

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD SCHNEITER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0335

Case Type: PA

DECISION NO. 39410

Appearances:

Nathaniel Cade, Jr., Carlos R. Pastrana and Antonique Williams, Attorneys, Cade Law Group, LLC, P.O. Box 170887, Milwaukee, Wisconsin, appearing on behalf of Richard Schneider.

Gesina S. Carson and Rachel L. Bachhuber, Assistant Attorneys General, Wisconsin Department of Justice, P. O. Box 7857, Madison, Wisconsin appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On January 13, 2020, Richard Schneider filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Corrections (DOC).

The parties thereafter engaged in extensive discovery and waived compliance with the 120-day time period established by Wis. Stat. § 230.445 (3)(c).

A telephone hearing was held on September 27 and 28, 2021 by Commission Examiner Peter G. Davis. A transcript of the hearing was prepared, and the parties thereafter filed written argument-the last of which was received January 4, 2022.

On April 8, 2022, Examiner Davis issued a Proposed Decision and Order affirming the discharge by DOC. Schneider filed objections to the Proposed Decision on April 13, 2022, and DOJ filed a response to the objections on April 15, 2022.

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

FINDINGS OF FACT

1. At the time of his discharge, Richard Schneider, herein Schneider, was employed by the State of Wisconsin Department of Corrections (DOC) as a Deputy Warden. He had permanent status in class and had worked for DOC in various positions for 42 years.

2. In July 2019, Schneider's Facebook account allowed any of his Facebook friends, including several co-workers, to view two memes that he had posted which were admitted to be offensive to the Muslim community.

3. On July 17, 2019, Schneider had an unauthorized conversation with a member of the media. Later that day, a front-page story ran in the Milwaukee Journal Sentinel with the headline "Deputy prison Warden posts Facebook meme that compares Muslim children to garbage."

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. By his misconduct set forth in Findings of Fact 2 and 3, Schneider engaged in outside activities 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.

3. By his misconduct set forth on Findings of Fact 2 and 3, Schneider was grossly negligent and engaged in conduct which causes a substantial risk to the safety and security of Department of Corrections facilities, staff, the community or inmates, offenders or juvenile offenders.

4. The State of Wisconsin Department of Corrections did have just cause within the meaning of Wis. Stat. § 230.34 (1)(a) to discharge Richard Schneider.

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

ORDER

The discharge of Richard Schneider by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 28th day of June, 2022.

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.

Schneiter 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 Schneiter 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).

Schneiter was the Deputy Warden of the Wisconsin Correctional Center System which consists of 14 minimum security prisons with approximately 2000 inmates and 460 staff. He was responsible for program implementation, security, treatment, food service and maintenance, and supervised the Management Services Director, Program Director, Security Director and four Superintendents.

Schneiter had a Facebook account which could be accessed by any of his Facebook friends. Some of those friends were current DOC employees. In June 2019, Schneiter posted five memes on his Facebook page.

In July 2019, one of his Facebook friends alerted a reporter for the Milwaukee Journal Sentinel to the posted memes. The reporter contacted Schneiter by email using Schneiter's DOC email address. In response, Schneiter called the reporter and they had a conversation. Shortly after the conversation ended, Schneiter then notified DOC that the media contact had occurred. Later that day, a story appeared on the front page of the Milwaukee Journal Sentinel with headline "Deputy prison Warden posts Facebook meme that compares Muslim children to garbage." The first portion of the article stated:

A top official in Wisconsin's minimum-security prison system in recent weeks posted a string of Facebook memes that compared Muslim children to garbage, equated flying the LGBTQ rainbow flag with hoisting the Confederate flag and laughed off accusations of racism.

In one, Deputy Warden Richard "Sam" Schneiter posted a photo of two full black garbage bags next to a Muslim woman and child in black burqas that covered their faces and bodies. "I saw her standing there and told her she had three beautiful children," text pasted onto the photo says.

Another post contrasted the rainbow flag with the Confederate flag and included the words, "If they have the right to fly theirs, we Deserve the Right to Fly Ours."

In an interview Wednesday, Schneiter said he posted the images to bring attention to messages that zip through the internet — including ones he disagrees with.

"That's not funny. If anything, it's very offensive," Schneiter said of the post about a Muslim woman and child. "But this is the type of stuff you see on Facebook. But it starts discussion, which I try — which, I guess, that's what I do."

He said in hindsight he should have written in his post that he considered the meme offensive.

"I like discussion and I thought that's what I was promoting," he said.

DOC placed Schneiter on paid administrative leave and conducted an investigation. On November 8, 2019, DOC discharged Schneiter.

The rationale for discharging Schneiter is set forth in the following November 8, 2019 letter:

This letter is formal notice of the termination of your employment as a Deputy Warden with the Division of Adult Institutions, Wisconsin Correctional Center System, effective November 08, 2019, for violation of the following State of Wisconsin work rules that apply to all Department employees:

- WR 2 – Failure to comply with written agency policies and procedures.
- WR 14 – Intimidating, interfering with, harassing, demeaning, treating discourteously, or bullying, or using profane or abusive language in dealing with others.
- WR 25 – Engaging in outside activities 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.

