

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**GARRY T. VAN OUSE**, Complainant,

vs.

**CITY OF WAUSAU and AFSCME, LOCAL 1287**, Respondents.

Case 97  
No. 60722  
MP-3787

**Decision No. 30272-B**

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**Appearances:**

**Mr. James W. Van Ouse**, 1904 Schuylier Avenue, LaFayette, Indiana 47904, appearing on behalf of Garry T. Van Ouse.

**Attorney William P. Nagle**, City Attorney, Wausau City Hall, 407 Grant Street, Wausau, Wisconsin 54403-4783, appearing on behalf of the City of Wausau.

Shneidman, Hawks & Ehlke, S.C., by **Attorney Aaron N. Halstead**, 217 South Hamilton, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of AFSCME Local 1287.

**ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

On May 30, 2002, Examiner Steve Morrison issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that neither Respondent had committed prohibited practices within the meaning of the Municipal Employment Relations Act by settling a grievance and that Respondent AFSCME, Local 1287 did not commit prohibited practices by failing to arbitrate grievances filed by Complainant Garry T. Van Ouse. Therefore, he dismissed the complaint.

On June 19, 2002, Complainant filed a petition for review with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition – the last of which was received August 12, 2002.

Dec. No. 30272-B

**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.**

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**ORDER**

- A. Examiner Findings of Fact 1-10 are affirmed.
- B. Examiner Finding of Fact 11 is affirmed in part and modified in part to delete the phrase:

. . . evidences the parties' accord upon the interpretation of the language contained in Article 8 - Seniority as it relates to the transfer of the Complainant and . . .

- C. Examiner Findings of Fact 12-13 are affirmed.
- D. Examiner Findings of Fact 14-15 are reversed and the following Finding of Fact is made:

14. When deciding whether to arbitrate the Pagel grievance and subsequently deciding whether and how to settle the Pagel grievance, the Union did not investigate whether Van Ouse's "department" changed when he was assigned to a new work site.

- E. Examiner Conclusion of Law 1 is reversed in part and affirmed in part as follows:

1. When deciding whether to arbitrate the Pagel grievance and subsequently deciding whether and how to settle the Pagel grievance, Respondent AFSCME Local 1287 breached its duty of fair representation toward Garry Van Ouse by failing to make a good faith assessment of the likelihood of success in arbitration. Respondent Local 1287 thereby committed

a prohibited practice within the meaning of Sec. 111.70(3)(b)1, Stats. Respondent Local 1287 did not thereby commit a prohibited practice within the meaning of Secs. 111.70(3)(b)2 or 111.70(3)(c), Stats.

F. Examiner Conclusion of Law 2 is reversed as follows:

2. Because Respondent AFSCME Local 1287 breached its duty of fair representation toward Garry Van Ouse, it is appropriate for the Wisconsin Employment Relations Commission to exercise jurisdiction over the allegation that Respondent AFSCME Local 1287 and Respondent City of Wausau violated the 2000-2002 collective bargaining agreement by changing Garry Van Ouse's departmental seniority date.

G. Examiner Conclusion of Law 3 is reversed in part and affirmed in part as follows:

3. By changing Garry Van Ouse's departmental seniority date, Respondents AFSCME Local 1287 and City of Wausau violated the 2000-2002 collective bargaining agreement and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(b)4 and 1 and 111.70(3)(a)5 and 1, Stats., respectively. Respondents did not thereby commit prohibited practices within the meaning of Sec. 111.70(3)(c), Stats.

H. The Examiner's Order is reversed in part and affirmed in part as follows:

1. The complaint is dismissed as to the alleged violations of Secs. 111.70(3)(b)2 and 111.70(3)(c), Stats.

2. IT IS ORDERED that the Respondent AFSCME Local 1287 and Respondent City of Wausau, its officers and agents, shall immediately:

a. Cease and desist from entering into settlement agreements that violate the terms of the collective bargaining agreement.

b. Take the following affirmative action that will effectuate the purposes and policies of the Municipal Employment Relations Act.

1. Rescind the July 13, 2001 settlement agreement to the extent that the agreement altered Garry Van Ouse's departmental seniority date.

2. Notify all Respondent City of Wausau employees represented by Respondent AFSCME Local 1287 of the Commission's Order by posting copies of the Notice attached hereto for sixty days in conspicuous places where such employees work. This Notice shall be signed by authorized representatives of the Respondent City of Wausau and Respondent AFSCME Local 1287.

Reasonable steps shall be taken by Respondents to insure that this Notice is not altered, defaced or covered by other material.

3. IT IS ORDERED that the Respondent City of Wausau, its officers and agents, shall immediately take the following affirmative action that will effectuate the purposes and policies of the Municipal Employment Relations Act.

a. Restore Garry Van Ouse's departmental seniority date to March 25, 1991.

b. Make Garry Van Ouse whole with interest at the Sec. 814.04(4), Stats., interest rate of 12% per annum in effect when the complaint was filed 1/ for any losses in wages and benefits he incurred because his departmental seniority date was changed to March 25, 2001.

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1/ See *WILMOT UNION HIGH SCHOOL DISTRICT, DEC. NO. 18820-B (WERC, 12/83)*, citing *ANDERSON v. LIRC, 111 WIS.2D 245, 258-259 (1983)*; *MADISON TEACHERS INC. v. WERC 115 WIS.2D 623 (CT.APP. IV, 10/83)*.

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4. IT IS ORDERED that Respondent AFSCME Local 1287, its officers and agents, shall immediately:

a. Cease and desist from failing to fairly represent Garry Van Ouse.

b. Take the following affirmative action which will effectuate the purposes and policies of the Municipal Employment Relations Act.

1. Make Garry Van Ouse whole for its breach of the duty of fair representation by paying him any costs he incurred litigating the violation of contract claim with interest at the Sec. 814.04(4), Stats., rate of 12% per annum in effect when the complaint was filed. 2/

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2/ *SUPRA.*

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Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of October, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/

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Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

**NOTICE TO ALL CITY OF WAUSAU EMPLOYEES  
REPRESENTED BY AFSCME LOCAL 1287**

Pursuant to the Order of the Wisconsin Employment Relations Commission issued on October 22, 2002, we hereby notify you that:

We have restored the departmental seniority date of Garry Van Ouse to March 25, 1991 and made him whole with interest for any losses in wages and benefits he suffered.

**City of Wausau**

\_\_\_\_\_  
By

\_\_\_\_\_  
Date

**AFSCME Local 1287**

\_\_\_\_\_  
By

\_\_\_\_\_  
Date

**THIS NOTICE WILL BE POSTED FOR SIXTY DAYS. THIS NOTICE SHALL NOT BE ALTERED, DEFACED, OR COVERED IN ANY WAY.**

City of Wausau

**MEMORANDUM ACCOMPANYING**  
**ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S**  
**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

The Pleadings

The complaint alleges that AFSCME Local 1287 breached its duty of fair representation to Garry Van Ouse by entering into an agreement with the City of Wausau that changed Van Ouse's seniority date and by subsequently refusing to arbitrate grievances filed by Van Ouse challenging the seniority agreement. The complaint asserts that this AFSCME conduct violated Secs. 111.70(3)(b)1, 2 and 4 and 111.70(3)(c), Stats.

The complaint further alleges that the City violated Secs. 111.70(3)(a)1 and 5 and 111.70(3)(c), Stats., by entering into the seniority agreement.

To remedy these statutory violations, the complaint asks that the seniority agreement be set aside, that Van Ouse have his seniority date restored to its pre-agreement status, and that Van Ouse be made whole.

In its answer, AFSCME denies having breached its duty of fair representation toward Van Ouse.

In its answer, the City denies having violated the law by entering into the seniority agreement with AFSCME.

The Examiner's Decision

As to the allegations related to the seniority agreement, the Examiner concluded that AFSCME did not thereby breach its duty of fair representation toward Van Ouse. He determined that the collective bargaining agreement was susceptible to differing interpretations as to the seniority issue and that AFSCME did not act in an arbitrary, capricious or bad faith manner when resolving the seniority issue contrary to Van Ouse's interests.

As to the allegations related to AFSCME's decision not to arbitrate the subsequent grievances filed by Van Ouse protesting the seniority agreement, the Examiner again concluded that AFSCME did not breach its duty of fair representation. He concluded that the

option of arbitrating the grievances was discussed by AFSCME, that Van Ouse's interest in having the grievances proceed to arbitration was presented to the Local 1287 membership, and that the decision not to arbitrate was a rational one because it advanced the interests of the majority of the affected employees.

Having concluded that no breach of the duty of fair representation had been established and noting that the parties' grievance arbitration process is presumed to be the exclusive mechanism for resolving alleged violations of contract, the Examiner did not resolve the merits of Van Ouse's claim that the seniority agreement violated the existing collective bargaining agreement.

Given all of the foregoing, the Examiner dismissed the complaint.

### **Positions of the Parties on Review**

#### **Van Ouse**

Van Ouse asks that the Examiner be reversed.

He argues that the seniority agreement reached by AFSCME and the City is directly contrary to his existing seniority rights under the collective bargaining agreement and reflects AFSCME's intention to harm him. Given AFSCME's intent, Van Ouse alleges the Examiner erred when concluding that, at most, the record can be read to reflect negligence on AFSCME's part.

Van Ouse contends that the vote of the AFSCME membership not to arbitrate his grievances should not insulate AFSCME from its breach of the duty of fair representation. While Van Ouse acknowledges that a union has a difficult task when resolving issues that pit the interests of one employee against another, he contends that a union violates its duty of fair representation when it acts in a manner that is clearly contrary to the existing bargaining agreement.

#### **AFSCME**

AFSCME urges the Commission to affirm the Examiner.

AFSCME contends that the Examiner correctly concluded that the seniority agreement reached by AFSCME and the City resolved a good faith dispute as to Van Ouse's seniority rights. Given the good faith nature of the dispute, AFSCME asserts that the record does not



establish that it acted in bad faith or in an arbitrary or discriminatory manner when it agreed to resolve the seniority dispute in a manner contrary to Van Ouse's interests. Given the good faith nature of the settlement agreement, AFSCME asserts that it also did not breach its duty of fair representation when it decided not to arbitrate grievances which sought to overturn the agreement.

### **The City**

The City urges the Commission to affirm the Examiner.

## **DISCUSSION**

### **Background**

Gary Van Ouse has been employed by the City as an Equipment Services Mechanic in the Department of Public Works, Motor Pool Division since his hire in 1991. Until March of 2001, Van Ouse's work site was the Fire Department. In March, 2001, the City changed his work site to the Public Works Garage and advised him through a March 12, 2001 memo that:

Because this is not a change in your position you will retain your seniority date of March 25, 1991, not only for city-wide purposes but also for departmental purposes.

On Van Ouse's first day of work at the Public Works Garage, three other Equipment Services Mechanics filed a grievance with the City asserting that Van Ouse's March 25, 1991 departmental seniority date was contrary to Article 34 of the existing contract between AFSCME and the City. The grievance stated:

The letter dated March 12, 2001 from Ila Koss states that Garry Van Ouse would move, Monday, March 19, 2001 to the dept. of public works motor pool. The letter also states that because this is not a change in position that Garry would retain his seniority date of March 25, 1991 for city wide and also departmental purposes.

Article 34, transfer of benefits, states that employees transferring [sic] to another dept. in the city of Wausau shall be given credit for length of employment in another dept. as it relates to all benefits except as length of service applies to seniority.

To remedy the alleged violation, the grievance asked “that Gary Van Ouse start, seniority wise on the bottom of the departmental seniority list at D.P.W.”

The City denied the grievance and AFSCME then decided to take the grievance to arbitration.

The change in Van Ouse’s departmental seniority date had the effect of changing his work hours from first to second shift.

Van Ouse then filed four grievances alleging that the settlement agreement violated Articles 1, 2, 3 and 8, respectively, of the existing contract between AFSCME and the City. The City denied the grievances and advised Van Ouse that:

Your grievances relate to a previous grievance that was settled by your Union. The settlement agreement is on file with your Union. Your requested remedy cannot be granted by the City because of the settlement agreement.

Van Ouse unsuccessfully asked AFSCME to arbitrate his grievances and then filed the instant complaint.

### Analysis

Where, as here, a labor agreement contains a grievance arbitration procedure, it is presumed (absent an express provision to the contrary) that the procedure is the exclusive method of settling contractual disputes and thus that an employee cannot obtain a review of a settlement of a contractual dispute produced by the procedure unless he can establish that the union breached its duty of fair representation during the procedure by acting in an arbitrary, discriminatory or bad faith manner. MAHNKE v WERC, 66 Wis2d 24 (1975).

Therefore, to obtain a decision on the merits of his contractual claim that his seniority date was improperly altered through the grievance arbitration procedure, Van Ouse must establish that AFSCME’s grievance/arbitration conduct as to the seniority issue breached its duty of fair representation.

There is an obvious linkage between the arbitration hearing settlement agreement that altered Van Ouse's seniority date, the subsequent refusal of the City to grant Van Ouse's grievances and AFSCME's refusal to arbitrate same. As the City advised Van Ouse, in light of the settlement agreement changing his seniority date, it could not grant his grievances that protested the change. Similarly, a decision by AFSCME to arbitrate Van Ouse's grievances would have placed AFSCME in the position of advancing a position which sought to undo the seniority date settlement agreement it had previously reached with the City.

Given this linkage, the parties and the Examiner correctly focused on the legitimacy of the settlement agreement (and the process that produced it) as being the focal point of the dispute. As AFSCME stated in its brief to us on review, ". . . the question is whether the Union-City settlement agreement, Jt. Ex 2, is a product of a good faith dispute between those parties . . ." If there was such a good faith dispute, then the resolution of the dispute through the settlement agreement would not constitute a breach of the duty of fair representation and the resulting decision not to arbitrate Van Ouse's grievances would also be an appropriate one. If there was no good faith dispute, then AFSCME was proceeding in bad faith and thus breached its duty of fair representation toward Van Ouse. We turn to a consideration of whether there was a good faith dispute.

Looking first at the relevant contractual provisions, the parties have variously cited Articles 8, 9 and 34 which provide as follows:

#### ARTICLE 8 – SENIORITY

A. Role of Seniority: It shall be the policy of the City to recognize seniority in filling vacancies, making promotions and in laying off or rehiring, provided however, that the application of seniority shall not materially affect the efficient operation of the various departments covered by this agreement.

B. Definition of Seniority: Seniority shall commence upon date of hire and be based upon the actual continuous length of service for which payment has been received by the employee. In the event of transfer to another department (as defined in Article 9, Section B – Departmental Posting) city-wide seniority shall continue but the employee shall be deemed a new employee with the department for the purpose of job posting, overtime and vacation selection, which shall be handled on a departmental seniority basis. Regular part-time employees shall have seniority rights limited to their department and involving the same type of employment.

. . .

ARTICLE 9 – JOB POSTING

. . .

B. Divisional/Unit and City-Wide Posting: whenever a vacancy is to be filled or a new job created, this position shall be posted for a period of three (3) working days on all shop bulletin boards. Any employee interested in applying for the job shall endorse his/her name and division/unit upon such notice in the space provided. The full-time employee with the greatest seniority within the division/unit when a vacancy occurs, who can qualify, shall be given the job. If the job is not filled within the division, the full-time employee with the greatest seniority with the employer who can qualify shall be given the job. For the purpose of this section, division/unit seniority shall be limited to the following divisions/units: maintenance and construction division, electrical division, engineering division, sign unit, water treatment plant division, water meter division, water distribution division, wastewater treatment plant division, sewerage maintenance division, and motorpool. If no full-time employee bidding can qualify for the work, it shall be given to the regular part-time employee with the greatest seniority who has bid for the job and can qualify.

. . .

ARTICLE 34 – TRANSFER OF BENEFITS

Employees transferring into this bargaining unit from another City of Wausau Department shall be given credit for length of employment in the other department as it related to all benefits, except as length of service applies to seniority (for example: transfer of existing vacation and sick leave balances to this department). If such a transfer is to an equal or lower wage rate class, the employee shall be placed on the wage scheduled (sic) according to his/her length of service in the City system. If such a transfer is to a higher rated class, the employee shall be placed at the step on the wage schedule which constitutes a minimum of a four percent (4%) increase, provided that no employee shall be placed at a rate higher than the maximum rate for the class. This provision shall in no way modify the provisions in Articles 9 and 10.

. . .

Based on this contractual language, it is clear to us that the City correctly advised Van Ouse through the March 12, 2001 memo that his 1991 departmental seniority date was not affected by his change in work site. The Article 34 language cited in the grievance of the three Mechanics is applicable only to “Employees transferring into this bargaining unit . . . .” Van Ouse was changing work sites within the AFSCME bargaining unit -- not transferring into the AFSCME bargaining unit. Article 8, Section B limits loss of departmental seniority to those situations in which there is a “transfer to another department (as defined in Article 9, Section B - Departmental Posting).” Because Van Ouse was in the “motorpool” before and after his change in work site, his move to the DPW garage was not a “transfer to another department” within the meaning of Article 8. Thus, based on the contract language alone, we would conclude that there could not be a good faith dispute as to Van Ouse’s seniority rights.

We acknowledge that despite the clarity of the contract language, there may be circumstances in which there nonetheless could be a good faith dispute. For instance, there can be a disagreement over critical facts relevant to how clear contract language should be applied to an employee. Here, AFSCME and the City contend that such circumstances are present because the Mechanics filing the grievance believed that Van Ouse’s change in work site was a “transfer to another department” -- from the Fire Department into the DPW. Mechanic Pagel’s testimony at hearing as to why he filed the grievance is supportive of this argument as is City Human Resource Specialist Koss’ testimony that there was a perception that Van Ouse was a Fire Department employee. From this testimony, we conclude that **when the Pagel grievance was filed**, there was a good faith dispute because employees erroneously but in good faith believed Van Ouse was transferring from another department.

However, **when a union decides to arbitrate a grievance**, the duty of fair representation requires that it should “take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. MAHNKE, SUPRA. AT 534. In this instance, particularly where the decision to arbitrate was to the potential (and ultimately actual) detriment of another employee (Van Ouse) to whom AFSCME also owed a duty of fair representation, an assessment of the likelihood of success in arbitration as to the Pagel grievance would include an assessment by AFSCME as to whether the City was factually correct when it advised Van Ouse on March 12, 2001 that “this is not a change in your position. . . .” and thus that Van Ouse’s change in work site was not a transfer. There is no evidence that such an investigation of this critical factual question ever occurred. Had such an investigation occurred, the Mechanics’ erroneous belief that Van Ouse had transferred would have been corrected and there would no longer have been a good faith dispute as to the fact which is dispositive as to Van Ouse’s contractual rights. Had such an investigation occurred, AFSME could not in good faith have entered into the settlement agreement that altered Van Ouse’s seniority date.

AFSCME argues that Van Ouse had some responsibility to present the facts to the union membership as to his change in work site and that his failure to do so should excuse any misunderstanding that existed. We do not agree. The fact as to whether Van Ouse remained in the same department when he changed work sites is an objective fact that was generally accessible to AFSCME. Thus, although there may be circumstances where an employee should be held accountable for failure to come forward with knowledge that only he possesses, this is not such a circumstance.

Given all of the foregoing, we conclude that by failing to perform the factual investigation that is part of the MAHNKE-mandated assessment of the likelihood of success in arbitration, AFSCME breached its duty of fair representation toward Van Ouse when it entered into the settlement agreement (which was the natural extension of the decision to arbitrate the Pagel grievance). Given the previously discussed linkage between the settlement agreement and the subsequent refusal to arbitrate Van Ouse's grievances, AFSCME also breached its duty of fair representation through said refusal. Said breaches constitute prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats.

Having found that AFSCME breached its duty of fair representation, it is appropriate under MAHNKE for us to exercise our jurisdiction to determine whether the change in Van Ouse's seniority date violated the existing AFSCME/City contract. As reflected earlier herein, we conclude that the change did violate that contract. Articles 8 and 9 make it clear that Van Ouse's departmental seniority was not changed by the move to a new work site. Thus, by entering into the settlement agreement, the City and AFSCME violated the contract and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1 and (3)(b)4 and 1, Stats, respectively.

### **Remedy**

To remedy the prohibited practices found, we have set aside the settlement agreement that altered Van Ouse's seniority date and ordered the City to restore his departmental seniority date to March 25, 1991. In addition, we have ordered the City to make Van Ouse whole with interest for any monetary losses he suffered due to the change in his departmental seniority. Lastly, to make Van Ouse whole for the AFSCME breach of the duty of fair representation which required that he pursue the instant complaint, we have ordered AFSCME to pay Van Ouse any costs incurred litigating the breach of contract claim. SEE UNIVERSITY OF WISCONSIN-MILWAUKEE (GUTHRIE), DEC. NO. 11457-I (WERC, 12/88). At a minimum, our

order in this regard requires that AFSCME pay \$40 to Van Ouse -- the fee Van Ouse paid to the Wisconsin Employment Relations Commission to file the instant complaint.

Our Order affirms the Examiner's dismissal of the alleged violations of Sec. 111.70(3)(b) 2 and (3)(c), Stats., because the illegal conduct of the City and AFSCME does not violate those statutory provisions.

Dated at Madison, Wisconsin, this 22nd day of October, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/

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Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

