

STATE OF WISCONSIN

PERSONNEL COMMISSION

DRAGOS ZEICU,
Complainant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES
[DEPARTMENT OF HEALTH AND
FAMILY SERVICES]¹**
Respondent.

DECISION AND ORDER

Case No. 96-0043-PC-ER

Mr. Zeicu, through his attorney, requested waiver of an investigation of his charge of discrimination so he could proceed directly to a hearing on the merits. His request was granted at the Commission's meeting on April 24, 1996. The parties agreed to the following statement of the hearing issues at a prehearing conference held on July 12, 1996:

1. Whether respondent discriminated against complainant on the basis of national origin and race, and retaliated against him for participating in activities protected by the Fair Employment Act (FEA) in regard to being suspended ten days without pay, effective March 28, 1996.
2. Whether respondent discriminated against complainant on the basis of national origin and race, and retaliated against him for participating in activities protected by the FEA in regard to not being promoted to the position of Temporary Supervising Youth Counselor, in April, 1996.

The hearing was held on October 29-30, 1996, with the parties agreeing to file simultaneous post-hearing briefs. The final brief was received by the Commission on November 19, 1996.

FINDINGS OF FACT

1. Mr. Zeicu has been employed by the Department of Health and Social Services (DHSS) at Lincoln Hills School (LHS) since November 14, 1993, where he was

¹ Pursuant to the provisions of 1995 Wisconsin Act 27 which created the Department of Health and Family Services (DHFS), the authority previously held by the Secretary of the Department of Health and Social Services (DHSS) with respect to the position that is the subject of this proceeding is now held by the Secretary of DHFS.

- hired as a Youth Counselor 1 (YC1) (Exh. R-121) and was promoted to a YC2 in April 1995.
2. Mr. Zeicu is a gypsy by ancestry.^A He emigrated from Romania to the United States in 1982, and became a naturalized U.S. citizen.
 3. Mr. Zeicu's participation in protected activities under the FEA include filing two prior complaints with the Personnel Commission against LHS. The first complaint (case number 95-0090-PC-ER) (Exh. C-1) was filed in July, 1995, alleging that he was denied promotion in December, 1994, and again in June, 1995;² and that he was subject to harassment and to less favorable terms and conditions of employment because of his national origin and race. The second complaint (case number 95-0174-PC-ER) (Exh. C-2) was filed in December 1995, alleging that his 5-day suspension in November, 1995, was imposed based on his national origin and race, as well as in retaliation for having filed the prior charge of discrimination. These cases are pending investigation at the Commission.
 4. Mr. Zeicu's participation in protected activities also includes complaints he filed internally at DHSS. His complaints were referred to and investigated by Mr. Rudolph Bentley, the Affirmative Action Officer for DHSS' Division of Youth Services (such division includes LHS). Mr. Bentley's written findings were included in his memo dated December 15, 1995 (Exh. R-149), which was sent to Paul Westerhaus, the Superintendent at LHS. The allegations investigated by Mr. Bentley did not involve the same adverse actions as addressed in this decision for case number 96-0043-PC-ER.
 5. The following individuals were aware prior to February, 1996, of Mr. Zeicu's participation in part or all of the above-noted protected activities: Merle Sheridan, Bruce Sunde, Terry Timm and Paul Westerhaus; all white males born in the U.S. (Exh. C-6, p. 4)

Prior Disciplinary History

6. Mr. Zeicu had been disciplined prior to the ten-day suspension, receiving a letter of reprimand dated December 2, 1994 (Exh. R-129), a one-day suspension

^A The term "ancestry" was substituted for "race". Although "ancestry" was not used to frame the hearing issue, the parties knew prior to hearing that complainant claimed protected status by virtue of being a "gypsy".

² The dates of the referenced promotion denials in case number 95-0090-PC-ER, were determined from information contained in Exh. C-7, p. 9-11; and in Exh. R-149, the portion recited in ¶25 of this decision. The June 1995 promotion went to Mr. Zeicu's wife.

by letter dated February 14, 1995 (Exh. R-130), a three-day suspension by letter dated July 10, 1995 (Exh. R-131), and a five-day suspension by letter dated October 30, 1995 (Exh. R-132). Management's view of each action is detailed in the disciplinary letters, and is summarized in the following paragraphs.

7. The basis for the letter of reprimand is recited below from Exh. R-129.³

On 11/7/94, it was reported to management that you entered the Shift Supervisor's Office⁴ and pointing your finger at the Supervisor on duty, stated, "I want you (pointing your finger at the supervisor) to tell your friend . . . he better lay off messing with my business". After a brief discussion with the supervisor, you stated further, "I'll make it my business and take care of it outside".

[LHS] management is charged with ensuring a harassment-free work environment. Management is concerned about this incident and this behavior, because it is disruptive and causes serious harm to the productivity, efficiency, and stability of our operations.

8. The basis for the one-day suspension is recited below from Exh. R-130, dated February 14, 1995.⁵

It was recently reported to LHS management, that you made several inappropriate comments to another staff. The comments reported were: I don't like working with relief staff; relief staff should only walk the halls; relief staff shouldn't answer the phone because they don't know what is going on, and if you could not get a switch, you would call in sick if you had to work with this staff.

[LHS] management is charged with ensuring a harassment-free work environment. Management is concerned about this incident and this behavior, which creates an intimidating, hostile, and offensive work environment. This is disruptive, and causes serious harm to the productivity, efficiency, and stability of our operations.

9. The basis for the three-day suspension is recited below from Exh. R-131.⁶

On 6/22/95, LHS management received a written statement from an employee alleging harassment by you. Specifically, on 6/22/95, at

³ This discipline is included as an adverse action in case number 95-0090-PC-ER.

⁴ The supervisor making the allegations about the 11/7/94 incident was Bruce La Mere. (Exh. C-1, p. 3)

⁵ This disciplinary action also is included as an adverse action in case number 95-0090-PC-ER.

⁶ Ibid.

approximately 7:20 A.M., you placed a telephone call to this employee, questioning her regarding a shift switch. When she stated she didn't want to switch, you said, "you'll pay for this one". She then asked you if that was a threat, and you stated "No, it is a fucking fact". When she responded with "why", you stated, "that's just the way it's got to be".

10. The basis for the five-day suspension is recited below from Exh. R-132.⁷

On 9/22/95, the Shift Supervisor responded to a staff assault, and directed the student who witnessed the incident to write an official statement. It was reported to us by that youth, that you directed him to rewrite the statement describing the serious assault on a staff member. In describing what the youth witnessed, he said you were holding the perpetrators face on the floor by putting your hand on the back of his head. The youth states that you said this did not look good to be described in such a manner, and consequently, you told him to leave it out and rewrite the statement.

We also have testimony from a staff member who you were working with at the time of the incident, stating that you directed the student to rewrite the statement. You deny both of these accounts.

There is also testimony from another staff member who was working with you at the time of the incident, indicating that the original statement that this staff member witnessed the student writing, is not the same statement that is in the prosecution packet that was sent to the Lincoln County District Attorney's Office. The staff identified the original statement as being written on a 5" X 8" yellow paper, with several staff names spelled wrong, and the statement in the prosecution packet was written on 8 ½" X 11" paper, with all staff names correctly spelled.

When Detective Mike Ratkovich interviewed you on 10-4-95 regarding the youth's assault on the staff member, he asked you if the youth that witnessed the incident had written a statement. You answered that you knew that the student did, because you collected it yourself from the student. Detective Ratkovich also asked you if there was anything special or different about the student's version, and you said no.

In the investigatory interview with Terry Timm and Jim Sheridan on 10-25-95, you were asked if you recalled the student writing a statement of what he had witnessed. You answered yes. When asked if the student turned the statement in to you, you answered no, he turned it in to the booth, indicating that someone else must have received the statement.

It is very important when soliciting evidence of an alleged crime, that the information is reported accurately and honestly as it was witnessed. Based on evidence listed above, management can only conclude you directed the student to change his original statement. Additionally, the discrepancy between your answers in your interview with Detective

⁷ This disciplinary action is included as an adverse action in case number 95-0174-PC-ER.

Ratkovich and the investigatory interview with management on October 25, and your denial of directing the youth to change the original statement, in the face of the evidence that has been presented, raises very serious concerns of your credibility and honesty.

Documentation relating to the 5-day suspension is contained in Exhs. C-8 and C-9. (Exh. C8, p. 7 is the student's statement, p. 8-15 are statements from co-workers indicating that the student statement turned in to LHS management was not the initial statement written by the student, p. 15-25 are notes of the fact finding conference with Mr. Zeicu, and pp. 26-33 are notes of the disciplinary meetings with Mr. Zeicu.) (Exh. C9, pp. 4-7 are the police department reports which include confirmation from a co-worker that Mr. Zeicu asked the student to rewrite his statement, and p. 8 is a statement from the student.)

11. Mr. Bentley's investigation included a review of the above-noted prior disciplinary history. His analysis is shown below (from Exh. R-149)⁸.

Mr. Zeicu alleges that LHS management has an established practice of issuing disciplinary action against Mr. Zeicu based solely on the word of one other LHS employee, and that as a result of this practice, Mr. Zeicu has unfairly been placed on the progressive discipline track. Mr. Zeicu further alleges that, conversely, when it is his word against another employee, nothing is done. My investigation of this allegation found:

Letter of Reprimand: Terry Timm, Institution Supervisor 1, stated in an Employee Conduct Report, dated 12/2/94, that "taking into consideration only (emphasis his [Timm]) the incident report written by Le Mere on 11/17, it is my opinion that some sort of inappropriate conversation or conduct was initiated by Zeicu." Mr. Timm indicated that he had reached his opinion after separating what he termed "extraneous allegations countered by Zeicu and his re." There was apparently, communication staff present during the time the incident is alleged to have taken place. These employees were not interviewed. It is clear that in this particular case, disciplinary action taken against Mr. Zeicu was based solely on the word of one employee.

One Day Off: Mr. Zeicu received one day off for allegedly making negative remarks about LHS employee Tanya Thompson regarding her then status as relief staff. In this case, the allegation made by Ms. Thompson was corroborated by other LHS employees.

Three Days Off: Mr. Zeicu received three days off for an alleged intimidating remark he made to LHS employee, Lisa Peterson.

⁸ The text shown was changed to correct the spelling of Mr. Zeicu's name and to omit references to attachments which were not made part of this hearing exhibit.

According to an Employee Conduct Report dated 6/22/95, the allegation made by Lisa Peterson was corroborated by another LHS employee.

Five Days Off: Mr. Zeicu received five days off with out pay for allegedly telling a resident to rewrite a statement. Sufficient evidence exists, including contradictory testimony given by Mr. Zeicu, a written statement by an LHS resident and other LHS employees, to give credence to this allegation.

Mr. Zeicu's contention that LHS has an established practice of issuing disciplinary action against Mr. Zeicu based solely on the word of other LHS employees, cannot be substantiated by the information gathered during this investigation. Mr. Zeicu was given a letter of reprimand based on the word of a single LHS employee, and this did result in Mr. Zeicu being placed on the disciplinary track. However, as noted above, subsequent discipline of Mr. Zeicu was based on corroborating evidence.

Mr. Zeicu cited several examples in support of his contention that in situations where it is his (Mr. Zeicu's) word against another employee, nothing is done. No evidence was found to indicate that any disciplinary action was ever taken against any employee about whom Mr. Zeicu complained. However, evidence was found to indicate that Mr. Zeicu's contention that "nothing was done" when he complained about another employee was not factual.

10-Day Suspension

12. LHS management's view of the 10-day suspension is included in the disciplinary letter dated March 28, 1996 (Exh. R-133), as shown below.

It was reported to management by a probationary employee that you made comments while this employee was engaged in on-the-job training on the 7-3 shift in Krueger Cottage on January 27, 1996. This employee interpreted your comments as harassing and threatening. Your comments included that the probationary employee had better not say anything about him (Dragos) behind his (Dragos') back, because his (Dragos') wife was a supervisor, and he was sure to find out about it. The employee also related that you told her she would not like the result of that.

The incident was witnessed by another employee who substantiated that this employee experienced anxiety as a result of your comments.

It is management's responsibility to provide a safe and secure, harassment-free environment for all who work and live here. Management will not condone harassment or threats of any type in this environment. The type of behavior you displayed is unacceptable.

13. The probationary employee referenced above is Rebecca Schoessow, a Caucasian female born in the U.S. (Exh. C-6, p. 4). Her written statement of the event is shown below (Exh. R-139).

I wish to inform you that I feel that I have been threatened and/or harassed by one of my fellow staff members in this institution. This left me with a bad feeling, fear, and the potential for difficulties in one of the cottages on grounds. On my third day of on-the-job training (January 27, 1996) was scheduled 7 to 3 in Krueger cottage and worked with Dragos Zeieu and Pam Hevey. During the course of my shift Mr. Zeieu was very helpful in explaining things to me. While we were discussing the staff at this institution he advised me to watch what I say and around who. This was a warning I had received from any staff in relation to the "rumor mill". After that Mr. Zeieu made the comment that I had better not say anything about him behind his back because his wife was a supervisor and he was sure to find out about it. And I would not like the result of that. I take that as a threat.

He also commented to the other OJT that was working with us, that "We minorities have to stick together" because the rest of the institution was "out to get them". While this may be a personal opinion of Mr. Zeieu, his attitude while saying it made me feel as though he placed me in the group that was "out to get him."

Another comment that offended me was that with the hiring that was going on, "HIS" overtime was being taken.

When we left that day, both of us that were on OJT felt like outsiders and that we didn't belong working in that cottage. We mentioned it to each other and hoped that we would not be sent to work there, at least not with him.

Since this incident, I have seen him on grounds and have waved or said "Hi". This has been met with a cold stare or ignorance. For those reasons, I believe it was more that just a bad day that gave me these feelings.

These statements and threats, added to his wife being a supervisor, him being a union steward, and my lack of knowledge about this institution lead me to deny this experience. Because it bothered me, I mentioned the situation, but not the names of the individuals or the cottage. Other staff throughout the institution guessed who it was. It was stated, "Yah, Dragos is that way. I know what you mean." This came from both female and male staff in just about every cottage that I have worked in.

I am not requesting that anything be done based on this one incident. I only wish to establish my perspective in case this continues in the future, or if this is a problem for other staff as well.

14. Ms. Schoessow testified that even though she felt threatened by Mr. Zeicu's statements on January 27, 1996, she did not report the same to anyone until around Valentine's Day. Her testimony as to how the reporting occurred is recited in this paragraph. A shift supervisor, Ms. Arlene Meyer, asked if anything was wrong to which she said she was afraid of Mr. Zeicu. Ms. Meyer listed Ms. Schoessow's options as including confronting Mr. Zeicu directly, which Ms. Schoessow did not want to do because of her fear of him. Ms. Meyer listed a second option of preparing a written statement of the events which Ms. Schoessow elected to do. Other options also were noted.
15. Ms. Schoessow gave her first line supervisor, Patrick J. Myers⁹, a copy of her written statement (Exh. R-139) on Friday, February 16, 1996. Mr. Myers shared it with Superintendent Westerhaus.
16. On February 25, 1996, Kevin McCarthy (a co-worker of Mr. Zeicu) telephoned his supervisor, Terry Timm, while Mr. Timm was at home. Mr. McCarthy said he was upset because he felt he had been bullied by Mr. Zeicu. Mr. Timm said he would discuss the matter with Mr. McCarthy at work the following day.
17. Mr. Timm and Mr. McCarthy met on Monday, February 26, 1996, at which time Mr. Timm asked Mr. McCarthy to write up the incident to the best of his recollection. Mr. McCarthy provided a written statement which contained the excerpt shown below. (Exh. R-137).¹⁰

On February 23, 1996, while working my cottage between the hours of 10:45 a.m. and about 12:00 p.m., I was verbally harassed and verbally bullied by a fellow employee YC Dragos Zeicu. . . .

My cottage was very busy. . . I had asked [Mr. Zeicu] if he would help. He said "No, just do the paperwork" . . . Dragos Zeicu came into the booth and yelled at me, "Know wonder why f-----g McCarthy nobody wants to work with you." You are too busy f-----g around." "Nobody wants to work with you because you're afraid of these little bastards." You're not safe to work with"! . . I knew and had been bullied. . . I did not feel safe in my own cottage . . .

18. Mr. Timm, on or about March 1, 1996, went to a LHS employee, Stan Rothmeyer, and asked whether he had been harassed by Mr. Zeicu. Mr. Rothmeyer indicated there had been an incident but he had not viewed it as harassment. Mr. Rothmeyer explained he was a new employee in training when

⁹ Patrick J. Myers is not related to Arlene Meyer.

¹⁰ The text shown was changed to correct spelling and add sentence structure.

he first worked with Mr. Zeicu, when Mr. Zeicu said he did not feel he should be training new people. Mr. Rothmeyer thought the comment odd because it would be normal for the person working with a new employee to train that new employee. Subsequently, Mr. Rothmeyer learned that the designation of who would train new employees was a historical issue between the union and LHS management. Later, a meeting was held where Mr. Rothmeyer was asked to discuss the same matter. Mr. Rothmeyer was asked if he wanted "to do anything about it". Mr. Rothmeyer said no, that he had worked again with Mr. Zeicu without incident. Mr. Rothmeyer did not file a complaint against Mr. Zeicu. He did not feel pressured by LHS management to do so.

19. LHS management decided to hold investigations regarding not only Mr. McCarthy's statement, but also Ms. Schoessow's statement. Ms. Schoessow was asked about the accuracy of her statement. The co-worker in training referenced in Ms. Schoessow's statement as a witness was Eric Calo. Bruce Sunde, a LHS Section Manager, and Mr. Timm held a separate "fact finding" conference with Mr. Calo on March 15, 1996. Mr. Sunde took notes during the conference (Exh. R-142) as did Mr. Timm (Exh. R-143). Mr. Timm's notes contain more detail and are shown below.¹¹

Question: Did Zeicu say to Calo: "We minorities have to stick together because the rest of the institution is out to get us."? [Calo Answer:] "He said that, but I thought it was a joke."

Q: What about: "New people are taking his overtime? A: "I didn't hear that one." He [Zeicu] said if you say anything about me, it goes around quick. Especially me because my wife is a supervisor. He was telling that to all of us. (A general statement.) He was telling us to be careful of what we say. I took it as general information to be careful of what you say to anybody.

Q: [Schoessow] had indicated [that she] and Eric had talked and said they hoped we wouldn't have to work in Krueger, especially with him (Dragos). A: I don't remember her saying that.

Q: Has he contacted you since he's been off duty? A: No.

Q: Did [Schoessow] indicate to you that she was feeling uncomfortable with the way the conversation was going? A: She looked uncomfortable. She just looked at me and shook her head.

¹¹ The text shown was changed to a question and answer format. Also, abbreviations were eliminated.

Q: She didn't say she was feeling intimidated by Mr. Zeicu? A: No, she didn't say that.

20. LHS' investigation did not include a fact finding conference with Pamela Hevey, who was present with Mr. Zeicu, Ms. Schoessow, and Mr. Calo on January 27, 1996. Ms. Hevey was not interviewed because Ms. Schoessow said Ms. Hevey had not been close enough to overhear Mr. Zeicu's statements. Ms. Hevey provided credible contrary testimony at hearing. Ms. Hevey did overhear the comments. Ms. Hevey did not interpret Mr. Zeicu's comments as intimidating or threatening. Ms. Hevey further observed that Ms. Schoessow was giggling during the exchange and, accordingly, Ms. Hevey did not at the time the incident occurred have the impression that Ms. Schoessow was upset.
21. Mr. Timm and Mr. Sunde held an investigatory conference with Mr. Zeicu and his union representative on March 19, 1996. Mr. Zeicu offered some new information relating to the allegations made by Mr. McCarthy which suggested that Mr. McCarthy had an ulterior motive for complaining about Mr. Zeicu or for fabricating the basis for such complaint. The meeting was reconvened the following day at which time LHS management said a decision had been made not to pursue Mr. McCarthy's allegations. However, the meeting was converted to a pre-disciplinary conference (with the agreement by those present) regarding the allegations made by Ms. Schoessow. Mr. Timm requested "additional information or mitigating circumstances to be considered". Mr. Sunde's notes of the pre-disciplinary meeting reflect that the following additional information was provided. The initials "DZ" stand for Mr. Zeicu, "TT" stand for Mr. Timm, "BS" stand for Mr. Sunde, and "DH" for Mr. Zeicu's union steward.¹²

DZ I didn't make no threats. I said that for her benefit.

TT You said that for her benefit, what did you mean - could you explain that.

DZ I used my wife as an example. I have said that to other people. I have heard other people say that to new people. I did not mean it threatening.

DH In offering that advise to a new employee, DZ in his capacity as a union steward was following a directive that I gave to all stewards during my presidency of Local 6, which remains in force today. The intent was to address the rumor mill at LHS and the malicious and harmful effects that are present in the

¹² The text shown was changed to eliminate abbreviations appearing in the text.

rumor mill. The directive was that all stewards whenever working with a new employee were for the remainder of the new employees working period to discuss the rumor mill with that new employee. The specific instruction was: to point out to new employees that the casual passing of rumors and information that they were not personally aware was truthful was hurtful and frequently harmful to the co worker about whom the rumor was being passed. I further instructed all stewards to point out to new employees that participation in the rumor mill could and probably would be harmful to the new employees. Specific within those instructions I directed the stewards to point out that there were multiple marital and family groupings employed at LHS. I told the stewards to explain to new employees how passing a rumor to a friend-family member or spouse of the employee about which the rumor related could result in those friends, family members or spouses passing the word that the new employee was spreading rumors with a possible if not probable atmosphere of retaliation developing toward the new employee. I appointed DZ as a steward and I personally instructed him in this directive. "Voluntarily submitted."

- TT Did your instruction to DZ or any stewards including anything like . . . (Terry read quote from statement.)
- DH If that is an accurate quote it does not reflect the directive I gave to the stewards.
- TT Dragos, did you identify yourself as a steward during this conversation?
- DZ No, I didn't.
- DH It is not necessary - they are co workers . . . I'm not done with the answer to the other question. If the quotation is as I suspect a paraphrasing of the conversation DZ had w/this employee it is consistent with the directive I gave to the steward in that Mr. Zeicu pointed out he had a spousal relationship with another employee at LHS, he identified his spouse's civil service classification which is consistent w/the directive I gave the stewards. He stated the spousal relationship would enhance the probability of him learning if someone was spreading rumors about him and he stated that he would be unhappy to learn that someone was spreading rumors about him. He also stated he would be unhappy with the results of learning that. That unhappiness would be shared by any other steward in the same position because I have encouraged all stewards to report to appropriate supervisory staff rumor mill participation by new employees.
- TT Was the directive you spoke about in writing?
- DH "Negative". Verbally in steward training sessions.
- TT Asked for additional comments from BCS/DH/CZ. All answered no.

Temporary Supervising Youth Counselor Position

22. A temporary vacancy existed for a Supervising YC position at LHS. The temporary vacancy was announced on March 25, 1996. Mr. Timm was aware

of the need to fill the position as early as March 4, 1996. Eight people applied for the temporary vacancy, including Mr. Zeicu and Richard Peterson, a Caucasian male born in the U.S. (Exh. C-6, p. 4). Mr. Peterson was hired per Merle Sheridan's recommendation which was approved by Superintendent Westerhaus. Mr. Sheridan is the LHS Security Director with responsibility to supervise the Supervising YC positions. Mr. Peterson worked in the temporary position for 5-6 weeks, after which an individual hired on a permanent basis took over the Supervising YC position.

23. Mr. Sheridan had supervised both Mr. Zeicu and Mr. Peterson in the past. He recommended Mr. Peterson for the temporary position because he was familiar with Mr. Peterson's ability to work with students and staff, including in situations that required control and tact. While it was true that Mr. Peterson had some problems in the past working with others, such problems appeared to be related to specific contexts (such as during his divorce). It also is true that Mr. Peterson had disciplinary actions up to the level of a 5-day suspension, all for reporting late to work. Mr. Sheridan also knew of Mr. Zeicu's disciplinary history. The five-day suspension in particular raised concerns in Mr. Sheridan's mind about Mr. Zeicu's interactions with students, as well as his credibility. It was reasonable for Mr. Sheridan to conclude from the disciplinary records of Mr. Peterson and Mr. Zeicu that Mr. Peterson was the better candidate for the temporary vacancy, even if Mr. Zeicu's past work experience otherwise would have made him the better candidate.
24. LHS was built to house up to 270 "students" who are youth ordered for placement by the court for an offense serious enough to result in incarceration for at least 6 months if the offender had been an adult. The number of offenders has grown beyond capacity to 360. Individuals working in Supervising YC positions have contact with a great number of people every day. Individuals in these positions are at times in charge of the entire institution. They are the highest ranking position at the institution for 12-16 hours per day and for up to 24 hours a day on weekends. The nature of Mr. Sheridan's concerns regarding Mr. Zeicu's disciplinary history (as noted in the prior paragraph) were legitimate considering the nature of the institution and the job being filled.

25. Mr. Bentley's prior investigation of Mr. Zeicu's internal complaints included an allegation regarding LHS' failure to promote him. The December 15, 1995, investigative memo (Exh. R-149) contains the following pertinent discussion:¹³

Mr. Zeicu submitted a memo to Terry Timm, dated June 2, 1995, requesting that he (Mr. Zeicu) be given consideration for a temporary Shift Supervisor position. It should be noted that this position was neither permanent nor promotional.

Mr. Zeicu was not selected for this temporary assignment. Although Mr. Zeicu submitted his request for consideration to Terry Timm, the actual decision was made by Jim Sheridan. Mr. Sheridan indicated in a memo, dated September 5, 1995, that he had chosen another candidate for the position based on the following: The candidate selected had 5 years experience as a YC at LHS, four years of which was working in an Intensive Treatment Cottage Program dealing with the institution's more emotionally disturbed and potentially dangerous students. The candidate selected also had worked for six months as a Temporarily Assigned YC III. Mr. Sheridan further stated that the candidate selected brought an extensive supervisory background and highly responsible job experience with him to the job.

Mr. Zeicu stated in his letter of request that he had a combined total of three and a half years YC experience at both Ethan Allen and LHS. However, information received from the LHS Personnel Manager indicated that Mr. Zeicu's total YC experience, including both Ethan Allen and LHS, totaled approximately two years, ten and one half months.

Although the selected candidate's actual YC experience was approximately twice that of Mr. Zeicu, Mr. Zeicu did indicate in his letter of request that he had received training in dealing with "mental disorders" and defusing "threatening behavior". Mr. Zeicu's letter listed other training and experience, including report writing, physical intervention and gang related activities.

Mr. Zeicu submitted a memo to James Sheridan, Dated December 11, 1994,¹⁴ requesting that he (Mr. Zeicu) be given consideration for a temporary Shift Supervisor position. It should be noted that this position, also, was neither permanent nor promotional.

Mr. Zeicu was not selected for this temporary assignment. The decision of whom would be selected was again made by Jim Sheridan. Mr. Sheridan indicated in a memo, dated September 5, 1995, that he had chosen another candidate for the position based on the following:

¹³ The text shown was changed to correct the spelling of Mr. Zeicu's name and to omit reference to attachments which were not made part of this hearing exhibit.

¹⁴ The date shown in the original is incorrectly stated as 1995.

The candidate selected for this temporary assignment had four and one half years experience as YC at LHS. The candidate was a YC 3 at the time the candidate submitted his request for consideration. As a YC 3, part of the selected candidate's responsibilities included being a lead person in the cottage program in terms of planning, establishing and directing cottage operations. Mr. Sheridan further stated that as a YC 3, the candidate was required to have a working knowledge of the institution, Administrative Rules, Division and Department Policies and Procedures as it pertains to staff.

Mr. Zeicu stated in his letter of request that he had a combined total of five years YC experience at Ethan Allen and LHS and at the Mendota Mental Health Institute. Information received from the LHS Personnel Manager indicated that 1) Mr. Zeicu's total YC experience totaled approximately two years, ten and one half months at Ethan Allen and LHS, 2) Mr. Zeicu was employed as a Psychiatric Care Technician with the Mendota Health Institute for a total of two years and nine days, and that Mr. Zeicu was employed for a total of two and one half years with the Winnebago Mental Health Institute, and that he was employed for three months of that total as an LTE Power Plant Operator, eight months as a LTE Institution Aide 1, and nineteen months as a permanent Resident Care Technician 1.

* * *

It is clear that Mr. Sheridan uses previous temporary assignments as a gauge for selecting candidates for current temporary assignments. It is reasonable to assume that temporary assignments could also provide experience which would assist an employee in eventually obtaining a permanent Supervising YC position.

It has not been established that Mr. Zeicu does not possess the training or experience necessary to perform the duties required of a temporarily assigned Supervising YC, nor has it been firmly established that placing Mr. Zeicu in a temporary Supervising YC position would prove detrimental to the cottage program. Mr. Zeicu has been denied the opportunities, nonetheless. Considering these facts, continued denial of Mr. Zeicu's requests would appear to serve only to deny Mr. Zeicu the equal employment opportunities guaranteed to all DHSS employees. The specific equal employment opportunity denied would be training which would assist Mr. Zeicu in becoming a qualified candidate for possible promotional opportunities.

I therefore recommend that unless, or until, it is established that Mr. Zeicu does not possess the training or experience necessary to perform the duties required of a temporary Supervising YC, or that placing Mr. Zeicu in a temporary Supervising YC position would be detrimental to the cottage program, Mr. Zeicu be given the opportunity to obtain the training that placement in a temporary Supervising YC would provide.

26. Superintendent Westerhaus wrote a letter to Mr. Zeicu responding to Mr. Bentley's recommendations noted in the prior paragraph. (Exh. C-3, pp. 6-7)

Mr. Westerhaus drafted the letter in January, 1996. He requested review by DHSS central office attorneys which resulted in delay. The final version of the letter was not mailed until April 3, 1996, and was amended in the final paragraph to reflect the intervening disciplinary action in March 1996. The letter stated as shown below in pertinent part:

The Apprenticeship Program Policy No. 5.09, is used to fill vacancies and/or to provide training experience for employees. Given the level of responsibility and decision-making authority, a temporarily assigned YC supervisor must possess experience commensurate with this position. This does not necessarily mean that a staff must have had previous experience as a supervising YC, but the individual must demonstrate a thorough working knowledge of the institution, and appropriate decision making in their current position. Over the years, LHS has responsibly chosen temporary assigned YCs who, through experience, have shown they possess the knowledge and appropriate judgment.

Acting in the capacity of a YC supervisor requires a great deal of appropriate interaction with other staff and youth throughout the institution. In each of the disciplines you have received, beginning with the letter of reprimand in December, 1994, up to and including your 10-day suspension in April of this year, you have demonstrated poor judgment and behavior interacting with staff and youth. Based on this behavior, I believe at this time, that placing you in a capacity where your duties would require more responsible interaction with staff and youth, would be detrimental to the cottage programs in this institution. This decision does not preclude you, however, from reapplying in the future, and consideration will be given for assignment should you demonstrate your ability to improve your judgment and interactions with staff and youth.

CONCLUSIONS OF LAW

1. Mr. Zeicu is protected under the FEA by virtue of his ancestry and national origin, as well as his participation in activities protected under the FEA.
2. Mr. Zeicu had the burden of proof to show that respondent imposed the 10-day suspension either because of his ancestry, national origin or participation in an activity protected under the FEA; a burden which he failed to meet.
3. Mr. Zeicu had the burden of proof to show that respondent failed to select him for the 1996 vacancy of Supervising YC either because of his ancestry, national origin or participation in an activity protected under the FEA; a burden which he failed to meet.
4. Respondent did not discriminate against Mr. Zeicu as alleged in case number 96-0043-PC-ER.

OPINION

The analytical framework applied in cases of discrimination and retaliation was laid out in *McDonald Douglas Corp. v. Green*, 411 U.S. 729, 93 S. Ct. 1817 (1973). This framework provides that the burden is first on the complainant to show a prima facie case; that this burden then shifts to respondent to rebut the prima facie case by articulating a legitimate, non-discriminatory reason for its action; and that the burden then shifts back to complainant to show that respondent's reason is a pretext for discrimination or retaliation.

