STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEACHING ASSISTANTS ASSOCIATION, LOCAL 3220, AFT-WISCONSIN, Complainant,

vs.

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

Case 531
No. 61674
PP(S)–330

Decision No. 30534-B

Appearances:

Aaron N. Halstead, Shneidman, Hawks & Ehlke, S.C., Attorneys at Law, 222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of the Teaching Assistants Association, Local 3220, AFT-Wisconsin.

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 State of Wisconsin, University of Wisconsin-Madison.

ORDER ON REVIEW OF EXAMINER'S DECISION

On August 24, 2004, Commission Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, concluding that the Respondent State of Wisconsin, University of Wisconsin-Madison (UW) had not violated the State Employment Labor Relations Act (SELRA) by deciding, towards the latter part of April 2002, not to hire Dinesh Somalinga (Somalinga) for a position at the Space Science & Engineering Center that would have been within the bargaining unit represented by the Complainant Teaching Assistants Association, Local 3220, AFT-Wisconsin (TAA). The Examiner dismissed all allegations in the complaint.

On September 13, 2004, the TAA filed a timely petition seeking Commission review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats. Both parties filed written argument, the last of which was received by the Commission on December 22, 2004.

For the reasons set forth in our Memorandum, below, we affirm the Examiner's conclusion that the Respondent did not violate SELRA by failing to hire Somalinga.

ORDER

A. The Examiner's Findings of Fact 1 through 7 are affirmed.

B. The Examiner's Finding of Fact 8 is affirmed as modified below:

> 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. Paulos and Short 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.

C. The Examiner's Conclusions of Law 1 through 5 are affirmed.

D. The Examiner's Conclusion of Law 6 is affirmed as modified below:

> 6. Respondent representatives Michael Rothstein and Sally Loy were aware of the lawful concerted activity referenced in Conclusions of Law 4 and 5. Respondent representatives Robert Morse, Robert Paulos, and John Short were not aware of the lawful concerted activity referenced in Conclusions of Law 4 and 5.

E. The Examiner's Conclusions of Law 7 and 8 are affirmed.

F. The Examiner's Conclusion of Law 9 is set aside.

G. The Examiner's Conclusion of Law 10 is renumbered Conclusion of Law 9 and is affirmed.

H. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

State of Wisconsin, University of Wisconsin-Madison

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

As noted in our Order, above, we have generally affirmed the Examiner's Findings of Fact, the most salient of which are summarized as follows.

The TAA represents a bargaining unit of graduate students employed by the UW-Madison as teaching assistants and/or project assistants. In early March 2002, graduate student and bargaining unit member Dinesh Somalinga approached Professor Robert Morse of the UW Department of Physics to inquire about employment opportunities. Morse, having no positions to offer Somalinga within the Physics Department, suggested Somalinga check with the School of Engineering, Space Science & Engineer Center (SSEC), and also offered to recommend Somalinga to others who might have had a position. At the time, Morse was involved with one of the SSEC's projects, the "IceCube Project," a multi-university collaboration tasked with drilling into the South Pole ice cap and inserting instrumentation for a neutrino telescope. On March 4, 2002, Morse sent an e-mail to certain individuals associated with the IceCube Project, describing Somalinga's background and training and suggesting that the Project consider him for any appropriate employment opportunities.

Robert Paulos was the Project Manager for IceCube and one of the recipients of Morse's e-mail. On April 2, 2002, Somalinga telephoned Paulos and later that day also e-mailed him, informing him that he (Somalinga) was looking for additional project assistant hours in order to qualify for a tuition waiver and referring Paulos to Morse's earlier e-mail. On April 20, Somalinga visited Paulos in person to discuss some possible project assistant hours. At first Paulos indicated the SSEC was not looking for anyone, but then noticed that Somalinga's resume indicated familiarity with Auto-CAD, an engineering software program that students as well as Project contractors were using already but which would be needed increasingly in the immediate future. Paulos then introduced Somalinga to John Short, who was in charge of the Project's Auto-CAD work and, after a brief discussion, Short told Somalinga that he would be receiving an offer. Later that day, Short met with Paulos about hiring Somalinga, and Paulos suggested that Somalinga be hired initially as a student hourly worker in order to get him on board as quickly as possible. Acting on advice from the Center's personnel department, Short sent an e-mail dated April 23, 2002, offering Somalinga a position at 50% student hourly, beginning on April 29, moving to a full-time project assistant position starting May 27, and moving to a 50% project assistant position in the fall. Short's e-mail asked Somalinga to contact the payroll office (Sally Loy) for details. At the time, Short was essentially unfamiliar with the hiring process in general and the contractual requirements relating to TAA positions.

Over the next three days, discussions occurred among Somalinga, the TAA, and UW officials with the ultimate result that the April 23 position offer was withdrawn by April 26. After

receiving Short's e-mail, Somalinga, who needed project position hours in order to obtain tuition remission, had unsuccessfully approached first Loy and then Short to change the initial position type from student hourly to project assistant, then telephoned the TAA about whether a position properly could be classified as student hourly if the work was the same as project assistant work. The TAA thought that would violate the contract and contacted Loy to let her know. Loy disagreed and the TAA then contacted UW labor relations counsel Michael Rothstein, who in turn advised Loy that she would have to post the position as a project assistant. The TAA also passed along to Somalinga the information that the position would have to be posted for five to ten days, from which Somalinga inferred that, while there could be other applicants, the position would be filled prior to the end of the term. On April 25, Loy e-mailed Short and Paulos to advise them that the position could not be filled as a student hourly and would have to be posted. Loy's e-mail indicated the information came from the UW personnel office, but also indicated that "we are following the union contract and posting the position first." That same day, Loy spoke with Somalinga to advise him that she (Loy) was waiting for a position description from Short in order to post the job. Somalinga, also the same day, telephoned Short, who said he was too busy to work on a position description immediately. The next day, April 26, Short and Paulos discussed the information they had received from Loy and decided that it would be more expeditious to continue outsourcing the Auto-CAD work to the laboratory that had been doing some of it, as to do so would take only a phone call, rather than to spend time preparing a position description, waiting for the position to be posted and then interviewing applicants. Short then e-mailed Loy of the decision, stating "we realize we can further utilize outside contractors to maintain schedule." Later that same day, April 26, when Somalinga again telephoned Short about the position description, Short informed Somalinga that the position was withdrawn and the Project would subcontract instead. In the meantime, on April 25, Somalinga had e-mailed Short to accept the position as offered in Short's April 23 e-mail.

Somalinga asked Morse why the position had been cancelled and Morse said he would get in touch with the SSEC and let Somalinga know the results. On May 13, Somalinga had another conversation with Morse, in which Morse indicated that the position may have been withdrawn because Somalinga "pushed too hard" or came with "too much overhead." Somalinga inferred that Morse had spoken with Short or Paulos but did not ask Morse for further explanation. Morse in fact had not contacted Short or Paulos and had no actual knowledge about the reasons the position had been withdrawn. Morse's comments to Somalinga were based upon Morse's view that Somalinga had seemed "pushy" with Morse and that Morse believed Somalinga's desire for a tuition remission at such a late point in the semester could be viewed as a burden on the Project's budget, since the Project would have to reimburse the University for the tuition. 1/

1/ The TAA challenges certain of the Examiner's factual conclusions regarding Morse's, Short's, and Paulos' knowledge of Somalinga's and the TAA's involvement in the situation and whether that involvement contributed to their decision to withdraw the job offer. We discuss these issues in the Memorandum that follows our Order.

Somalinga brought the situation to the attention of the TAA, who e-mailed a memorandum to Rothstein on May 28, 2002 stating that the circumstances and timing strongly suggested 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." By e-mail dated June 5, 2002, Rothstein responded that his investigation revealed that the SSEC had "decided to contract out the work rather than hire their own employee...." On October 9, 2002, the TAA filed its Complaint in the instant matter.

Discussion

This case is troublesome on its surface. No matter how the facts are presented, there is no question that, but for having contacted the TAA and the TAA having intervened on his behalf, Somalinga would have been hired by the SSEC in or about the end of April 2002. In this sense, there is a literal nexus between Somalinga's and the TAA's protected activity (including the contractual requirements) and the fact that the job was withdrawn. In such circumstances, we can well understand the TAA's concern that the situation would have a chilling effect on Somalinga's and other bargaining unit members' willingness to engage in union activity. That acknowledged, we are nonetheless compelled to conclude, as did the Examiner, that UW did not in fact violate the law.

We note that the troublesome nexus is more accurately described thus: but for the restrictions set forth in the union contract, which prevented SSEC from employing a graduate student as a student hourly when the work is project assistant work and required SSEC to prepare a position description and post the position, Somalinga would have been hired by SSEC for the position in question. While the TAA's intervention drew the employer's attention to the contractual requirements, and while it was the contract that set up the "red tape" that the SSEC wished to avoid, it was avoiding the red tape, not the contract or the union, that led the SSEC to withdraw the job offer. The record is clear that the SSEC had time sensitive needs to meet. We see nothing in SELRA that requires an employer to offer work to bargaining unit members, rather than to less expensive and/or less cumbersome subcontractors, even if avoiding the expense or the contractual "hoops" is the motive, unless the contract or a prevailing practice so requires. Put another way, if Paulos and Short would not have offered or been required to offer the job to Somalinga in the first place, had they realized the applicable restrictions, then SELRA does not compel them to maintain the offer simply because they learned of the contractual restrictions subsequently. The mere fact that the discovery of the restrictions post-dated union intervention cannot render unlawful what otherwise would have been within the employer's legitimate prerogatives.

As UW argues, we have previously confronted a similar analytical dilemma in a decision under the Municipal Employment Relations Act (MERA) that is instructive here. 2/ In CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), an employee had been terminated at the conclusion of her probationary period. Shortly before her termination, she had engaged in certain vociferous protected activity. The Examiner had concluded that the County had not terminated her out of animus toward her protected activity and dismissed the (3)(a)3 allegation. However, because the circumstances would lead co-workers to believe that she had been

terminated for her protected activity, the Examiner held that the County's action produced a chilling effect on employees' rights and therefore independently violated (3)(a)1. On review, the Commission concluded that in cases "where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees," the appropriate prohibited practice analysis would lie in the four-element paradigm the Commission applies in (3)(a)3 discrimination cases. "If the circumstances demonstrate that the adverse action (e.g., termination, discipline, layoff) was lawfully motivated, we will not find it unlawful [as an independent (3)(a)1] simply because it could be perceived as retaliatory." ID. at 15. We noted that to do otherwise would go beyond preventing discrimination and ensuring a level playing field, and would effectively create a higher standard for union activists than the employer would have to meet in other circumstances. ID. In CLARK COUNTY, for example, under the Examiner's analysis, an employer who had complied with all contractual obligations and had fully legitimate reasons for terminating an employee, nonetheless would have violated the law simply because other employees misperceived the situation. 3/ Similarly, in the instant case, if the SSEC's decision to withdraw the job offer was not a response to the union activity, but instead a legitimate managerial decision to use less expensive and less complicated outside labor sources, then the understandable but mistaken impressions of the TAA and Somalinga should not in and of themselves render the action unlawful.

2/ Since the relevant provisions of SELRA are substantively identical to Secs. 111.70(3)(a)1 and 3, respectively, of the Municipal Employment Relations Act (MERA), both the Commission and the Wisconsin Supreme Court have concluded that it is appropriate to apply precedent arising under provisions of MERA to cases arising under similar provisions of SELRA. DER (DOC), DEC. NO. 30167-B (SHAW, 4/02); AFF'D BY OPERATION OF LAW, DEC. NO. 30167-C (WERC, 5/02), CITING STATE V. WERC, 122 WIS. 2D 132, 143 (1985); AFSCME COUNCIL 24 AND STATE OF WISCONSIN, DEC. NO. 29448-C (WERC, 8/00).

3/ In CLARK COUNTY, the Commission ultimately disagreed with the Examiner and concluded that the employee had been terminated out of animus toward her protected activity and hence held that the County had violated the law, applying the traditional four-element discrimination analysis of (3)(a)3.

The TAA argues that CLARK COUNTY is limited to situations involving disciplinary action, which would not encompass the job withdrawal at issue here. However, by its specific language, CLARK COUNTY applies to "adverse action," because those are the situations in which the essence of the problem would lie in perceived retaliation. Withdrawing a job offer allegedly in response to union activity is "adverse action," and hence its lawfulness is properly determined under the four-element "motive" analysis traditionally utilized in discrimination cases. Accordingly, we will not undertake the balancing test traditionally employed in allegations under Sec. 111.84(1)a, Stats. (or Sec. 111.70(3)(a)1, Stats.) (weighing the employer

interference with protected activity against the employer's legitimate business needs) in this case, and we have set aside the Examiner's Conclusion of Law and modified Finding of Fact pertinent to that analysis.

Turning, then, to the issue of whether UW's action was unlawful discrimination, the Examiner properly set forth the four elements of a successful claim of that nature: that the TAA and Somalinga were engaged in lawful concerted activities; that the relevant agents of the employer were aware of those activities; that those agents bore animus towards those activities; and that they took adverse action (withdrawing the job offer) at least in part out of animus toward those activities. VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) at 18, citing MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1961); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985). The Examiner concluded and there is no dispute that the first element has been satisfied.

As to the second element, the Examiner concluded that UW agents Rothstein and Loy were aware of Somalinga's resort to the TAA and the TAA's intervention. We have modified the pertinent Conclusion of Law to state that Morse, Paulos, and Short were not aware of that protected activity. As noted in footnote 1, above, the TAA urges us to find that these individuals were aware of the protected activity, based upon a series of inferences they would have us draw. The TAA disagrees with the Examiner's finding that Morse had not actually discussed the position withdrawal with Paulos and/or Short and her finding that Morse's comments to Somalinga had simply represented Morse's speculation as to those reasons. We believe the record supports the Examiner's findings. Morse, Paulos, and Short each denied categorically that Morse had any conversation with either of the other two about the reasons the job was withdrawn. Morse's credibility on this point is somewhat weakened by the inconsistency between his testimony and what he told or implied to Somalinga (i.e., first that he would contact the SSEC managers and subsequently that he had done so). However, given Paulos' and Short's unequivocal and generally credible testimony, we conclude that Morse told Somalinga he would contact SSEC because at that time Morse intended to do so. Later, when Somalinga followed up with Morse, Morse apparently preferred not to acknowledge that he had failed to do what he had promised, i.e., contact SSEC about the reason, and instead proffered certain reasons, i.e., that Somalinga had been too "pushy" or carried too much "overhead." At first blush, these comments seem consistent with information Morse could have received from Paulos or Short. However, that conclusion would require a determination that not only Morse, but both Paulos and Short, testified falsely. We see nothing in this record to support that view of their testimony. We agree with the Examiner that Morse could and apparently did reach his own view of Somalinga's "pushiness," in that the record reflects insistent/persistent behavior by Somalinga, including Somalinga's several contacts with Morse about the position and why he hadn't gotten it. As to the "overhead" comment, Morse plausibly explained that he meant to refer to the tuition reimbursement that a project assistant position would have required, when balanced against the short period of time left in the semester.

Morse could have received these impressions if he had contacted Loy (which he denied), since Loy knew that the TAA had intervened on Somalinga's behalf. However, on this record, neither Loy's nor Rothstein's knowledge or feelings about Somalinga's protected activity played a role in the SSEC decision to withdraw the job offer. There is no evidence that Loy was involved in the decision to withdraw the position, that she had discussed the TAA intervention with Paulos and/or Short, or that she otherwise knew their reasons for choosing not to post the position. Moreover, even if we assume arguendo, based on adverse inferences from UW's failure to call Loy to testify and Morse's ostensible lack of credibility, that Loy told Morse that the job was withdrawn because Somalinga and the TAA had pushed too hard, we would still have no basis to conclude that Loy's putative assertions would accurately reflect Short's and Paulos' reasons. Nothing in Short's or Paulos' testimony suggests they discussed their reasons with Loy, beyond Short's April 26 e-mail to Loy stating that they had decided to "utilize outside contractors to maintain schedule," and, as discussed earlier, both credibly denied any knowledge of the union's involvement. 4/

4/ ***The TAA urges us to reach a different conclusion regarding Short's testimony. They argue that he did not directly deny knowledge of the TAA's involvement, but instead gave a relatively lengthy and diffuse response when asked that question, as compared with his brief and simple "no" to other questions. Asked whether he knew anything about the union's involvement, Short's answer was:***

> ***"I'm sure that Sally, our personnel, made reference to groups in her E-mail, but frankly until recent weeks and months of discussion, I have never paid attention to the different groups, whether it be APO, which I now understand refers to Academic Personnel Office, TAA, all of those terms, the union, all of that is outside of my experience of understanding or, you know, having an interest in. And if she didn't make reference to them in an E-mail to me, I'm sure that I saw it, but I really didn't care. . . ." (TR 106-07).***

The TAA suggests that Short's failure to directly answer "no" compels the inference that the answer was really "yes." While such an inference is plausible, we decline to draw it. Instead we interpret his answer to reflect a desire to be completely honest so that, if in fact Loy's e-mail messages had included a reference to the TAA as one of the "groups," or had copied the TAA along with other groups, he would not be perceived as misstating the facts. His response, as a whole, indicates that he took no conscious notice of the TAA's involvement, albeit there may have been a reference, and this is not sufficient to demonstrate the level of knowledge that would satisfy the second element of the discrimination paradigm.

Since the TAA has not met its burden of production regarding the second element of the paradigm, we need not discuss the other elements. Nonetheless, we note that the record amply supports a conclusion that, even if Short and Paulos were aware that the complications had arisen because Somalinga had resorted to the union, their decision to withdraw their offer was not motivated by animus toward that protected activity. Short and Paulos had not been seeking to employ anyone to perform the Auto-CAD work in question, prior to Somalinga's approach. From the outset, they were reluctant to utilize a "project assistant" because of the late point in the semester, even though they knew that Somalinga's interest was in a tuition remission that would require project assistant status. They deliberately decided to constitute the position as "student

hourly" until the end of the term and they, as well as Loy, rejected Somalinga's efforts to persuade them to change it to a project assistant position after they had offered it to him and before he had approached the union. Accordingly, their subsequent decision to withdraw the offer, once it was clear that they could not utilize the relative uncomplicated "student hourly" format, was consistent with their view of their needs from the outset. These circumstances would belie any inference of improper motivation, even if the elements of knowledge and animus had been established.

Accordingly, for the foregoing reasons, we affirm the Examiner's decision to dismiss the Complaint.

Dated at Madison, Wisconsin, this 4th day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

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