

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**TEACHING ASSISTANTS ASSOCIATION, LOCAL 3220 OF THE WISCONSIN
FEDERATION OF TEACHERS, AFT, Complainants**

vs.

STATE OF WISCONSIN, UNIVERSITY OF WISCONSIN-MADISON, Respondent.

Case 531
No. 61674
PP(S)-330

Decision No. 30534-A

Appearances:

Shneidman, Hawks & Ehlke, S.C., Attorneys at Law, by **Mr. Aaron N. Halstead**, 222 West Washington Ave., Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of the Complainant WFT.

Mr. David Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondent UW.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant Teaching Assistants Association, Local 3220, WFT, AFT (TAA) filed with the Commission a complaint alleging that the above-named Respondent University of Wisconsin-Madison has violated Secs. 111.84(1)(a) and (c), Stats., by not employing Dinesh Somalinga in the School of Engineering, Space Science & Engineering Center; and the Commission having appointed Coleen A. Burns, an Examiner on its staff, to conduct a hearing and to make Findings of Fact and Conclusions of Law, and to issue appropriate Orders; and hearing having been held

No. 30534-A

on October 1, 2003, in Madison; and the parties having submitted post-hearing briefs and responsive briefs, the last of which was received by the Examiner on January 3, 2004; and the Examiner being fully advised in the premises, now makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. The Teaching Assistants Association, Local 3220, WFT, AFT, hereafter TAA or Complainant, is a labor organization within the meaning of Sec. 111.81(12), Stats., with principal offices at 306 North Brooks Street, Madison, Wisconsin 53715.

2. The State of Wisconsin, University of Wisconsin-Madison, hereafter Respondent, is an employer within the meaning of Sec. 111.81(8), Stats., with principal offices at 500 Lincoln Drive, Madison, Wisconsin 53715.

3. At all times material hereto, the TAA has been the sole and exclusive bargaining representative for all program, project, and teaching assistants employed by the University of Wisconsin-Madison (UW) and the University of Wisconsin-Extension and Dinesh Somalinga has been a graduate student on the UW campus. The State of Wisconsin and the TAA are parties to a collective bargaining agreement, which by its terms covers the period from April 8, 2000 through June 30, 2001.

4. In early March of 2002, Somalinga approached Professor Robert Morse of the UW Department of Physics to inquire about employment opportunities. There were no employment opportunities in Physics, but Morse suggested that Somalinga contact School of Engineering, Space Science & Engineering Center (SSEC) and offered to recommend Somalinga to others who might have a position. On March 4, 2002, Morse sent an email to Robert Paulos, Charley Bentley, and Don Lebar that includes the following:

While interviewing various people I came across Dinesh Somalinga who seemed to be a well qualified applicant. While we had no open positions in physics, I thought that someone in SSEC or ICDS might have a need for someone of Mr. Somalinga talents. Mr. Somalinga has had significant training in physics, math, and probability, as well as engineering: fluids, thermo, and heat transfer problems. He has experience in computing with Basic, Fortran, C, some C++ , Java, data-bases, Oracle, visual-basic, ASP and HTML. He does web-

pages. Also experience on PC and UNIX/LINUX. He is pursuing a PhD so he will be around for a number of years and he is looking for a project assistant position.

This email included a resume site; telephone number and email address for Somalinga. At that time, Paulos was the Project Manager on the IceCube Project and Morse was responsible for the project's logistics. The IceCube Project is a multi-year project involving 23 institutions in the US and other countries. The task of this project is to drill into the South polar ice cap and insert instrumentation for a large neutrino telescope. On April 2, 2002, Somalinga telephoned Paulos. On that same date, as a follow-up to this telephone conversation, Somalinga sent an email to Paulos that included a list of his interests and qualifications. This email also included the following:

I am currently a grader in the Math department. The position is approximately a 21% project assistant. I require about 80-90 more hours as a project assistant to qualify for a tuition waiver for this semester. I am attaching a copy of my resume for your kind perusal. I would appreciate a chance to meet with you to discuss your needs and objectives and how I may contribute toward them.

Thank you for your time and consideration.

. . .

I am attaching Professor Morse's email in case you have missed it.

On or about April 20, 2002, Somalinga went to talk to Paulos about needing a few more hours to get tuition remission for the semester. Paulos initially indicated that the SSEC was not looking for anyone, but then reviewed his CV and noticed that he had experience with AutoCAD. Although no decision had been made to hire someone to do AutoCAD work, Paulos knew that the project designers would be performing more AutoCAD work; thought that it was possible that they could use some help in that area; and introduced Somalinga to John Short, a mechanical design and drafting technician at the SSEC who was in charge of the project's AutoCAD work. At that time, Short, students, and contractors, such as the Physical Sciences Lab, were performing AutoCAD work. During the ensuing meeting with Short, Somalinga discussed his skills in general, as well as his ability to perform the specific work of fabricating designs using AutoCAD and providing general support to others using that software. During this discussion, Somalinga learned that Short was currently performing some of the AutoCAD work and that subcontractors were doing some of the AutoCAD work. At the end of the discussion, Short indicated that Somalinga would be receiving an offer. Short did not discuss the classification of the position because that decision was not within his

authority. Prior to the end of the day, Short met with Paulos and told Paulos that Somalinga could be useful. When Paulos expressed a concern that it was the middle of the semester, Short suggested that Somalinga be initially hired as a student hourly worker to get him on board because they could use help at that time. At that time, Paulos had the opinion that simply referring Somalinga to the HR department could accomplish the hiring and that the HR department would handle the details. By email dated Tuesday, April 23, 2002, Short advised Somalinga of the following:

We can offer a position at Space Science & Engineering Center as follows:

50% student hourly position, paid at project assistant rate, starting April 29
100% project assistant position, starting May 27
(2 classes maximum, during Summer)
50% project assistant position, Fall semester

The work will consist of preparation of detail drawings for shop fabrication using AutoCAD 2000. In addition we look forward to your contributions as a general support person to others using AutoDesk products including Mechanical Desktop

For the time being it is necessary to share desk, computer and AutoCAD software with other students

Please contact Sally for details of the payroll and benefits; notify me as soon as possible of your intentions.

At the time of this email, Short had not hired a project assistant and was not knowledgeable about the project assistant hiring process. Short offered terms of employment consistent with directions that he had received from the personnel department. Somalinga considered this email to be an unofficial offer that would be confirmed officially by a subsequent letter. Prior to receiving this offer, Somalinga had contacted the TAA to inquire about the number of hours that he needed to qualify for tuition remission. Prior to accepting this offer, Somalinga knew that project assistant hourly, but not student hourly, work would count towards tuition remission.

5. On April 24, 2002, Somalinga met with Loy to inquire whether the student hourly position could be a project assistant position and Loy responded that he would need to get in touch with Short. On that same day, Somalinga met with Short and was advised that the position would remain student hourly. Somalinga then telephoned the TAA office and spoke with representative Shawnee Parsil. At that time, Somalinga inquired if the offered position was properly classified

as a student hourly because it would involve the same work as the project assistant that was being offered at a later point in time and expressed an interest in trying to accumulate sufficient hours to receive retroactive tuition remission for the spring semester. Parsil responded that, if Somalinga would be doing the same work, then the offered "student hourly" position should be a "project assistant" position covered by the TAA contract; that she would discuss the matter with university personnel; and then she would get back to Somalinga. On April 25, 2002, Somalinga sent the following email to Short:

Thank you for offering the position. I'm happy to inform you that I am accepting the position and will start off from Monday, April 29th.

Thanks once again for your help.

On April 25, 2002, Parsil telephoned Loy to discuss the matter. During this conversation, Parsil indicated that the position should be classified as a project assistant position; Loy expressed a concern that the position had not been posted and maintained that for the month of May, it would be a student hourly position. At the conclusion of the conversation, Parsil telephoned Michael Rothstein of the Academic Personnel Office. Rothstein's responsibilities included administering the contract between the State and the TAA and investigating TAA claims that project assistant positions had been misclassified as student hourly positions. During the ensuing conversation, Parsil stated her opinion that, if the student hourly and project assistant duties were the same, then all of the work should be project assistant work. Rothstein indicated that, based upon the information provided by Parsil, he agreed because if the duties are the same throughout, the position should be either all student hourly or all project assistant. When Parsil mentioned that she had spoken with Loy, Rothstein agreed to discuss the matter with Loy. When Rothstein contacted Loy, he told her that, if they were going to hire a project assistant, they could not have that person working for a portion of the time as a student hourly. When Rothstein started to remind Loy that, under the terms of the TAA contract, project assistant positions had to be advertised, Loy responded that she was aware of the requirements and that it was her intention to advertise and fill the position as a project assistant. Loy did not argue or disagree with Rothstein's assertions regarding the student hourly position. Nor did Loy explain what would happen to the student hourly portion of the position. Later that same day, Rothstein telephoned Parsil and told Parsil that SSEC would comply with the contract requirements. Rothstein also stated that Loy's primary concern was with posting the position; that the position would be posted as a project assistant position for five to ten days and that Somalinga could apply for that position. Thereafter, Parsil told Somalinga that the position would be posted as a Project Assistant and that inasmuch as postings generally were from five to ten days, there would be a delay in Somalinga's starting work for SSEC. Parsil's comments lead Somalinga to conclude that the position would be project assistant hourly until May 27th and a project assistant for the summer

and fall. Somalinga understood that other people could apply for the posted position. In an email dated April 25, 2002 addressed to Short and Paulos, Loy stated as follows:

I just received a call from Academic Personnel Office asking me the details. They basically do not want someone hired as a student hourly and go to a PA appointment. They all were pleased that we are following the union contract and posting the position first. So if after we post the position you have available for the summer and fall and Deniesh applies and is offered the position then we can hire him. His appointment then can start with us May 28th the beginning of the summer semester. Otherwise we can not employ him before this PA appointment basically.

Please let Deniesh know that he is more than welcome to apply for you PA appointment once we have it opened.
Thanks.

This email was the first notification that Short had received regarding the need to post for project assistant positions. On April 25, 2002, Somalinga spoke with Loy and was told that Loy was waiting for a position description from Short so that she could post the position. Loy also told Somalinga to contact her in one to two weeks. Following this conversation, but on the same day, Somalinga then spoke with Short and was told that Short was busy and could not immediately prepare a position description. Somalinga contacted Short on April 26 and was told that SSEC would not be posting a project assistant position because it had been decided to continue subcontracting the work. Somalinga then attempted to contact Paulos to ask why the position had been cancelled. Subsequently, Somalinga contacted Morse to ask why the position had been cancelled. Morse told Somalinga that he would get in touch with the people over at the SSEC and then get back to Somalinga. Morse did not have any authority over Short or Paulos' hiring decisions. By email dated April 26, 2002, Short advised Loy of the following:

We have decided to not advertise the project assistant position at the present time. After discussion with BobP, we realize we can further utilize outside contractors to maintain schedule. Thus, I will not be sending you a job description.

Paulos was cc'd on this email. Prior to sending this email, Short advised Paulos that Loy had said that it was not possible to hire Somalinga as a student hourly. Short and Paulos then discussed that the AutoCAD work could be performed by other students or by outsourcing. Short and Paulos concluded that the most expeditious way of performing the AutoCAD work was to outsource to the Physical Sciences Lab because such outsourcing could be accomplished with a phone call and they would not have to expend their time and effort in writing a position

description; posting a position description; and interviewing candidates. At the time that Paulos and Short made the decision to not go forward with posting a project assistant position, Paulos and Short did not know that Somalinga had gone to the TAA or that the TAA was involved in any way.

6. Somalinga telephoned Parsil in early May and advised her that SSEC had decided to not offer him the position. Parsil did not have any further contact with Rothstein or Loy regarding this matter. On May 13, 2002, Somalinga had a conversation with Morse. During this conversation, Morse made statements to the effect that Somalinga might have pushed too hard or come with too much overhead. Somalinga, who concluded that Morse must have talked to either Short or Paulos, did not ask Morse what he meant by these statements. Morse, however, had not contacted either Short or Paulos to ask why Somalinga had not been hired. Nor had Morse made any recommendation or provided any input regarding SSEC's decision to not hire Somalinga. At the time of this conversation, Morse did not know that Somalinga had contacted the TAA or that the TAA had intervened on Somalinga's behalf, but Morse knew that Somalinga wanted a project assistant position in order to obtain tuition remission; that any tuition remission would have to be paid for by the group that hired Somalinga; that the semester was nearly over; and that project assistant positions generally started in February. Morse's comments to Somalinga were speculation, based upon Morse's opinion that Somalinga's application for a project assistant position was too late to provide sufficient value to offset the costs of the tuition remission and Morse's opinion that Somalinga had been too pushy with Morse. Morse's opinion that Somalinga was too pushy had not been shared with anyone else and was based solely upon Morse's personal observation of Somalinga's conduct in insisting that Morse attend to Somalinga's concerns and not taking into account that Morse may have had other matters that required Morse's attention. By letter dated May 21, 2002, Loy advised Somalinga of the following:

Thank you for your letter expressing an interest in possible future positions here at the Space Science and Engineering Center.

We currently have enough staff in the areas you are interested in.

At SSEC all resumes and letters are kept on file and reviewed from time to time. I wish you well in your academic and career goals.

Somalinga met with TAA representative Sandy Levitsky to discuss the SSEC matter. Thereafter, on May 28, 2002, Levitsky sent an email to Rothstein, which included the following:

Subject: Possible ULP

On another front entirely, a case has been brought to my attention with which you have been previously involved, and I wanted to touch base with you before we contact our attorney.

Dinesh Somalinga is an international student who earlier this semester was looking for additional hours to qualify for tuition remission. He interviewed for a position in the Space Sciences Department and received by email a detailed informal job offer as an hourly for the remainder of the semester, as a 100% PA in the summer, and as a 50% PA in the fall. He then learned that the “hourly” position was inappropriately classified as a *student* hourly position, which would mean he could not count those hours toward a remission. At this point, I believe Shawnee Parsil contacted you to have the position reclassified. There was some question about whether the department needed to first advertise the position, consistent with the contract’s requirements. My understanding is that when you were last involved, the department was going to reclassify and advertise the position.

Dinesh followed up the department’s HR person, Sally Loy, who told him that she was just waiting on a position description from the supervisor. When Dinesh followed up with the supervisor, he was told that the supervisor had “changed his mind” about hiring Dinesh. Dinesh is concerned that because the Department *never* advertises positions, your (and indirectly the TAA’s) insistence that the department follow this protocol pushed the supervisor over the edge. And in fact another professor suggested to Dinesh that he probably seemed to the supervisor to come with “too much overhead”

The timing of these events (the offer was withdrawn only a day or two after you arranged to have the position classified pending advertisement) would strongly suggest that the withdrawal of the job offer was in response to our attempts to get the position reclassified and enforce the TAA contract with respect to advertising.

Because you were involved at an earlier stage in this case, I wanted to check in with you to see whether you think this might be resolved informally, without filing an unfair labor practice complaint.

Let me know what you think.

Prior to receiving this email, Rothstein had not had any contact with Paulos, Short or Morse regarding the Somalinga matter. By email dated June 5, 2002, Rothstein advised Levitsky as follows:

Marcia Douglas has looked into the matter involving Dinesh Somalinga. It appears that the researchers involved in the project decided to contract out the work rather than hire their own employee. The work was contracted out to the Physical Sciences Lab, a Graduate School center located in Stoughton. The lab had been providing assistance to this project, so the researchers decided to continue to utilize their expertise. That is the reason they did not send Sally a job description for her to advertise – they decided against creating a position.

Assistant Dean Douglas was cc'd on this email. Levitsky did not have any conversation with Douglas or Rothstein regarding the Somalinga matter.

7. Short and Paulos did not hire Somalinga into the positions offered in Short's email of April 23, 2002 because Loy's email of April 25, 2002 lead Short to conclude that it was not possible to hire Somalinga as a student hourly and that project assistant positions had to be posted. Thereafter, Short advised Paulos that Loy had stated that it was not possible to hire Somalinga as a student hourly and that project assistant positions had to be posted. Paulos and Short did not post a project assistant position because they mutually determined to subcontract the work. Their determination to subcontract the work was based upon their conclusion that it would require less of their time and effort to arrange to have the work subcontracted.

8. Paulos and Short's decision to not hire Somalinga into the student hourly position offered in the April 23rd email was in response to, and reliance upon, directives contained in Loy's email of April 25, 2002. The directives contained in Loy's email of April 25, 2002 are consistent with Rothstein's April 25, 2002 directives to Loy. Rothstein had valid business reasons for his directives of April 25, 2002. Loy had valid business reasons for the directives contained in her email of April 25, 2002. Paulos and Short had valid business reasons for responding to, and relying upon, the directives contained in Loy's email of April 25, 2002. Paulos, Short and Loy were the SSEC representatives responsible for the decision to not hire Somalinga into the positions offered in Short's April 23rd email. Paulos and Short were the SSEC representatives responsible for the decision to not post a project assistant position at the SSEC. Paulos, Short and Loy had valid business reasons for these decisions.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The Complainant is a “labor organization” within the meaning of Sec. 111.81(12), Stats.
2. The Respondent is an “employer” within the meaning of Sec. 111.81(8), Stats.
3. Dinesh Somalinga is an employee within the meaning of Sec. 111.81(7), Stats.
4. Somalinga was engaged in activity protected by Sec. 111.82, Stats., when he sought advice and assistance from the TAA regarding the classification of the student hourly position.
5. Complainant was engaged in activity protected by Sec. 111.82, Stats., when TAA representatives provided advice and assistance to Somalinga, including intervening on his behalf with Respondent representatives to have the student hourly position reclassified in accordance with the requirements of the TAA contract.
6. Respondent representatives Michael Rothstein and Sally Loy were aware of the protected activity referenced in Conclusions of Law 4 and 5, supra.
7. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Rothstein, Loy, or any other Respondent representative is hostile to activity that is protected by Sec. 111.82, Stats.
8. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent’s decisions to not hire Somalinga into the positions offered in Short’s email of April 23, 2002 and to not post a project assistant position at the SSEC were motivated, in any part, by hostility to activity that is protected by Sec. 111.82, Stats.
9. Respondent had valid business reasons for its decision to not employ Somalinga in the positions offered in Short’s email of April 23 2002 and to not post a project assistant position at the SSEC.
10. Respondent has not violated Sec. 111.84(1)(a) and (c), Stats., as alleged by Complainant.

On the basis of the above and foregoing Conclusions of Law, the Examiner makes and issues the following

ORDER

Complainant's complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 24th day of August, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

STATE OF WISCONSIN, UNIVERSITY OF WISCONSIN-MADISON

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On October 9, 2002, the Complainant filed an unfair labor practice complaint alleging that Respondent had violated Sec. 111.84(1)(a) and (c), Stats., by not employing Dinesh Somalinga in the School of Engineering, Space Science & Engineering Center (SSEC). The Respondent denies that it has committed unfair labor practices as alleged by the Complainant.

ARGUMENTS OF THE PARTIES

Complainant

Dinesh Somalinga was offered employment by the SSEC under which Somalinga would have been employed as a student hourly worker for the balance of the Spring 2002 semester and, then, as a project assistant for the Summer and Fall 2002 semesters. Somalinga suspected that SSEC had misclassified the position of employment as a student hourly position for the Spring 2002 semester and, thus, contacted the TAA for advice and assistance concerning the classification issue.

The TAA then discussed Somalinga's situation with SSEC human resources personnel, as well as with UW-Madison's contract administrator. During these discussions, the TAA objected to SSEC's designation of the position as student hourly, rather than project assistant, and asserted that a student hourly classification would violate the parties' collective bargaining agreement. When SSEC's human resources officer was not receptive to TAA's claim, the UW-Madison's contract administrator was forced to intervene on behalf of the TAA.

Somalinga accepted SSEC's offer of employment at or about the time of the above-described conversations. After the TAA intervened on behalf of Somalinga, the SSEC informed him that they would not employ him, thereby effectively terminating his employment for the balance of the Spring semester, but also, as a project assistant for the Summer and Fall 2002 semesters.

SSEC's refusal to employ Somalinga has a reasonable tendency to interfere with his and TAA's rights under Sec. 111.82 and, further, such refusal was motivated, at least in part, by the protected and concerted activity in which Somalinga and the TAA engaged when they objected to the SSEC's violation of the collective bargaining agreement. Therefore, by SSEC's refusal to employ Somalinga, the University of Wisconsin-Madison has violated Sec. 111.84(1)(a) and (1)(c), Stats.

Respondent

Implicit to establishing a violation of Sec. 111.84(1)(a) is proof that the employer that undertook the conduct had knowledge that an employee and/or a union were engaged in protected activity. Even if conduct has a tendency to interfere with protected activity there is no violation of SELRA if the acts are prompted by a legitimate business reason. A violation of Sec. 111.84(1)(c) requires a different proof, *i.e.*, proof of intent and proof of animus toward the employee and/or the union.

