly noted that DOC has a policy dealing with Social Media, namely Executive Directive #87. In Section VII, it provides:

Employees shall not post anything on SMNS (Social Media Networking Sites such as Facebook) that has the potential to negatively affect the work environment, impair the DOC's ability to carry out its mission, impair relationships with DOC partners, or impair the public trust. Violations to this policy may result in discipline, up to and including termination, in accordance with Executive Directive 2.

Additionally, DOC has a work rule that applies to off-duty conduct, namely work rule #25. It provides:

Engaging in any outside activities (including violations or convictions of criminal or other laws) which may impair the employee's independence of judgment or impair the employee's ability to perform his/her duties as an employee of the state.

This work rule is very broad. It proscribes DOC employees from "engaging in any outside activities . . . which may impair the employee's . . . ability to perform his/her duties as an employee of the state." On its face, it is broad enough to apply to postings made by DOC employees on social media that are deemed by DOC to be detrimental to the department and impair and/or adversely affect an employee's ability to perform their job duties.

Washetas offers the following defenses to excuse and/or mitigate his conduct.

First, Washetas contends that the NLCI employee who reported his Facebook postings to management (CS) did so when he was being investigated himself. According to Washetas, CS reported him to management to retaliate against him and his mother (who also works at NLCI). Even if that is what happened, and CS's motive in reporting Washetas' Facebook postings was the proverbial payback, it simply does not matter. That is because the focus of this case is not on CS's motive in reporting Washetas' Facebook postings to management; instead, the focus is exclusively on Washetas' Facebook postings.

Next, Washetas challenges the sufficiency of the investigation which DOC conducted. After management received the claim noted above from CS about Washetas' Facebook postings, it did what employers are supposed to do when they receive a claim from an employee about objectionable conduct/behavior by another employee. It investigated the claim. It would have been remiss for DOC not to do so. The investigator who was assigned to investigate CS's claim about Washetas' Facebook postings conducted a textbook investigation. He first interviewed potential witnesses, with some people being interviewed twice. After that, he compiled a report and made determinations about the facts. In doing that, he was a neutral fact finder. In our view, there is nothing about DOC's investigation that raises any proverbial "red flags" with the Commission. Accordingly, we find that DOC's investigation was not tainted or biased. It therefore passes muster.

Next, Washetas notes that after he was fired, he deleted all of his Facebook postings. He wants credit for doing that. However, his doing that does not wipe the proverbial slate clean or excuse his conduct. Simply put, Washetas is still responsible for his Facebooks postings at issue herein.

Finally, Washetas wants this case to be about what he believes. However, that is not what this case is about; it is about what he **did**. What he did, of course, was make numerous postings on Facebook that were disparaging and derogatory in nature. The punishment which DOC meted out to him was for those postings, not his beliefs.

Having considered those defenses and found them unpersuasive, the Commission finds that Washetas' Facebook postings constituted misconduct for which he could be disciplined.

The focus now turns to the discipline which was imposed. Washetas contends that his discipline should have been less severe than discharge; in his view, a letter of expectation should have sufficed. He notes in this regard that prior to this matter, he had no prior discipline. Thus, in this case, the Commission is tasked with deciding whether discharge was excessive under the circumstances.

In prior cases where the Commission has overturned a discharge, one reason it did so was because the charge against the employee was not substantiated. Here, though, the charge against Washetas was substantiated. That being so, the Commission lacks that objective basis for overturning the discharge. Next, in other cases where the Commission reduced discipline, one reason it did so was because the employee was a long-term employee. That is not the situation here. Washetas was a short-term employee with just one and a half years with DOC. Therefore, the Commission lacks that objective basis as well for overturning the discharge.

When an employee commits serious misconduct, as Washetas did, it logically follows that their discipline can likewise be serious. Here, Washetas' misconduct warranted a skip in the normal progressive disciplinary sequence. Thus, DOC was not obligated in this instance to suspend Washetas; it could discharge him.

In so finding, the Commission has considered Washetas' claim that he was subjected to disparate treatment and punished more harshly than another DOC employee. An employee who raises a disparate treatment claim has the burden of proving that contention.

Washetas cites what happened to JL, a black correctional officer at Columbia Correctional Institution who also recently was found to have made offensive racial posts on Facebook. In one posting, JL said: "Y'all did it all wrong u supposed to fuck up the white peoples shit, not ours." In another posting, JL said: "If y'all let them wack [sic] corn smelling ass Mexicans that don't even belong over here that supposed to be across the border scare y'all, y'all need to be scared." JL was also found to have committed other misconduct that was unrelated to her Facebook postings. While the record does not show the punishment that JL received from DOC, Washetas avers it was a five-day suspension. For the purpose of discussion, that assertion is assumed to be true. In DOC's standard disciplinary progression, a five-day suspension is the last discipline imposed before discharge; it is also the longest suspension that DOC can impose.

The Commission does not find Washetas' disparate treatment argument to be persuasive. Unlike the racist posts of JL, Washetas' posts also promoted violence and anti-Semitism in addition to racism. DOC could reasonably conclude that this misconduct was more severe than that of JL and impose a higher level of discipline.

Given the fact that Washetas was not subjected to disparate treatment, the fact that he was not a long-term employee, and the fact that his misconduct was serious, the Commission finds that discharge was not an excessive punishment under the circumstances.

Given the foregoing, it is concluded there was just cause for Washetas' discharge and it is therefore affirmed.

Issued at Madison, Wisconsin, this 15th day of November, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman