

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Ohio Council 8, AFSCME, AFL-CIO and Its Local 100,

Respondent.

Case No. 2002-ULP-06-0455

ORDER
(OPINION ATTACHED)

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich:
August 5, 2004.

On June 28, 2002, Artis Gillam, Jr. ("Intervenor"), filed an unfair labor practice charge against Ohio Council 8, American Federation of State, County and Municipal Employees, Local 100, AFL-CIO ("Local 100"). On October 10, 2002, the State Employment Relations Board ("SERB or "Complainant") determined there was probable cause for believing that Local 100 had committed or was committing unfair labor practices, authorized the issuance of a complaint, referred the matter to hearing, and directed the parties to the unfair labor practice mediation process. On December 5, 2002, the parties filed a settlement agreement with SERB that resolved the underlying issue within the charge. On December 12, 2002, SERB approved and adopted the settlement agreement, construed the settlement agreement as a motion to withdraw, granted the motion, dismissed the complaint, and dismissed with prejudice the unfair labor practice charge.

On August 6, 2003, the Intervenor filed a motion to show cause, asserting that Local 100 had not complied with the terms of the settlement agreement. On September 18, 2003, SERB directed this matter to a show cause hearing to determine whether Local 100 had complied with the settlement agreement in this case and, if not, what acts must be taken to be in compliance.

On January 28, 2004, a hearing was held. Subsequently, the parties filed briefs setting forth their positions. On April 9, 2004, a Proposed Order was issued by the Administrative Law Judge, recommending that the Board find that Local 100 had complied with the settlement agreement entered into in this case. On May 3, 2004, the Intervenor filed exceptions to the Proposed Order.

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After reviewing the record, the Proposed Order, and all other filings in this case, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Proposed Order, incorporated by reference, finding that Local 100 complied with the settlement agreement that was previously entered into in this matter. The Board also dismisses the Direction to Show Cause Hearing.

It is so ordered.

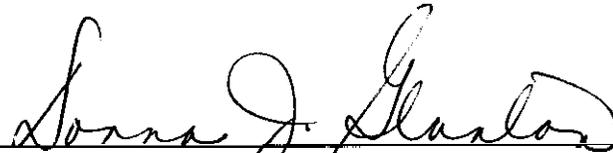
DRAKE, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.



CAROL NOLAN DRAKE, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the State Employment Relations Board's order.

I certify that a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 9th day of August, 2004.



DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

STATE EMPLOYMENT RELATIONS BOARD,

: CASE NO. 02-ULP-06-0455

Complainant,

v.

**: BETH C. SHILLINGTON
: Administrative Law Judge**

**OHIO COUNCIL 8, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, LOCAL 100, AFL-CIO,**

: PROPOSED ORDER

Respondent.

I. INTRODUCTION

On June 28, 2002, Artis Gillam, Jr., filed an unfair labor practice charge against Ohio Council 8, American Federation of State, County and Municipal Employees, Local 100, AFL-CIO ("AFSCME" or "Local 100"). On October 10, 2002, the State Employment Relations Board ("SERB" or "Complainant") determined there was probable cause for believing that the Respondent had committed or was committing unfair labor practices, authorized the issuance of a complaint, referred the matter to hearing, and directed the parties to the unfair labor practice mediation process. On December 5, 2002, the parties filed a settlement agreement with SERB that resolved the underlying issue within the charge. On December 12, 2002, SERB approved and adopted the settlement agreement, construed the settlement agreement as a motion to withdraw, granted the motion, dismissed the complaint, and dismissed with prejudice the unfair labor practice charge.

On August 6, 2003, Mr. Gillam filed a motion to show cause, asserting that AFSCME had not complied with the terms of the settlement agreement. On September 18, 2003, SERB directed this matter to a show cause hearing to determine whether AFSCME has complied with the settlement agreement in this case and, if not, what acts must be taken to be in compliance.

On October 2, 2003, a notice of hearing and prehearing order was issued. Mr. Gillam filed a motion to intervene, which was granted in accordance with Rule 4117-1-07(A).¹ A hearing was held on January 28, 2004, at which testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

¹ All references to statutes are to the Ohio Revised Code, Chapter 4117; and all references to administrative code rules are to the Ohio Administrative Code, Chapter 4117, unless otherwise indicated.

II. ISSUE

Whether AFSCME has complied with the terms of the settlement agreement and, if not, what acts must be taken to be in compliance?

III. FINDINGS OF FACT²

1. Ohio Council 8, AFSCME, AFL-CIO ("OC8") and Local 100, AFSCME, AFL-CIO ("Local 100") (collectively referred to as "AFSCME") are "employee organizations" as defined by § 4117.01(D). (S. 1)
2. The December 12, 2002 settlement agreement resolving the underlying unfair labor practice charge filed by Mr. Gillam against AFSCME included the following:
 1. The Charged Party agrees to fairly represent all employees and process grievances in accordance with the terms of the parties' collective bargaining agreement.
 2. The Charged Party agrees to proceed to Step 4 arbitration with Grievance No. 20-03-100-085-99 without undue delay.
3. On February 26, 2003, an arbitration hearing was held before Arbitrator Nels Nelson in regards to Grievance No. 20-03-100-085-99 involving Mr. Gillam's termination from employment with the City of Cleveland ("City") for neglect of duty and insubordination for failure to properly submit overtime cards, making false claims or misrepresentations in an attempt to secure a City benefit, and unacceptable job performance in monitoring contractors' work. AFSCME Staff Representative James Ciocia presented AFSCME's case before the arbitrator. Mr. Gillam was present for the arbitration hearing and was the only witness who testified on behalf of AFSCME. (S. 2)
4. Mr. Gillam was employed by the City as an Assistant Civil Engineer in the Water Pollution Control Division of the Department of Public Utilities from January 27, 1997, until the City terminated his employment effective April 16, 1999. As an Assistant Civil Engineer, Mr. Gillam was assigned to monitor construction projects being done for the City by outside contractors. Mr. Gillam was required to be at the construction site. Mr. Gillam was to view plans and specifications to determine whether the contractors were doing the work in accordance with the specifications. (T. 195; C & I Exh. 10)

² References in the record to the Joint Stipulations of Fact filed by the parties are indicated parenthetically by "S.," followed by the stipulation number. References to the Joint Exhibits in the record are indicated parenthetically by "Jt. Exh.," followed by the exhibit number(s). References in the record to Complainant and Intervenor's Exhibits are indicated parenthetically by "C & I Exh.," followed by the exhibit number(s). References to the stipulations and exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the related Finding of Fact.

5. On April 20, 1999, the City suspended Mr. Gillam pending discharge following a predisciplinary hearing held concerning events that occurred between April 2, 1999 and April 12, 1999. Mr. Gillam grieved this discipline. Subsequently, Mr. Gillam filed the underlying unfair labor practice charge against AFSCME alleging that AFSCME did not fairly represent him in handling his grievance. (C & I Exhs. 27, 28, 29, 30, 30A)
6. Mr. Ciocia has been a Staff Representative for five years. Previously, Mr. Ciocia was an attorney in private practice working primarily in the area of labor law. As a Staff Representative, Mr. Ciocia is not permitted to practice law and has not engaged in legal practice. Mr. Ciocia does maintain his license to practice law. (T. 79-82, 85-86, 256-257)
7. Mr. Ciocia is assigned to the Cleveland Region of Ohio Council 8. He is assigned to 11 local unions. As a Staff Representative, Mr. Ciocia's duties include Step 3 grievance representation, representation at arbitrations, negotiating collective bargaining agreements, and promoting the use of labor-management committees. Angela Caldwell is the Staff Representative assigned to Local 100; however, Ms. Caldwell does not represent Local 100 at arbitration hearings. Ms. Caldwell's duties include contract negotiations, representing grievants at Step 3 grievance hearings, assisting in the preparation of and attending arbitration hearings, union organizing, and handling various labor-management issues. The Cleveland Regional Director for Ohio Council 8 occasionally assigns Mr. Ciocia to represent Local 100 at arbitration hearings. (T. 82-83, 237-238)
8. Mr. Ciocia spoke with Mr. Gillam five times in telephone conversations of various lengths before meeting with him in person for about three hours to prepare him for the arbitration hearing. The day he was initially scheduled to meet with Mr. Gillam, Mr. Ciocia became ill, went to see his doctor, and then went home for the balance of the day. He asked his office to attempt to reach Mr. Gillam to cancel the meeting. When Mr. Gillam arrived at Mr. Ciocia's office for the meeting, a secretary apologized for not calling him and explained that Mr. Ciocia was ill and would be calling Mr. Gillam to reschedule. The meeting was rescheduled and held during the week preceding the arbitration hearing. (T. 87-89, 199)
9. The number of in-person meetings AFSCME Staff Representatives hold with grievants during preparation for arbitration depends upon the circumstances of the particular grievance, and can be from one to two or three or more times. (T. 162-163, 167-168, 266)
10. Mr. Ciocia's preparation for the arbitration hearing also included reviewing applicable provisions of Local 100's collective bargaining agreement with the City, reviewing Local 100's grievance file, reviewing Mr. Gillam's prior discipline and grievances, and meeting with Ms. Caldwell in the AFSCME regional offices on several occasions. (T. 87-89, 95, 119-120, 130, 153-154)

11. Mr. Gillam provided Mr. Ciocia with the names of three potential witnesses, Ramona Lowery, Brian Grancha, and Louis Brown. Mr. Ciocia contacted Ms. Lowery. Ms. Lowery told Mr. Ciocia that Mr. Gillam had complained to her about harassment on the job, but that she was not an eyewitness to anything Mr. Gillam had experienced. Mr. Ciocia determined that Ms. Lowery's testimony would not be helpful because she did not have personal knowledge. Mr. Ciocia determined that Mr. Grancha's testimony and Mr. Brown's testimony would not be helpful because, based upon what Mr. Gillam had told Mr. Ciocia, neither Mr. Grancha nor Mr. Brown had personal knowledge of the events surrounding Mr. Gillam's termination from employment with the City. Mr. Grancha's personal knowledge related only to the events that occurred in the summer of 1998 that led to a ten-day suspension that Mr. Gillam had previously received. (T. 21, 31-32, 97-98, 115, 129-132, 148-149; C & I Exh. 36)
12. The City and AFSCME were parties to a collective bargaining agreement ("CBA") effective December 11, 1995 through March 31, 1998, which was in effect until the parties executed a successor CBA on April 23, 1999. Paragraph 147 of the CBA states, in part, that "any materials in the employee's personnel record which have not been seen or signed by him or which are more than two (2) years old at the time discipline is being considered shall not be used against him." (S. 4)
13. During the arbitration hearing, the City presented documentary evidence of an April 7, 1997 cautioning/instruction given to Mr. Gillam. The documentary evidence was admitted into the record of the arbitration hearing without AFSCME's objection. Mr. Ciocia did not object to the introduction of this evidence because he had determined from his review of the grievance file that on April 7, 1999, the City was considering disciplining Mr. Gillam for events that had occurred in April 1999. The collective bargaining agreement did not serve to bar the introduction of the April 7, 1997 cautioning/instruction, as it was issued within two years of the time when the City was considering the April 1999 discipline, termination, at issue in the arbitration. (S. 3; T. 98-106; C & I Exhs. 29, 46; R. Exh. F)
14. Mr. Gillam's prior discipline in his file from April 7, 1997 to the date of his termination was admitted into the record at the arbitration by stipulation. AFSCME Staff Representatives testified that this practice is common in arbitration; the goal is to lessen the negative impact of the prior discipline by not focusing on the prior discipline during the arbitration hearing. (T. 108-111, 155-156, 259)
15. During a conversation before the day of the arbitration hearing, Mr. Gillam told Mr. Ciocia that Mr. Gillam suffered from a sleep disorder. Mr. Ciocia asked Mr. Gillam to bring to Mr. Ciocia medical documentation of Mr. Gillam's medical

condition.³ Mr. Gillam did not provide any medical documentation stating that he suffers from sleep apnea or any other chronic medical condition. (T. 89-92, 111, 124-125, 189-190; C & I Exhs. 20, 38)

16. After his review of the documents, his conversations with Mr. Gillam, and his meetings and discussions with Ms. Caldwell, Mr. Ciocia formulated a strategy for Mr. Gillam's arbitration hearing. Mr. Ciocia decided he would focus on the City's burden of proof and argue that a heightened standard, beyond a reasonable doubt, was appropriate. Mr. Ciocia further decided he would focus on the credibility surrounding the City's case for Mr. Gillam's termination because Mr. Ciocia believed Mr. Gillam would present well as a testifying witness. Mr. Ciocia decided not to contest the prior disciplines in the termination arbitration because AFSCME had no basis on which to contest them. The prior disciplines were in Mr. Gillam's personnel file and were either not grieved or had been grieved but the grievances were not sustained. (T. 110-111, 115-116, 120-121, 123-124, 134-135)
17. During the arbitration hearing, the City presented three witnesses. Mr. Ciocia cross-examined each of the City's witnesses. (T. 144-145, 169-170, 242-248)
18. AFSCME's post-arbitration brief, focusing on the legal issue of the appropriate burden of proof, was sent to the arbitrator on April 25, 2003. (S. 5; T. 134-135)
19. On occasions when all parties agree, post-arbitration briefs are submitted. These briefs are intended to be summaries of what the representative believes are the important facts or arguments to be made in the case. Brief content is dependent upon the unique circumstances of each case. (T. 137-138, 260-264)
20. The arbitrator issued his decision and award denying the grievance on June 10, 2003. (S. 6)
21. AFSCME notified Mr. Gillam of the arbitrator's decision by letter dated June 12, 2003. (S. 7)

IV. ANALYSIS AND DISCUSSION

The question presented is whether AFSCME has complied with the December 12, 2002 settlement agreement. Complainant and Mr. Gillam contend that AFSCME has not complied with the first paragraph of the settlement agreement.

³ The only items in the exhibits of record that Complainant and Mr. Gillam cite as supporting the assertion that he has a sleep disorder are a letter from Mr. Gillam to Ms. Caldwell in which Mr. Gillam himself wrote that he had sleep apnea, and a doctor's note dated June 20, 1998, stating generally that Mr. Gillam was ill and experiencing "considerable discomfort" during the month of February 1998, but providing no diagnosis. (C & I Exhs. 20, 38)

Specifically, Complainant and Mr. Gillam assert that AFSCME did not fairly represent Mr. Gillam when processing his termination grievance to arbitration.

The duty of fair representation is set forth in § 4117.11, which provides in relevant part as follows:

- (B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

* * *

- (6) Fail to fairly represent all public employees in a bargaining unit[.]

When an unfair labor practice is charged because a union has allegedly violated its duty of fair representation, to determine whether § 4117.11(B)(6) has been violated SERB will look to see if the union's actions are arbitrary, discriminatory, or in bad faith. If SERB finds any of these components, the duty has been breached. The Complainant has the burden of proving that the union did not fairly represent its bargaining-unit members. In re OCSENAFSCME Local 11, SERB 98-010 (7-22-98), at 3-57 to 3-58.

In determining whether conduct is arbitrary, SERB has adopted the analysis of the U.S. Sixth Circuit Court of Appeals in Venci v. Int'l Union of Operating Engineers, 137 F. 3d 420, 426, 157 L.R.R.M. 2530 (6th Cir. 1998), citing Ruzicka v. General Motors Corp., 649 F.2d 1207, 1209 (6th Cir. 1981): "Absent justification or excuse, a Union's negligent failure to take a basic and required step, unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct which amounts to unfair representation." In re OCSENAFSCME Local 11, supra at 3-58. The basic and required steps a union must take when fulfilling its duty of fair representation will vary depending upon the nature of the representation. In re OCSENAFSCME Local 11, supra. One of these representation functions is the processing of a grievance. Id. Failure to take a basic and required step while performing any of these representation functions creates a rebuttable presumption of arbitrariness. Id. Once that burden has been met, the Union must come forth with its justification or viable excuse for its actions or inactions. Id; see also In re OCSEA. AFSCME, Local 11, SERB 99-009 (5-21-99).

SERB has followed federal court precedent under the National Labor Relations Act ("NLRA) in developing its interpretation and application of § 4117.11(B)(6). The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in seeing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of discretion. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

SERB has contrasted the meaning of "fair representation" with the meaning of "legal representation" in developing the standard for determining when a union's actions are arbitrary.

[E]ssential to the analysis of the duty is an understanding that the concept of "representation," in this instance, is not the equivalent of "legal

representation" which, in general, prescribes zealous advocacy of the client's lawful position regardless of the representative's perception of the merits. [citation omitted] Rather, the union's representative duty involves balancing the interests of a diverse group. This balancing occurs most often in bargaining, * * * but it also may be a legitimate concern in resolving grievances and other contract administration issues. Given this essential component of an exclusive representative's function, flexibility and deference must be accorded the union in its efforts to seek benefits and enforcement for the unit as a whole, even though the desires of individual employees or groups of employees within the unit may go unfulfilled.

The foregoing practical considerations form the foundation for our determination of whether a union's action is "arbitrary." In making such an assessment, this Board will look to the union's reason for its action or inaction. Is there a rational basis for the union's position? If there is, the action is not arbitrary. We accord the union great deference in evaluating approaches to bargaining and contract enforcement. Exclusive representatives must be able to form, evaluate, and pursue strategies for bargaining and contract enforcement. In interpreting and pursuing contract rights, unions must have leeway to assess and allow for ramifications and merits. Thus, a union's reason for a given approach will be examined not for its wisdom, for we cannot second-guess a union on its assessment of merit, but to determine merely whether the reason is rational.

In re AFSCME. Local 2312, SERB 89-029 (10-16-89), at 3-203.

Complainant and Mr. Gillam raise several issues about Mr. Ciocia's preparation and presentation of Mr. Gillam's grievance at arbitration that they assert constitute evidence of AFSCME's failure to adequately represent Mr. Gillam. The record reflects, however, that AFSCME has articulated a rational basis for its actions in processing Mr. Gillam's grievance to arbitration. Moreover, no evidence is present in the record that AFSCME's actions were discriminatory or in bad faith. Accordingly, AFSCME has complied with the terms of the settlement agreement.

Complainant and Mr. Gillam complain that Mr. Ciocia failed to call the witnesses that Mr. Gillam suggested be called. Mr. Ciocia has articulated a rational basis for his decision to call only Mr. Gillam: other than the City's management and supervisory employees, each of whom was called by the City and cross-examined by Mr. Ciocia at the arbitration hearing, Mr. Gillam was the only witness with personal knowledge of the incidents that formed the basis for his termination. Mr. Ciocia had reviewed Mr. Gillam's prior disciplinary history and had determined that the only disciplinary action Local 100 had a contractual basis to contest was the termination. Ms. Lowery, Mr. Granchar, and Mr. Brown did not have personal knowledge of the events of 1999 giving rise to Mr. Gillam's termination.

Mr. Gillam suggests that Mr. Grancha had knowledge of a "confined space" safety issue and should have been called to testify about this matter. But the record reveals that Mr. Gillam never brought this issue to Mr. Ciocia's attention either before or during the arbitration. Moreover, the record reveals that Mr. Gillam never raised a safety issue with the City when the City was considering Mr. Gillam's inadequate work performance when his supervisor observed him on April 12, 1999, as a basis for his termination. Mr. Gillam did not raise this issue when his supervisor questioned him about the contractor's progress on the sewer project, nor did he raise it at his predisciplinary hearing. Instead, the exhibits reveal that Mr. Gillam offered other explanations when questioned about his lack of knowledge of the status of the project. (T. 240; C & I Exhs. 29, 30) Under these circumstances, AFSCME did not act arbitrarily when it did not introduce evidence of a "confined space" safety issue at the arbitration and when it did not call Mr. Grancha to testify regarding this issue.

Complainant and Mr. Gillam argue that Mr. Ciocia did not present evidence that Mr. Gillam suffered from a sleep disorder. Mr. Ciocia determined that, while sleeping on work time had been a basis for earlier discipline, Mr. Gillam's termination was not for sleeping on work time. Nonetheless, Mr. Ciocia asked Mr. Gillam to bring in medical documentation of his sleep disorder. Mr. Gillam did not do so. Indeed, the exhibits cited by Complainant and Mr. Gillam in support of Mr. Gillam's allegation that he suffers from a sleep disorder consist only of Mr. Gillam's own statement in a letter he wrote to Ms. Caldwell and a doctor's note from July 1998 that contains no reference to a sleep disorder or to any diagnosis. It is implicit that the duty of fair representation encompasses not only the union's duty to act in the best interests of the grievant, but also that the grievant not hinder this duty and assist when so requested. In re Ohio Civil Service Employees Assn Local 11 Chapter/Bureau of Motor Vehicles, SERB 94-015 (8-25-94), aff'd sub nom. Owens v SERB, 1995 SERB 4-26 (CP, Franklin, 6-6-95). Grievants who act otherwise may later find themselves unsuccessful with charging the union with violating its duty of fair representation. *Id.*

Complainant and Mr. Gillam argue that Mr. Ciocia did not adequately prepare for the arbitration hearing. Mr. Ciocia undertook AFSCME's usual preparation, including reviewing Local 100's grievance file, conducting several telephone calls and one in-person meeting with the grievant, holding several office conferences with Ms. Caldwell, the Staff Representative involved in the grievance process, conducting legal research, and developing a strategy for presenting the case at arbitration. AFSCME's witnesses confirmed that no set standard exists for the number of in-person meetings with a grievant; it might be one, two, or three, and it is a case-specific, discretionary matter.

Complainant and Mr. Gillam argue that Mr. Ciocia's brief was inadequate because it did not contain a detailed analysis of the facts adduced at the arbitration hearing. AFSCME's witnesses explained that an arbitration brief is not intended to be the same as a legal brief. Arbitration briefs are not submitted in all cases; they are submitted upon the agreement of the arbitrator and the representatives of the parties. They are not intended to be all-inclusive or to contain alternative arguments. Rather, the goal is to place before the arbitrator what the representative considers to be an important point for consideration. Mr. Ciocia's brief is consistent with his strategy for the

arbitration. He focused on the burden of proof, arguing that a "beyond a reasonable doubt" standard was appropriate rather than the lower, "preponderance of the evidence" standard. He also pointed out the significance of credibility in determining whether the City met its burden of proof.

Complainant and Mr. Gillam complain that Mr. Ciocia did not object to the City's evidence that Mr. Gillam had complained of harassment and discrimination. Complainant's and Mr. Gillam's own exhibits, however, reveal that Mr. Gillam had written memoranda to his supervisors suggesting that he was being treated in the same manner that previous African-American Assistant Civil Engineers had been treated and complaining of harassment as recently as April 1, 1999, the month of his termination. (C & I Exhs. 31, 32)

Complainant and Mr. Gillam complain that it was improper for Mr. Ciocia to stipulate that Mr. Gillam had received a cautioning/instruction on April 7, 1997. Mr. Ciocia articulated a rational basis for the decision to stipulate to this evidence rather than argue about it at arbitration. Mr. Ciocia did not object to the introduction of this evidence because he had determined from his review of the grievance file that on April 7, 1999, the City was considering disciplining Mr. Gillam for events that had occurred in April 1999. The collective bargaining agreement did not serve to bar the introduction of the April 7, 1997 cautioning/instruction, as it was issued within two years of the time when the City was considering the April 1999 discipline, termination, at issue in the arbitration.

Mr. Ciocia had asked Mr. Gillam to provide Mr. Ciocia with documents before the day of the arbitration hearing so that he would have time to review them. On the morning of the arbitration hearing, Mr. Gillam brought several boxes of documents to Mr. Ciocia. Complainant and Mr. Gillam complain that Mr. Ciocia did not introduce any of these documents into the record of the arbitration hearing. Mr. Ciocia has set forth a rational basis for his handling of the boxes of documents. When Mr. Ciocia asked Mr. Gillam what the documents were, Mr. Gillam responded that the boxes contained his personal notes. Mr. Gillam wanted to use the notes to refresh his recollection. Mr. Ciocia was concerned because he did not have enough time to review the documents before the hearing. Mr. Ciocia was also concerned because if Mr. Gillam used the documents while testifying, the City would be entitled to examine them as well, and as Mr. Ciocia did not have time to review the documents, he did not know if the documents would be prejudicial to Mr. Gillam. (T. 126-127)

Mr. Gillam also appears to argue in his post-hearing brief that Mr. Ciocia should have advanced Mr. Gillam's grievance over his August 1998 ten-day suspension to Step 3. This argument is curious as Mr. Ciocia is not the staff representative assigned to Local 100, and was not involved with Mr. Gillam's grievance before the arbitration stage. In any event, the direction to show cause hearing involves compliance with the December 2002 settlement agreement, in which AFSCME made agreements involving its conduct after, not before, December 2002. Thus, this argument is not relevant.

Complainant and Mr. Gillam point out that Mr. Ciocia did not introduce into evidence at the arbitration a December 11, 1998 memorandum stating that Mr. Gillam was removed from the Absence Abuse List, having made "a sincere effort to correct the problem of abusive and/or excessive absenteeism." (C & I Exh. 35) The record reflects that on March 4, 1998, Mr. Gillam signed a First Letter of Warning-Absence Abuse, acknowledging that he had been advised of his abusive absence leave pattern and that he had been advised that he would remain on the Absence Abuse List for nine months. The letter that Mr. Ciocia did not introduce into evidence at arbitration reflects the completion of this nine-month disciplinary period. AFSCME points out that Mr. Gillam's eventual removal from the Absence Abuse List did not negate the fact that Mr. Gillam had been disciplined previously for absence abuse.

While the arbitration record would have been more complete had the December 11, 1998 memorandum been admitted into the record along with the stipulated prior disciplines, this omission alone does not constitute a failure to take a basic and required step. At most, the omission is merely simple negligence, which does not constitute arbitrary conduct. In re OCSENAFSCME Local 11, SERB 98-010 (7-22-98), at 3-57 to 3-58. Thus, this omission cannot lead to the conclusion that AFSCME has failed to adequately represent Mr. Gillam.

Complainant and Mr. Gillam have not demonstrated that AFSCME failed to comply with the terms of the settlement agreement by processing Mr. Gillam's grievance to arbitration in an arbitrary manner. Furthermore, Complainant and Mr. Gillam have presented no evidence that AFSCME or Mr. Ciocia made any decision during the processing of Mr. Gillam's grievance to arbitration that involved AFSCME's use of irrelevant and invidious considerations, hostile action, or malicious dishonesty. Therefore, no evidence is present in the record that AFSCME has acted in bad faith or in a discriminatory manner. Accordingly, no basis is present to determine that AFSCME has failed to comply with the terms of the settlement agreement.

V. CONCLUSIONS OF LAW

Based upon the entire record herein, this Administrative Law Judge recommends the following Conclusions of Law:

1. Ohio Council 8, AFSCME, AFL-CIO and Local 100, AFSCME, AFL-CIO are "employee organizations" as defined by § 4117.01(D).
2. Artis Gillam, Jr., was a "public employee" as defined by § 4117.01(C).
3. Ohio Council 8, AFSCME, AFL-CIO and Local 100, AFSCME, AFL-CIO have complied with the settlement agreement entered into in this case.

VI. RECOMMENDATIONS

Based upon the foregoing, the following is respectfully recommended:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board dismiss the Direction to Show Cause Hearing.