Complainant's claim is fatally flawed in that neither of the Respondent decision-makers (Paulos and Short) had any knowledge or information of the protected activity of the TAA or Somalinga. Professor Morse had not had contact with these decision-makers regarding their reasons for their decision. There is no credible evidence of direct hostility, or of retaliation.

The two Respondent decision-makers offered employment based on their understanding that Somalinga could be hired immediately with minimal effort. When the two Respondent decision-makers learned that the process would be more involved and time consuming, they reasonably reevaluated their offer and decided to use existing resources. The offer of employment was withdrawn for legitimate business reasons.

Complainant has failed to meet its burden of proof. Respondent has not violated SELRA as alleged by the Complainant.

DISCUSSION

By e-mail dated April 23, 2002, John Short, a mechanical design and drafting technician at the Space Science & Engineering Center (SSEC), notified UW graduate student Dinesh Somalinga of the following:

We can offer a position at Space Science & Engineering Center as follows:

50% student hourly position, paid at project assistant rate, starting April 29
100% project assistant position, starting May 27
(2 classes maximum, during Summer)
50% project assistant position, Fall semester

The work will consist of preparation of detail drawings for shop fabrication using AutoCAD 2000. In addition we look forward to your contributions as a general support person to others using AutoDesk products including Mechanical Desktop

For the time being it is necessary to share desk, computer and AutoCAD software with other students

Please contact Sally for details of the payroll and benefits; notify me as soon as possible of your intentions.

The referenced "Sally" was Sally Loy, UW HR Manager.

On April 25, 2002, Loy issued the following e-mail to Short and Robert Paulos, also of the SSEC:

I just received a call from Academic Personnel Office asking me the details. They basically do not want someone hired as a student hourly and go to a PA appointment. They all were pleased that we are following the union contract and posting the position first. So if after we post the position you have available for the summer and fall and Deniesh applies and is offered the position then we can hire him. His appointment then can start with us May 28th the beginning of the summer semester. Otherwise we can not employ him before this PA appointment basically.

Please let Deniesh know that he is more than welcome to apply for you PA appointment once we have it opened.

Thanks.

On April 26, 2002, Short told Somalinga that the SSEC would not be posting any project assistant position because the SSEC had decided to continue subcontracting the work. (T. at 31)

Complainant TAA alleges that SSEC's refusal to employ Somalinga has a reasonable tendency to interfere with his and the TAA's rights guaranteed under Sec. 111.82, Stats., and argues, therefore, that Respondent has violated Sec. 111.84(1)(a), Stats. Complainant TAA also alleges that SSEC's refusal to employ Somalinga was motivated, at least in part, by hostility toward Somalinga's and the TAA's engaging in activity protected by Sec. 111.82, Stats., *i.e.*, objecting to the SSEC's violation of the collective bargaining agreement. Complainant argues, therefore, that Respondent has violated Sec. 111.84(1)(c), Stats. Respondent denies that it has violated Sec. 111.84(1)(a) and (c), Stats., as alleged by Complainant.

Sec. 111.84(1), Stats., provides that it is an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. 111.82.

. . .

(c) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. This paragraph does not apply to fair-share or maintenance of membership agreements.

. . .

As Examiner David E. Shaw stated in DEPARTMENT OF EMPLOYMENT RELATIONS (DOC), DEC. NO. 30167-B (4/02);AFF'D BY OPERATION OF LAW, DEC. NO. 30167-C (WERC, 5/02):

Those provisions of SELRA are substantively identical to Secs. 111.70(3)(a)1 and 3, respectively, of the Municipal Employment Relations Act (MERA) and both the Commission and the Wisconsin Supreme Court have concluded on that basis that it is appropriate to apply precedent arising under provisions of MERA to cases arising under similar provisions of SELRA. STATE v. WERC, 122 WIS. 2D 132, 143 (1985); AFSCME COUNCIL 24 AND STATE OF WISCONSIN, DEC. NO. 29448-C (WERC, 8/00).

With regard to “interference”, the Commission has found a violation of Sec. 111.70(3)(a)1, Stats., occurs when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. WERC v. EVANSVILLE, 69 WIS. 2D 140 (1975). If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77).

A violation of Sec. 111.70(3)(a)(1), Stats., may be established by a showing of a threat of reprisal or a promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their rights. CITY

OF BEAVER DAM, DEC. NO. 20282-B (WERC, 5/84). Employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

To establish a finding of “discrimination”, in violation of Sec. 111.84(1)(c), Stats., a complainant must establish, by a clear and satisfactory preponderance of the evidence, (1) that complainant was engaged in activity protected by Sec. 111.82, Stats., (2) the State was aware of the activity and was hostile to it, and (3) that the State acted toward complainant, based at least in part, on that hostility. STATE V. WERC, 122 WIS. 2D at 140; AFSCME COUNCIL 24 AND STATE OF WISCONSIN, DEC. NO. 29448-C, *supra*.

Merits

On April 24, 2002, Somalinga contacted both Short and Loy to inquire if the student hourly position could be classified as a project assistant position. (T. at 26-28) Somalinga does not claim, and the record does not establish, that Somalinga referenced the TAA contract or indicated that he had contacted the TAA. The evidence of these contacts does not provide any reasonable basis to infer that Short, or Loy, had knowledge that Somalinga was engaged in activity protected by Sec. 111.82, Stats., or that either was hostile to such activity.

Subsequently, on April 24, 2002, Somalinga contacted TAA Representative Shawnee Parsil to question whether the student hourly classification was appropriately classified. (T. at 28; 48-49) Somalinga was engaged in activity protected by Sec. 111.82, Stats., when he sought advice and assistance from the TAA regarding the classification of the student hourly position.

On April 24, 2002, Parsil responded to Somalinga by expressing her opinion that, under the TAA contract, the student hourly position should be classified as a project assistant position and by stating that she would discuss the matter with University personnel. (T. at 50) On April 25, 2002, Parsil contacted Loy and Michael Rothstein of the Academic Personnel Office and stated to each that the student hourly position should be classified as a project assistant position. (T. at 50-51) Complainant was engaged in activity protected by Sec. 111.82, Stats., when Parsil provided advice and assistance to Somalinga, including intervening on his behalf with Respondent representatives to request that the student hourly position be reclassified in accordance with the requirements of the TAA contract.

Parsil’s contact with Loy provided Loy with knowledge that Somalinga and the TAA were engaged in activity protected by Sec. 111.82, Stats. Parsil’s testimony regarding this contact

establishes that Loy maintained that the student hourly position would remain a student hourly position (T. at 50), but does not provide a reasonable basis to infer that Loy exhibited hostility to either Somalinga's or the TAA's exercise of protected activity. Nor is an adverse inference of hostility warranted by the failure of the Respondent to call Loy as a witness.

As a result of Parsil's contact with Rothstein, Rothstein telephoned Loy and advised her that, if the SSEC intended to hire a project assistant, then the work associated with that position initially could not be performed as a student hourly. (T. at 64) Complainant argues that Rothstein's account of his conversation with Loy reasonably indicates that Loy was not receptive to his follow-up call after Loy had rebuffed Parsil.

Loy did not "rebuff" Parsil. Rather, as Parsil's testimony establishes, Loy accepted Parsil's telephone call; listened to what Parsil had to say; expressed, as her primary concern, that the project assistant position had not been posted; and maintained that, for the month of May, the position would be a student hourly. (T. at 50)

Rothstein's testimony indicates that Loy accepted, without disagreement, Rothstein's statements that, if the SSEC intended to hire a project assistant, then the work associated with that position initially could not be performed as a student hourly and that Project Assistant positions had to be advertised. (T. at 64-65) Such acceptance is also implied by the statements made in Loy's email of April 25, 2002.

Rothstein's testimony may indicate that Loy "bristled" when he began to "remind" her of the TAA contract's posting requirement. Given her response to this reminder, as well as the fact that previously she had addressed the posting requirement with Parsil, the most reasonable inference to be drawn from this "bristling" is that Loy did not appreciate being instructed by Rothstein on how to perform a familiar job duty.

On April 25, 2002, after Parsil had informed Somalinga that the SSEC position would be posted as a project assistant position, Somalinga contacted Loy, who advised Somalinga that she was waiting for a position description from Short. (T. at 29) On that same day, Somalinga contacted Short and was advised that Short was busy and could not immediately prepare the position description. Somalinga understood that Short would prepare the position description as soon as possible. (T. at 29-30) Somalinga's testimony regarding these contacts does not provide a reasonable basis to infer that Loy or Short exhibited any hostility.

Notwithstanding Complainant's arguments to the contrary, Rothstein's account of his conversation with Loy does not reasonably give rise to an inference that Loy was hostile to the TAA's protected activity. Nor does the clear and satisfactory preponderance of the evidence otherwise establish that Loy was hostile to either Somalinga's or the TAA's exercise of protected activity.

Paulos and Short agree that they decided to not hire Somalinga into the student hourly position offered in the April 23rd email because Loy had said that it was not possible to hire Somalinga as a student hourly. (T. at 93; 107) Short concluded that Loy made such a statement in her email of April 25, 2002 and Paulos concluded that Loy made such a statement when Short reported that Loy had made such a statement. (Id)

Inasmuch as Loy's April 25, 2002 email directives indicate that the SSEC could not employ Somalinga as a student hourly, Short's conclusion was reasonable. It is not evident that Loy's statements regarding student hourly employment were based upon any factor other than Rothstein's directive of April 25, 2002, which directive is consistent with Parsil's stated view that the SSEC could not hire Somalinga as a student hourly. Loy had a valid business reason to rely upon Rothstein's directive regarding student hourly positions. Short had a valid business reason to rely upon the directives contained in Loy's email of April 25, 2002. Paulos had a valid business reason to rely upon Short's report that Loy had made such a statement.

Paulos and Short recall that, when they became aware that a project assistant position had to be posted, they discussed the situation and decided that it would require less time and effort on their part to subcontract the work, using existing resources. (T. at 93-94; 102-106) Their testimony that they decided to subcontract is consistent with Short's April 26, 2002 email to Loy; Somalinga's testimony that Short told Somalinga that SSEC was not going to post a project assistant position because they had decided to continue subcontracting (T. at 30-31); as well as Rothstein's email of June 5, 2002.

According to Paulos, the subcontracting required less time and effort because the AutoCAD work in question could be contracted to the Physical Sciences Lab with a telephone call, but that to arrange for a project assistant to perform this work would require Short and Paulos to write a position description; post the position; and interview candidates at a point in which Short and Paulos were short of time. (T. at 94) Short's testimony, while providing less detail regarding the efficiencies of subcontracting, is consistent with Paulos in that he recalls that "the question before us was, you know, do we prepare the paperwork for a project assistant position" (T. at 103) and there was no need to go to the "extra" work of preparing a position description. (T. at 106) This testimony is consistent with statements made by Short to Somalinga on April 25, 2002, *i.e.*, that Short was busy and could not come up with a position description immediately. (T. at 29-30)

There is no direct evidence that Loy communicated her knowledge of the TAA's or Somalinga's protected activity to either Paulos or Short prior to the time that they concluded that they could not hire Somalinga as a student hourly and would not post an SSEC project assistant position. Neither the statements in Loy's email of April 25, 2002, nor any other record evidence, provides a reasonable basis to infer that Loy must have shared her knowledge of the TAA's, or

Somalinga's, protected activity with either Paulos or Short prior to the time that they concluded that they could not hire Somalinga as a student hourly and would not post an SSEC project assistant position. Indeed, to infer from the email of April 25, 2002 that Loy must have shared her telephone conversations with Parsil or Rothstein prior to sending the email would be inconsistent with Short's credible testimony that he was not aware of any posting requirement until he received Loy's email of April 25, 2002. (T. at 102-103)

Paulos credibly testified that, at the time that Paulos and Short decided to not post a project assistant position, Paulos did not know that Somalinga had contacted the TAA, or that the TAA was involved in any way. (T. at 94) When asked if he knew anything of the union's involvement, Short responded that Loy had sent an e-mail referencing a "group;" that the group may have been the TAA or the Academic Personnel Office (APO); and that Short did not really care about which "group" might be involved. (T. 106-107)

The most reasonable inference to be drawn from Short's testimony is that, if Loy had referenced the TAA in her email, then he would have seen this reference. Given that Loy's email of April 25, 2002 references the Academic Personnel Office, the most reasonable inference to be drawn from Short's testimony is that the "group" of which he was aware was the APO, rather than the TAA.

In arguing that Paulos and Short's stated rationale for not hiring Somalinga is pretextual, Complainant contends that, if time were of the essence, as Paulos claimed at hearing, why did SSEC wait so long to make Somalinga the offer of April 23rd. Complainant, however, mistakes what "time" was of the essence. (T. at 94) The "time" referenced by Paulos was not an imperative need to have additional AutoCAD work performed, but rather, it was Paulos and Short's time that was of the essence.

To be sure, Paulos testified that they offered Somalinga a student hourly position in order to get him on board now. (T. at 91) Paulos, however, also testified that, at the time, he thought the hiring would be accomplished by simply referring Somalinga to the HR department. (Id.)

Paulos and Short each credibly testified that, at the time that Short made the April 23rd employment offer, the SSEC had not been actively recruiting employees. (T. at 88; 100) The evidence that SSEC wanted Somalinga on board now is not inconsistent with this testimony because it is evident that the determination that they could use someone "now" was precipitated by Somalinga's request for employment and their consideration of this request.

Complainant argues that Paulos and Short exhibited hostility to lawful activity when they considered posting and interviewing requirements at the time that they decided that it was more

expeditious to subcontract. However, the time and effort needed to prepare a position description; to advertise a position; and to interview for a position are valid administrative costs associated with the hiring process. Thus, Paulos and Short had valid business reasons for considering such administrative costs when they reached their conclusion to subcontract the work.

Shortly after Somalinga learned that the SSEC would not be posting a project assistant position, he contacted Robert Morse, of the UW Physics Department, to ask why the position had been cancelled; Morse responded that he did not know; he would get in touch with SSEC; and get back to Somalinga. (T. at 31) On May 13, 2002, Somalinga had a second conversation with Morse.

Somalinga recalls that, during this second conversation, Morse told Somalinga that he had gotten in touch with someone at SSEC and that Somalinga “might have pushed too hard or come with too much overhead, that’s why they decided not to have the position at all.” Somalinga does not remember if Morse identified the “someone at SSEC,” but does recall that Morse did not explain what he meant by those statements. (T. at 45)

In Complainant’s brief, the Complainant relies upon Morse’s statements as evidence of SSEC’s hostility to Somalinga’s and the TAA’s protected activity and not as evidence of an independent violation of Sec. 111.84(1)(a), Stats. Thus, this is the context in which the Examiner has considered Morse’s statements of May 13, 2002.

Although Morse did not recall making the statement that Somalinga came with too much overhead, he acknowledges that he could have made such a statement because he held the opinion that it was too late in the semester to be getting sufficient useful work to justify the tuition remission costs associated with a project assistant position. (T. 80-81) Morse explains that his statement that Somalinga had pushed too hard was based upon Morse’s personal observation that, in the few contacts that he had with Somalinga, that Somalinga was too pushy at times. (T. 81-82)

Morse denies that he ever contacted Paulos or Short to ask why Somalinga did not get the job and believes that he did not contact anyone else at SSEC to ask why Somalinga did not get the job. (T. at 79-80) Morse states that he knew no facts regarding Somalinga’s failure to get the job other than which Somalinga had relayed to him. (T. at 82) According to Morse, he speculated with Somalinga about why he was not hired at the SSEC. (T. at 79; 81) This testimony is consistent with TAA representative Levitsky’s May 28, 20002 email, in which she states that “And in fact another professor suggested to Dinesh that he probably seemed to the supervisor to come with ‘too much overhead.’ ” It is also consistent with Somalinga’s recollection that Morse said “might have.” “Probably” and “might have” indicate a possibility, rather than a reality.

Morse's testimony is consistent with Paulos' testimony that he did not recall having any conversation with Morse in which Morse inquired why SSEC did not post the project assistant position (T. at 94) Paulos denied that he had told Morse words to the effect that Somalinga had come with too much overhead or pushed too hard. (T. at 95) Short did not recall any conversation with Morse in which Morse inquired why a decision had been made to not hire Somalinga or in which he told Morse the reasons why such a decision had been made. (T. 107-08)

Morse testified that his first contact with Somalinga occurred when Somalinga contacted Morse for the purpose of seeking work, which was in March of 2002. (T. at 75-77) Given the lack of any prior relationship, it is likely that, after the two or three apparently unscheduled contacts in which Somalinga sought Morse's assistance in obtaining employment, that Morse "found him to be what you might call insistent and just sort of created the impression that I'm here and I want you to deal with me right now, and it didn't seem to matter that I was busy with something else" and "felt that he was too pushy with me at times." (T. at 81-82)

The fact that Morse agreed to circulate Somalinga's resume after their initial meeting and, in this email, stated that Somalinga "seemed to be a well qualified applicant" does not require a contrary conclusion. Morse's testimony reasonably leads to the conclusion that he formed his opinion after he had several contacts with Somalinga. Contrary to the argument of the Complainant, Morse's explanation of why he would have the opinion that Somalinga pushed too hard is plausible.

Although the record does not clearly establish when Somalinga first contacted Morse to discuss that he had not obtained employment with the SSEC, Somalinga recalls that he tried to contact him immediately. (T. at 31-32) Given that this contact, at the earliest, would have been at the end of April, Morse's explanation of why he would have the opinion that Somalinga came with too much overhead is plausible.

Contrary to the argument of the Complainant, Morse offered a plausible explanation for why he would have the personal opinion that Somalinga might have pushed too hard or come with too much overhead. Morse's testimony that he knew no facts regarding Somalinga's failure to get the job other than what Somalinga had relayed to him is credible. As is Morse's testimony that, at the time of his second conversation with Somalinga, he was not aware that Somalinga had gone to the TAA or that the TAA was involved. (T. at 82-83)

It may be, as Somalinga claims, that Morse told Somalinga that he had contacted someone at the SSEC. The record, however, does not warrant the conclusion that Morse had contacted Loy, Paulos or Short. Notwithstanding Complainant's arguments to the contrary, the record does not warrant the conclusion that, at the time of the May 13th conversation, Morse had knowledge of

the reasons why Loy, Paulos or Short decided to not hire Somalinga into the positions offered in Short's email of April 23, or why Short and Paulos decided to not post a project assistant position. The evidence of Morse's May 13, 2002 comments does not provide a reasonable basis to infer unlawful hostility upon the part of the SSEC representatives responsible for the decisions to not hire Somalinga into the positions offered in Short's email of April 23, 2002 or to not post project a assistant position.

As the Complainant argues, the TAA's intervention was a factor in Somalinga's loss of the employment offered on April 23, 2002. The union intervention was to ask that the employer comply with the contract and the employer response to this intervention was to comply with the contract by rescinding an invalid employment offer. Under the facts of this case, neither the rescission of the April 23rd employment offer, nor the timing of this rescission, provides a reasonable basis to infer unlawful hostility upon the part of the employer. Nor, given the valid business reasons for not posting a project assistant position, is an inference of unlawful hostility raised by the timing of the decision to not post a project assistant position.

In summary, Respondent's witnesses have offered valid business reasons for SSEC's decision to not hire Somalinga into the positions offered in Short's email of April 23, 2002 and for SSEC's decision to not post a project assistant position. Notwithstanding Complainant's argument to the contrary, the record provides no reasonable basis to conclude that the offered valid business reasons are pretextual.

Conclusion

Loy, Paulos and Short were the SSEC representatives responsible for the decision to not hire Somalinga into the positions offered in Short's email of April 23, 2002. Paulos and Short were the SSEC representatives responsible for the decision to not post a project assistant position at the SSEC.

The clear and satisfactory preponderance of the evidence establishes that Loy, but not Paulos or Short, had knowledge that Somalinga and the Complainant TAA were engaged in activity protected by Sec. 111.82, Stats. The clear and satisfactory preponderance of the evidence does not establish that Loy, Paulos or Short had hostility to the exercise of activity protected by Sec. 111.82, Stats., or that SSEC's decisions to not employ Somalinga and to not post a project assistant position were motivated, in any part, by hostility to activity protected by Sec. 111.82, Stats.

SSEC had valid business reasons for not hiring Somalinga into the positions offered in Short's email of April 23, 2002 and for not posting a project assistant position at the SSEC. Thus, even if such conduct may have a reasonable tendency to interfere with rights protected by Sec. 111.82, Stats., it does not constitute a violation of Sec. 111.84(1)(a), Stats.

Complainant has not established the violations of Sec. 111.84(1)(a) and (c), Stats., alleged by Complainant. The Complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 24th day of August, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns

Coleen A. Burns, Examiner

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