The 10-day Suspension

Mr. Zeicu has not established his claim that the 10-day suspension was imposed due to his ancestry or national origin. He did establish a prima facie case of discrimination in that: 1) he is eligible to file a claim based on his being a gypsy from Romania, 2) the 10 day suspension is an adverse action imposed by respondent, and 3) the suspension was imposed under circumstances raising an inference of discrimination because he had not intended to intimidate or threaten Ms. Schoessow and others present did not interpret the comments as intimidating or threatening. Respondent said the suspension was imposed, however, due to respondent's belief that Ms. Schoessow was genuinely upset by Mr. Zeicu's comments, and due to Mr. Zeicu's past disciplinary history which included the letter of reprimand in December 1994, and the one-day suspension in February 1995, also involving allegations of harassing or threatening conduct. Mr. Zeicu disagreed with respondent's assessment of the need for imposing discipline and further contended that Ms. Schoessow's reaction was unreasonable. The Commission agrees that Ms. Schoessow's reaction was unreasonable, but such a finding is insufficient to support a conclusion that the suspension was imposed due to Mr. Zeicu's ancestry or national origin. The Commission further notes the record is devoid of any indication that employees of ancestry or national origin different than Mr. Zeicu's had a similar history of intimidating or threatening behavior yet were treated more favorably than he was.

Mr. Zeicu has not established his claim that respondent imposed the 10-day suspension due to his participation in activities protected under the FEA. He did establish a prima facie case of retaliation by showing: 1) that he engaged in activities protected under the FEA, 2) that the decision makers, Mr. Timm and Mr. Sunde, were aware of his participation in at least some of those activities, and 3) that the decision

makers were aware that some of his complaints were still pending review which, arguably, is sufficient to establish a causal link to their decision to impose a the suspension. However, for reasons discussed previously, he has not shown respondent's offered reason for imposing the discipline was really a pretext for retaliation.

The Temporary Supervising YC Vacancy

Mr. Zeicu has not established his claim that he was not selected for the temporary Supervisory YC position because of his ancestry or national origin. He arguably established a prima facie case by showing: 1) he is eligible to file such a claim based on his being a gypsy from Romania, 2) respondent's selection of a different candidate is an adverse action, and 3) the selection of another candidate raises a suspicion of discrimination because Mr. Zeicu's work experience could be viewed as more extensive to the job requirements than the experience attained by the person hired. Respondent said Mr. Peterson was viewed as more qualified for the job than Mr. Zeicu due to the nature of the institution being a secured setting for youth convicted of serious offenses and the nature of the vacancy as often being the highest-ranking employee on premises. These circumstances when considered in light of Mr. Zeicu's disciplinary history, particularly the 5-day suspension, led respondent to conclude that Mr. Zeicu was less qualified for the job than Mr. Peterson. Mr. Zeicu failed to establish that respondent's stated reasons were actually a pretext for discrimination.

Mr. Zeicu attempted to establish pretext by the fact that Mr. Peterson also had a disciplinary history to the point of a 5-day suspension. The nature of Mr. Peterson's offenses, however, were not as serious in context of the vacancy as were Mr. Zeicu's.

The Commission realizes the importance of the 5-day suspension as support of respondent's contention that Mr. Peterson was more qualified for the temporary vacancy than Mr. Zeicu. The Commission further realizes that Mr. Zeicu has continually denied that he told the student to change his statement. It is understandable that Mr. Zeicu would resent having this incident impact on his chances for promotion if it is true that he did not tell the student to change his statement. However, respondent's conclusion that he did so was not so unreasonable based on all the information available as to support a conclusion that respondent discriminated against Mr. Zeicu. Not only was there an inconsistency between part of Mr. Zeicu's statement to the police and his statement to the institution, but the police report also indicated that

one of Mr. Zeicu's coworkers confirmed hearing Mr. Zeicu ask the student to change his statement.

Mr. Zeicu has not established his claim that respondent hired someone other than him for the temporary vacancy a because of his participation in activities protected under the FEA. He did establish a prima facie case of retaliation by showing: 1) that he engaged in activities protected under the FEA, 2) that the decision makers, Mr. Sheridan and Mr. Westerhaus, were aware of his participation in at least some of those activities, and 3) that the decision makers were aware that some of his complaints were still pending review which, arguably, is sufficient to establish a causal link to their decision to hire someone else. However, for reasons discussed previously, he has not shown respondent's offered reason for hiring Mr. Peterson rather than Mr. Zeicu was actually a pretext for retaliation.

ORDER

This case is dismissed.

Dated: January 16, 1997. STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

JMR
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NOTICE OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds

for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95