Specifically, in July 2019, you responded to a reporter's inquiries, without approval and in violation of the DAI Media Policy 300.00.79, regarding various memes you posted on Facebook. The memes were described as being derogatory towards minorities, Muslims and the LGBTQ community. As a result, a newspaper article

was published in a major Wisconsin newspaper which indicated a top official posted a string of memes that compared Muslim children to garbage, equated flying the LGBTQ rainbow flag with hoisting the Confederate flag and laughed off accusations of racism.

Your postings were in violation of Executive Directive 05 – Employee Harassment and Discrimination. Supervisors, especially Career Executive staff, are held to a higher standard and expected to intervene and take steps to stop behavior that could reasonably be considered a violation of this policy.

Your postings furthermore impaired your ability to perform your duties as a Deputy Warden. For example, one of your postings referenced the Confederate flag as “our” flag. This flag has served as a symbol of slavery and white supremacy, which has caused it to be very popular among white supremacists. For many African American persons, the Confederate battle flag stands as a symbol of their ancestors’ oppression and labeling as property to be sold, beaten, exploited, and tortured.

Denegation [sic] of minorities, Muslims and the LGBTQ community casts public doubt about your ability to lead, casts public doubt about your ability to treat inmates, staff, and members of the public fairly and impartially, sows discord and divisiveness, and sets a poor example.

The effectiveness of the Department of Corrections (DOC) depends, in part, on the respect and trust of the public, its employees, and the offenders 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 a detrimental effect on establishing and maintaining strong working relationships within a diverse workforce and with diverse community partnerships. These postings could additionally potentially interfere with DOC recruitment. Your postings – which were shared with approximately [sic] 1,200 Facebook friends, many of whom are DOC employees, eliminated your ability to act as a role model and as a supervisor. Any supervisory actions you may take are now suspect.

The DOC’s rehabilitative mission may also be impaired when inmates become aware of apparent racial, religious, or sexual-orientation animus on the part of DOC employees. Inmates 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 safety concerns in the institutions.

When interviewed, you reported to Department investigators you posted the memes to spark conversation and bring attention to the messages that are on the internet, even ones you disagree with. However, you did not provide any comments on the posting indicating you disagreed with the message the memes were exhibiting. Your posts demonstrated poor judgment and you, in effect, acknowledged that error

in judgment when you either deleted or had someone else delete most of the posts after the newspaper article was published.

The DOC is committed to maintaining a work environment free from discrimination, harassment, and retaliation. High ranking civil servants may from time-to-time express controversial viewpoints on matters within their “jurisdiction.” On the other hand, the general expectation is that people in that category will not publicize their views on topics outside of their domain. Due to your position as a Deputy Warden, higher restraint must be exercised in expressing your viewpoint on matters, especially those that fall outside of the job-related responsibilities. Your views command more attention and you are held to a higher standard of ethical expectations both on and off-duty due to the level of position that you hold with the Department. The public expects employees of the DOC, especially high-ranking employees, to behave with a high level of propriety.

Additionally, you are regularly tasked with enforcing policies and procedures, and ensuring the discipline, safety and security of our staff and inmates. As a Career Executive employee, you are expected to serve as a representative of the Department of Corrections and serve as an example of what is [sic] means to carry out the Department’s mission, vision and core values. When you fail to do so, you represent the Department as a workplace that condones such behavior. 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. Therefore, you have left me no choice than to skip progression and terminate your employment.

Schneiter denies having engaged in any misconduct worthy of formal discipline and attacks the DOC discharge rationale with multiple arguments.

The record reflects that DOC relied on four of the five memes when deciding to discharge Schneiter. Schneiter acknowledges that the meme portraying Muslim children as garbage bags was offensive. From that testimony, it appears that Schneiter would also agree that the meme that “Bacon America Great Again” would also be offensive to Muslims confined by or employed by DOC. However, he disputes the alleged offensive nature of the other two memes. Schneiter’s acknowledgment as to the offensiveness of the two Muslim memes suffices for purposes of our evaluation of this matter.

Given the foregoing, the Commission concludes that the two memes are offensive.

Schneiter contends that the investigation into his conduct was flawed. He argues that had DOC interviewed more individuals, there would have been support for his testimony that he is not racist, anti-LGBTQ or anti-Muslim and that the memes were on his Facebook page only for the purpose of provoking discussion. DOC points out that Schneiter could have but did not call any of those individuals as witnesses at hearing. However, more fundamentally, the record establishes that Schneiter was not found to have engaged in misconduct because DOC concluded he was a

bigot, anti-LGBTQ or anti-Muslim or that the reason for his postings mattered.¹ Rather, the DOC decision was based on a conclusion that the postings and ensuing publicity called into question the legitimacy of any future action Schneider might take as a DOC employee and more broadly called into question DOC's commitment to its core values if it retained Schneider as an employee.

Schneider alleges that the investigation (and ultimate discharge decision) was a sham because it was preceded by the public comment of Lieutenant Governor Mandela Barnes that:

Well, now he's the one that has to be taken out. Too much of our nation's system of corrections is based on dehumanization. To add bigotry to the mix is dangerous and cannot be tolerated.

DOC presented credible testimony that the Barnes comment did not influence the investigation or the discharge decision and thus the Commission rejects this allegation.

Schneider asserts that because DOC did not have a social media policy in place at the time of his Facebook posts, he did not know that the posts might expose him to discipline. The Commission concludes that it would be self-evident to any reasonable DOC employee (particularly a high-ranking DOC employee) that posting memes offensive to the Muslim community was misconduct-particularly in the context of the diverse DOC workforce and prison community.

In addition, several State employee work rules² were in effect at the time in question and known to Schneider.

Work Rule 25 prohibited Schneider from:

¹ The parties disagreed as to who had the obligation/burden to seek to recover any meme-related Facebook comments that were apparently deleted by Schneider's son. While any such comments may well have confirmed Schneider's rationale for the postings, the Commission need not resolve this portion of the parties' dispute. Although DOC may have been skeptical of Schneider's purported rationale for posting the memes, the record as a whole does not support a conclusion that DOC would have reached a different disciplinary decision had the comments been accessible and provided. Furthermore, those who viewed the posts on Facebook or read about them in the Journal Sentinel were going to come to their own conclusions as to why Schneider posted the memes and some would inevitably reject his purported rationale as untrue or irrelevant. Thus, the damage done to the perception of DOC was done whatever his rationale.

² State employee Work Rule 2 prohibits employees from failing to comply with written agency policies and procedures. DOC contends that Schneider violated this work rule by not following the DOC Media Policy which it asserts required Schneider to seek DOC approval before contacting the Journal Sentinel reporter. Schneider asserts he did not violate the policy because the media contact occurred while he was on his lunch hour and not in uniform. More broadly, he contends that he was not speaking as a DOC representative.

It is noteworthy that shortly after the media contact occurred, Schneider did advise DOC of same. That conduct indicates some realization on Schneider's part that whatever the particulars of the media policy might be, the nature and context of this media contact was such that he should have sought prior approval. In any event, it is apparent that this violation did not play a significant role in the DOC decision to discharge Schneider.

Engaging in outside activities 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.

While Schneider contends that the Facebook posts and media contact did not impair his ability to perform his duties as Deputy Warden, the testimony of Fessahaye and Pechacek and the rationale expressed in the discharge letter persuades the Commission otherwise.³

Given Schneider's clear violation of Work Rule 25, the Commission declines to explore his culpability under a Work Rule 14 analysis.

If the Commission concludes that he did engage in misconduct, Schneider contends that DOC did not have just cause to discharge him. In this regard, he points to the general DOC interest in progressive discipline and to his 42 years of high-quality discipline free service with DOC.

Schneider is correct that his years of quality service and discipline free record are relevant considerations when determining what level of discipline is appropriate under the just cause standard. However, DOC points to Executive Directive #2 which establishes five types of prohibited "serious misconduct" which can warrant discharge without progressive discipline. DOC contends discharge is the appropriate discipline because Schneider is guilty of:

5. Gross negligence or conduct by an employee which causes a substantial risk to the safety and security of our facilities, staff, the community or inmates, offenders or juvenile offenders under our care.

Schneider asserts that he was not grossly negligent and did not engage in conduct that created a substantial risk to anyone. Particularly in the context of Schneider's duties as a Deputy Warden and publicity generated by the Journal Sentinel story (which inmates could access), the testimony of Fessahaye and Pechacek persuades the Commission that Schneider was grossly negligent and did create a substantial safety and security risk.

Schneider cites to multiple decisions in which the Commission rejected the discharge of employees who engaged in misconduct he alleges was more severe than that which now confronts the Commission. Many of those decisions are factually distinguishable for a variety of reasons. However, the overriding distinction is that none of those employees were high ranking DOC employees who then became the subject of front-page news in a newspaper with State-wide circulation. Thus, the Commission does not find Schneider's argument to be a persuasive basis for reducing the level of discipline imposed here.

Given all of the foregoing, although the Commission has narrowed the breadth of Schneider's misconduct to the Muslim community, the Commission is persuaded that DOC has nonetheless met its burden under *Safransky* to establish that Schneider's misconduct "sufficiently

³ DOC cites in part to the portion of Executive Directive #2 which requires that high ranking employees such as Schneider have a responsibility to investigate claims of discrimination and harassment. DOC reasonably questions whether employees would have confidence in Schneider's ability to meet that responsibility in light of the memes.

undermined the efficient performance of the duties of employment” to an extent that just cause for discharge is present. Therefore, the Commission affirms the discharge.

Issued at Madison, Wisconsin, this 28th day of June, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman