

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL #429 :  
 :  
 v. : Case No. PERA-C-97-669-E  
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 :  
 LEBANON COUNTY AND :  
 LEBANON COUNTY SHERIFF :

**FINAL ORDER**

On August 7, 2000, the Teamsters, Local No. 429, (Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO-2), dated July 17, 2000. By letter, dated August 30, 2000, the Board's Secretary granted the Lebanon County Sheriff's (Sheriff) request for an extension to file its brief in response to the Union's exceptions. On September 8, 2000, the Sheriff filed a timely response to the Union's exceptions. In PDO-2, the Hearing Examiner concluded that the Union failed to prove that the discipline imposed upon Deputy Sergeant Charles Williams (Williams) was the result of anti-union animus in violation of Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA) as charged by the Union.

**PROCEDURAL BACKGROUND**

On December 10, 1997, the Union filed a charge of unfair practices (Charge) alleging that Lebanon County (County) violated Section 1201(a)(1), (3) and (5) of PERA when the Sheriff, Michael DeLeo, unilaterally removed the "on-call" service, thereby depriving deputies of income and hours, without bargaining to impasse, in retaliation for their union activity. By letter, dated January 6, 1998, the Board's Secretary informed the Union that the Board was unable to process the Charge for the following reasons: (1) the Union incorrectly charged Lebanon County as the respondent while alleging that the Sheriff alone engaged in the conduct that served as the basis for the Charge; (2) the Board was unable to ascertain the meaning of the "on-call" service that the Sheriff allegedly terminated; and (3) even assuming the allegations in the Charge to be true, the Charge failed to state a claim for which relief could be granted because the Charge alleged that the Sheriff exercised his managerial prerogative as an employer by reducing the number of compensable hours.

On January 28, 1998, the Union filed an amended charge of unfair practices (Amended Charge) in which it abandoned the claim for the bargaining violation under section 1201(a)(5), named the Sheriff as the respondent to the Charge and alleged that the Sheriff removed "on-call" duties to retaliate against bargaining unit members for their union activities. On February 12, 1998, the Board Secretary issued a complaint and notice of hearing (Complaint). In the Complaint, the Board Secretary incorrectly designated the County as the respondent in the caption and served only the Union and the County commissioners. On April 13, 1998, the Union filed a second amended charge of unfair practices (Second Amended Charge) against the Sheriff adding allegations that on or about March 19, 1998, the Sheriff issued progressive discipline to Williams because he supported the Union. On April 27, 1998, the Board Secretary issued an amended complaint and notice of hearing (Amended Complaint). In the Amended Complaint, the Board Secretary again incorrectly designated the

County as the respondent in the caption and served only the Union and the County commissioners. The Board Secretary did not effectuate service of either the first Complaint or the Amended Complaint on the Sheriff. After several continuances, a hearing in this matter was held on October 22, 1998. During the hearing, the Union abandoned all pending allegations and factual bases relating to the removal of the "on-call" service and the reduction of compensable hours as part of the remaining discrimination claim. On the record, the Union expressly limited the basis for its Second Amended Charge to the progressive discipline imposed on Williams.

On September 20, 1999, the Hearing Examiner issued his first Proposed Decision and Order (PDO-1). In PDO-1, the Hearing Examiner concluded that the County, and not the Sheriff, was the only respondent served and named in the caption of the two complaints. All the allegations and evidence adduced at the hearing pertained to the Sheriff's conduct, not the conduct of any agent or employe of the County commissioners. The Sheriff was not served as a named party in the complaint. Although the Sheriff was present to testify at the hearing, he was merely called as a witness from the County's attorney. He did not have an opportunity to have counsel of his choosing, present evidence or call and examine witnesses on his own behalf. Therefore, the Hearing Examiner dismissed all charges because the Sheriff was not afforded adequate due process of law.

On October 8, 1999, the Union filed timely exceptions, and a supporting brief to PDO-1. In these exceptions, the Union challenged the Hearing Examiner's findings of fact and his conclusion that the Sheriff was denied due process. The Union argued that it specifically amended its original Charge to name the Sheriff as the respondent, at the request of the Board Secretary. The Union maintained that the Board Secretary retained the incorrect caption and failed to serve the Sheriff. Moreover, the Union contended that, at no time during the adjudication of the charges, did the Hearing Examiner afford the Board and the parties an opportunity to cure these defects before the issuance of PDO-1. The Union therefore requested a remand claiming that it should not have to suffer the dismissal of its charges when the Secretary incorrectly issued a complaint only against the county commissioners.

On December 21, 1999, the Board issued an Order Directing Remand to Secretary for Further Proceedings. Consequently, on January 7, 2000, the Board Secretary issued a second amended complaint and notice of hearing (Second Amended Complaint) containing an amended caption, which included the Sheriff as additional respondent. The Second Amended Complaint scheduled a new hearing date of May 5, 2000. On February 16, 2000, counsel for the County filed an entry of appearance on behalf of the Sheriff. On March 30, 2000, the parties filed with the Board a Stipulation of Teamsters Local 429, Lebanon County and Michael DeLeo, Lebanon County Sheriff (Stipulation). In the Stipulation, all parties agreed to waive a second hearing on the merits and agreed to have the matter decided on the transcript and the record as it already existed. They expressed the understanding that the relevant issues were completely and fairly adjudicated with respect to the Sheriff and that the Sheriff was adequately represented at the first hearing. The Hearing Examiner therefore issued PDO-2 addressing the merits of the remaining allegations that Sheriff DeLeo imposed progressive discipline on Williams because of his union activities.

## FACTUAL BACKGROUND

Sergeant Williams began his employment with the Sheriff's office in June 1984 as a deputy sheriff. In 1988, the sheriff at the time, Clifford Roland, promoted Deputy Williams to the position of sergeant, which is third in the chain of command below the sheriff and the chief deputy and which he has held continuously since that time. Williams' job duties generally include the following responsibilities: directing deputy sheriffs; serving process, warrants and protection from abuse orders; transporting prisoners; overseeing and providing security for courtrooms; and maintaining control and records of confiscated property in the possession of the Sheriff's office. Sheriff DeLeo was elected the County Sheriff and began serving in that capacity shortly thereafter in January 1990. Sheriff DeLeo is currently serving his third four-year term.

On September 3, 1996, Williams held an organizing meeting for the Union at his home. Subsequently, other organizing meetings were also held at his home. As a result of these meetings, the Union filed a representation petition with the Board on October 29, 1996, and an election was held on December 19, 1996. Sheriff DeLeo was aware of Williams' organizing efforts, and he was aware that Williams was the Union's observer at the Board election. On December 30, 1996, the Board certified the Union as the exclusive representative of the nonprofessional employes of the Sheriff. Williams was included in the unit and thereafter became a member of the Union's bargaining committee.

Since 1990, the Sheriff annually evaluated Sergeant Williams and recorded the evaluation in writing on a standard form. The forms that were used for 1990 through 1994 inclusively contained the following five ratings for ten performance categories: unsatisfactory, fair, satisfactory, very satisfactory, and excellent. In 1990, the Sheriff gave Williams ratings of "satisfactory", "very satisfactory" and "excellent" for various performances. For the years 1991 through 1994 inclusively, the Sheriff rated Williams' performance as either very satisfactory or excellent. In 1995, the Sheriff used a different form which contained only three rating columns: unsatisfactory, satisfactory, and excellent. On the 1995 evaluation form Williams received a satisfactory rating in all categories of work performance. Williams signed this performance report. In 1996, Sheriff DeLeo returned to the former performance report forms, which contained five ratings for ten performance categories. The Sheriff again gave Sergeant Williams a satisfactory rating in every performance category. Sheriff DeLeo signed the 1996 performance report on October 2, 1996, but on October 23, 1996, the Sheriff noted that Williams refused to sign it. In 1997, Sheriff DeLeo used the performance form with five possible ratings and again gave Williams a satisfactory rating in every performance category. Sergeant Williams refused to sign the 1997 report.

On January 23, 1998, Sheriff DeLeo issued a written counseling notice to Williams. The express purpose of the counseling notice was to make him aware that he was not properly performing his job and to obtain his cooperation in improving his work performance. Accordingly, the Sheriff enumerated several instances whereby Williams failed to properly perform his duties. Specifically, in December 1997, the Sheriff discovered that Williams failed to follow up with respect to an outstanding order of execution that was served on February 25, 1997, which cost the Sheriff's office between \$24.60 and \$33.00 in unpaid fees. The second incident

occurred on December 10, 1997 when Williams wrote the wrong name of a newly sentenced prisoner on a list of prisoners who were transported to the Lebanon County Correctional Facility (Prison). Consequently, the Prison became confused regarding who was in its custody. Also, on December 15, 1997, Sheriff DeLeo discovered that Williams failed to return a confiscated weapon, in possession of the Sheriff's Office, to its owner, Arquelio Martinez, whose weapon was confiscated and held by the Sheriff's Office pursuant to a protection-from-abuse order. The weapon was supposed to have been returned in March 1997, and it was not recorded on any of the inventory sheets, for which Williams was responsible. Finally, the counseling letter informed Williams of his delinquency in following up on an outstanding order of execution wherein the defendants paid the judgment debt, but the matter was not properly closed by Williams because he failed to correctly file the relevant documents.

By letter dated March 19, 1998, Sheriff DeLeo issued a written warning to Williams because he failed to carry his county-issued pager on two occasions when the Sheriff's Office needed to communicate with him. By separate letter, also dated March 19, 1998, Sheriff DeLeo issued a one-day suspension without pay to Williams, effective April 2, 1998, for failing to follow the express orders and directives of the Sheriff regarding the handling of prisoners at court on March 4, 1998. On that day, Sergeant Williams was in charge of security for a courtroom where nine inmates from the Prison were scheduled to appear. Two of these prisoners were being arraigned on murder charges, and Sheriff DeLeo considered them to be high security risks. Accordingly, on the assignment sheet, the Sheriff placed in capital letters and orange highlighter that "COURTOOM 1 PRISONERS SHALL BE TAKEN UP TOGETHER AND BROUGHT DOWN TOGETHER DURING A RECESS OR AT THE END OF COURT." During the hearing in this matter, Williams admitted that he failed to look at the assignment sheet and that he directed his deputies to take two of the prisoners from the courtroom alone instead of all nine as a group. According to the suspension letter, the Sheriff considered this incident to be a serious breach of Williams' duties which compromised the security of the courtroom.

By way of a third, separate letter, also dated March 19, 1998, Sheriff DeLeo issued a second one-day suspension without pay to Williams, effective April 3, 1998, for starting work at 8:30 a.m. on March 5, 1998 instead of 8:15 a.m. as scheduled. Although Williams arrived on time, the Sheriff informed Williams that he was no longer needed for courtroom duty. At this time, Williams went outside for a cigarette. Because Williams came back in at 8:25 a.m., he told the chief deputy that he changed his start time to 8:30 a.m. The Sheriff deemed this to be a unilateral unauthorized schedule change contrary to the Sheriff's directive.

#### **ANALYSIS**

The Union's first exception claims that the Hearing Examiner failed to consider whether the Sheriff's disciplinary actions against Williams constituted an independent violation of Section 1201(a)(1) of PERA. Although the Hearing Examiner did not expressly include a discussion of his 1201(a)(1) analysis in PDO-2, he did conclude that "[n]either the County nor the sheriff has committed unfair practices within the meaning of Sections 1201(a)(1) and (3) of the Act [PERA]." Therefore, the Hearing Examiner did indeed evaluate the merits of the Union's 1201(a)(1) claim. However, due to the nature of the Union's objection, the Board will independently analyze the merits of the Union's 1201(a)(1) claim.

There are two types of Section 1201(a)(1) violations: independent and derivative. PLRB v. Mars Area Sch. Dist., 480 Pa. 295, 389 A.2d 1073 (1978). An independent violation of Section 1201(a)(1) stands on its own merits while a derivative violation occurs in tandem with a violation of another of the specifically enumerated unfair labor practice provisions. Establishing an independent violation of Section 1201(a)(1) requires proof that "the action of the employer, in light of the totality of the circumstances in which the particular act occurred, tends to coerce employes in the exercise of their protected rights, regardless of whether the evidence shows that the individual employe(s) involved in the proceeding have been shown in fact to have been coerced." AFSCME, Local 394, AFL-CIO v. City of Philadelphia, 24 PPER ¶ 24112, 299 (Final Order, 1993). This Board has held that disciplinary action, "directly related to acts in defiance of the employer's instruction, does not have a tendency to coerce the exercise of protected employe rights." Pittston Area Fed'n of Teachers Local 1590 v. Pittston Area Sch. Dist., 27 PPER ¶ 27066, 145. (Final Order, 1996). The Board in Pittston also stated that "no policy of PERA would be served if the acts of insubordination were sheltered under the protection of the right of employes to engage in lawful union activity." Id.

The Sheriff, like any other public employer, has the managerial prerogative to direct its work force in a manner that ensures quality service and the integrity of his office. AFSCME v. Commonwealth of Pennsylvania (Governor Dick Thornburgh), 13 PPER ¶ 13097 (Final Order, 1982), aff'd, 479 A.2d 683 (Pa. Cmwlth. 1984); PSSU, Local 668, SEIU v. Commonwealth of Pennsylvania, Dep't of Labor and Indus., Office of Vocational Rehabilitation, 31 PPER ¶ 31127 (Final Order, 2000). In the instant case, Williams admitted to engaging in the conduct that resulted in discipline. There is substantial evidence in the record that this conduct constituted a dereliction of Williams' duties, caused by non-performance and inadequate performance of known and expected official duties and responsibilities, or caused by conduct that was in direct contravention to an express order from the Sheriff. Moreover, Sheriff DeLeo did not immediately impose discipline on Williams. In December 1997, Sheriff DeLeo became aware of four separate instances in which Williams failed to properly fulfill his job responsibilities. At this time, rather than discipline Williams for his repeated display of dereliction, the Sheriff merely issued a "Counseling" "to make [him] aware of [the] incidents and to obtain [his] cooperation in improving [his] work performance." (F.F. 8). The Sheriff's initial counseling placed Williams on notice that "[i]n the event that further work performance problems do occur, [Williams] may be subject to discipline. That discipline could include oral or written warnings, suspension, or termination from employment." (F.F. 8). Subsequent to this notice, Williams admittedly engaged in conduct that contravened the written rules and policies of the Sheriff's Office and the explicit directives from the Sheriff. By this time, the Sheriff was entitled to discipline Williams for his substandard job performance and insubordination.

Williams did not have a protected right to repeatedly neglect his duties and ignore the Sheriff's direct orders. Pittston, supra. Therefore, under the totality of the circumstances, Sheriff DeLeo's imposition of progressive discipline on Williams for his consistent dereliction did not have any tendency to coerce or restrict Williams, or other deputies, in the exercise of their protected rights because Williams'

conduct, the subject of the discipline, was not protected activity. A public employer has the right to establish standards to ensure the quality of the public service. Dick Thornburgh, supra. Williams' conduct repeatedly compromised the ability of the Sheriff's Office to safely and effectively perform its function. After approximately 16 years of service, Williams knew the nature and extent of his responsibilities. Williams' behavior threatened the safety of the courtroom and the efficiency and quality of service of the Sheriff's Office. Accordingly, the Sheriff was certainly entitled to correct Williams' behavior and terminate this threat through the use of discipline without contravening Section 1201(a)(1).

The Union next excepts to the "Hearing Examiner's failure to consider the Union's argument that the County retaliated against Williams after the Union filed its unfair labor practice charge." Although the Union mistakenly referred to the County as the respondent in this exception, a review of PDO-2 reveals that the Hearing Examiner did indeed dismiss the Union's argument, that the Sheriff retaliated against Williams for filing an unfair practice charge, because the Union failed to specifically charge a violation of Section 1201(a)(4) of PERA.

The Union's failure to specifically charge a violation of Section 1201(a)(4) in this case does not justify a dismissal of the Union's allegations of retaliation against Williams for filing an unfair practice charge. The Union's Amended Charge alleged that the Sheriff violated Section 1201(a)(3) by retaliating against Williams for filing the Charge. Any claim for retaliation or discrimination based on the filing of a charge or petition with this Board is covered under the umbrella of 1201(a)(3). Section 1201(a)(3) prohibits "[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization." Section 1201(a)(4) prohibits "[d]ischarge or otherwise discriminating against an employe because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act," conduct which is clearly designed to discourage membership in or support for the Union.

The elements for establishing a 1201(a)(4) are subsumed within the elements for establishing the more general violation of 1201(a)(3). The claimant must proffer evidence that would enable the Board to infer unlawful motive or anti-union animus on the part of the employer as the impetus to the retaliation or discrimination. Illegal motivation under Section 1201(a)(4) can be inferred from the facts as under 1201(a)(3). Mayview State Hospital, 17 PPER ¶ 17221 (Proposed Decision and Order, 1986). The close sequence of events between the protected union activity of causing a union to file a claim with this Board or testifying before this Board and the alleged retaliation for that conduct without a supportable basis for the employer's action is a basis for inferring animus, as in the 1201(a)(3) context. William Penn School District, 2 PPER 170 (Final Order, 1972). When an employe has his union file a petition or charge with this Board, he is engaged in protected union activity and he is exercising his protected rights under Article IV of PERA. Retaliating or otherwise discriminating against an employe for such conduct comes within the prohibitions of both 1201(a)(3) and 1201(a)(4). Therefore, the Hearing Examiner erred by dismissing the Union's claim for retaliation in this case merely because it failed to charge a 1201(a)(4) violation.

The Hearing Examiner did analyze whether the progressive discipline was the result of animus. However, that analysis focused primarily on

whether the discipline was the result of animus engendered from Williams' organizing efforts and his active participation in negotiations and other Union activities. Due to the Examiner's position on the lack of a 1201(a)(4) charge, he refused to specifically address whether the progressive discipline resulted from animus engendered from Williams' and the Union's filing of an unfair practice charge with the Board. Therefore, the Board must conduct an independent evaluation of the retaliation claim even though the analysis for determining the existence of animus is very similar to that conducted by the Examiner in evaluating the discrimination claim.

The Union alleged that Williams was discriminated against, in the form of retaliation, for filing the unfair practice charge in December 1997. Both section 1201(a)(3) and 1201(a)(4) require the complainant to prove discrimination. As previously stated, the analysis for proving discrimination is the same for both sections. Accordingly, to establish discrimination, the complainant has the burden of proving the employer's anti-union animus because "motive creates the offense." PLRB v. Stairways, Inc., 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981). The Board is permitted to draw inferences of unlawful motive from the facts because there is rarely direct evidence of anti-union animus. City of Reading v. PLRB, 568 A.2d 715, 719 (Pa. Cmwlth. 1989); PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1988). A charge of discrimination can also be sustained when the complainant shows that the subject employe was the victim of disparate treatment. City of Reading, supra. Adverse action by an employer against an employee closely following a display of unlawful motive with an inadequate employer explanation is sufficient to support a finding of discrimination. PLRB v. Sands Restaurant Corp., 429 Pa. 479, 240 A.2d 801, 805 (1968); PLRB v. Stairways, Inc., supra. However, close timing alone is insufficient to support a basis for discrimination. Shive v. Bellefonte Area Bd. of Sch. Dir., 317 A.2d 311 (Pa. Cmwlth. 1974); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Dep't of Labor and Indus., Office of Vocational Rehabilitation (OVR), 16 PPER ¶ 16020 (Final Order, 1984). After the complainant has offered evidence of disparate treatment and anti-union animus, the burden shifts to the employer to offer a valid explanation for engaging in the subject conduct. City of Reading, supra. If the employer offers such evidence, the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual. Id.

After a thorough review of the record in this matter, the Board is compelled to dismiss the Union's claim that the Sheriff discriminated against Williams for filing the initial Charge, or causing it to be filed, by imposing progressive discipline on Williams thereafter. The Union failed to meet its initial burden of proof. It also failed to rebut the Sheriff's sound explanation for taking reasonable action and expose a pretextual nature of that explanation. The Union filed the initial charge on December 10, 1997. On January 23, 1998, approximately 6 weeks later, the Sheriff issued a letter of "counseling" to Sergeant Williams. This letter did not constitute a reprimand, although it provided the first step in the subsequent progression of discipline. Rather, the express purpose of the letter was to make Williams aware that several incidents came to the Sheriff's attention that he found unacceptable and that the Sheriff expected an improvement in work performance. The letter placed Williams on notice that he needed to improve the performance and accuracy of his work. This letter detailed four separate and distinct incidents in which Williams

was derelict in his duties and cited the written policies and authorities which set the standard of expected conduct with respect to those incidents. At the end of this counseling letter, the Sheriff specifically notified Williams that future misconduct and dereliction of duties could result in discipline.

After having been placed on notice, in January 1998, that his job performance was inadequate, Williams was twice caught without his County issued pager while away from the Sheriff's Office. These two incidents were in direct violation of a standing directive that all deputies carry their County issued pager at all times when away from the office. Accordingly, on March 19, 1998, the Sheriff issued a written warning to Williams in which he again notified Williams that future disobedience or inadequate work performance could result in discipline including suspension or termination. The Sheriff met his burden of proving that he had a sound, reasonable basis for issuing a written reprimand after having placed Williams on notice that he was not performing his job properly and the Union failed to rebut this explanation or expose the explanation as a pretext for retaliation. The record, being devoid of substantial and legally competent evidence, does not support the conclusion or yield the inference that, in late March of 1998, the Sheriff sought to retaliate against Williams with discipline because Williams filed an unfair practice charge in December of 1997.

Additionally, on March 19, 1998, the Sheriff issued a one-day suspension without pay effective April 2, 1998. The basis for this suspension was that Williams ignored a direct order from the Sheriff. On March 4, 1998, Sergeant Williams was in charge of the security in a County Courtroom where two murder suspects were arraigned. Sheriff DeLeo considered these suspects to be very dangerous and a high security risk. Consequently, prior to the arraignment, the Sheriff placed a direct order on the Assignment sheet in capital letters and orange highlighter. The directive stated the following: "COURTROOM 1 PRISONERS SHALL BE TAKEN UP TOGETHER AND BROUGHT DOWN TOGETHER DURING A RECESS OR AT THE END OF COURT." According to the suspension letter, which was corroborated by Williams' own testimony, Sergeant Williams failed to read the assignment sheet and ordered his deputies to transport the inmates separately instead of as a group where he would have the added security of all the deputies present. Sheriff DeLeo testified that Williams' conduct on this occasion constituted a serious breach of his duties because his actions compromised the security of the court and the people within the courthouse. The record reveals that this incident was the seventh incident which came to the attention of the Sheriff. Williams had already been counseled and issued a written warning for inadequate performance and disobedience. Suspension was the next step in the progression of discipline.

Finally, by separate letter dated March 19, 1998, Sheriff DeLeo also issued a second one-day suspension to Williams, effective April 3, 1998, for unilaterally changing his work schedule without permission to start work at 8:30 a.m. instead 8:15 a.m. on March 5, 1998. The testimony reveals that Williams arrived at work on time to cover a courtroom that morning as assigned. The Sheriff, however, informed Williams that court was cancelled. Williams, having no immediate assignment, went outside to smoke a cigarette. He came back in at 8:25 a.m. Williams then changed his start time to 8:30 a.m. on the schedule because he did not want to receive pay for time that he did not work. After he altered the schedule, he leaned into the chief deputy's office and informed her of the change. The

Sheriff testified that Williams had no permission to delay his start time because he had other duties for him to perform that morning, namely, to supervise a female prisoner in the office.

Based on the evidence of record, the Board concludes that there is substantial, legally competent evidence that the Sheriff had sound professional and managerial interests and reasons for imposing discipline on Williams and that he gave Williams ample notice and opportunity to improve his performance before any discipline was imposed. Accordingly, the Union failed to meet its burden of proving that the Sheriff discriminated against Williams in the form of imposing progressive discipline upon him for filing the initial Charge, or causing it to be filed, merely because the Sheriff imposed discipline three months after the Charge was filed. The timing between the discipline and the filing of the Charge, which is not so close, is all the Union has to offer to substantiate its retaliation claim. The Commonwealth Court and this Board have long held that timing alone will not support a claim for discrimination. Shive, supra; OVR, supra. Additionally, the Sheriff adequately explained the reasonable, independent basis for imposing discipline.

The Union's third exception objects to the Hearing Examiner's conclusion that "the discipline meted out by the Sheriff was not the result of union animus." For the reasons set forth above and in PDO-2, the Board concludes that the record contains substantial evidence to support the Hearing Examiner's conclusion. Sergeant Williams admittedly and repeatedly failed to meet the known responsibilities of his position. Certain incidents that occurred before the filing of the Charge did not come to the Sheriff's attention until after the Charge was filed. The Sheriff did not immediately impose discipline even though the charge was filed and numerous derelictions came to the Sheriff's attention. Instead, the Sheriff chose to inform Williams that he was expected to improve his performance or discipline would be imposed for the purpose of obtaining cooperation and improvement. Even though Williams was warned, he failed to comply with the Sheriff's directives and produced a substandard work product. The Union has simply failed to meet its burden of proving that the Sheriff's actions in this case were the result of unlawful motive and, again, the Sheriff offered sound, professional bases for his actions, which remain unrebutted by the Union.

The Union's fourth exception objects to the Hearing Examiner's conclusion that other employees who were treated differently than Williams were not similarly situated. During the hearing, the Union presented Williams' testimony that Deputy Dave Keenan neglected to have his County issued pager with him on three separate occasions when the Sheriffs' Office tried to contact him, and he was not disciplined. Deputy Keenan, however, was due to retire the following month. Disciplining Keenan would have had no effect on improving or rehabilitating Keenan's behavior or job performance nor would it have affected his record or future promotions in any way. Williams also testified that Deputies Greg Baney and Ferdinand Sammer told him that they had forgotten their pagers in the past. Notwithstanding the hearsay issues with this testimony, the Sheriff did not have first-hand knowledge or reliable information that Baney and Sammer forgot their pagers. In this regard, Baney and Sammer were not caught without their pagers when the Sheriff's Office was trying to contact them via their County issued pagers. When Williams purportedly told the Sheriff that Baney and Sammer forgot their pagers, the Sheriff requested dates and

times so that he could have some account of what happened. Williams failed to produce any such information. Instead, Williams testified, "I lost that paper." (N.T. 34). Therefore, the Union failed to meet its burden of proving that Williams was the victim of disparate treatment because not one of the aforementioned deputies was similarly situated.

Additionally, during the hearing, the Union offered the testimony of Sergeant Williams that another employe left his revolver in a men's room located across from the holding cell, and he was not disciplined. Accordingly, Williams testified in the following manner:

Q. Are you aware of other employees violating policy and not being suspended?

A. I know one left his revolver in a men's room and no discipline was given to that gentlemen.

(N.T. 41). This testimony is the only evidence that the incident even occurred. The Union does not offer evidence to determine whether Williams was told about the incident or whether he personally observed the revolver in the men's room. There is no evidence that Williams even knew the identity of the deputy who allegedly left his revolver in the men's room. Moreover, the Union failed to present evidence that Sheriff DeLeo was aware of the incident. Sheriff DeLeo testified that none of the deputies, including Williams, ever told him of this incident, although he heard a rumor. After questioning several deputies and the Chief Deputy about the incident, Sheriff DeLeo was unable to verify whether the incident even occurred. The identity of the deputy remains a mystery.

Even assuming the incident actually occurred, the Union offered no evidence to establish the status of this unidentified deputy in the progressive disciplinary process. Absent such evidence, the Board cannot infer or conclude that the other deputy was similarly situated with respect to the range of discipline that he should have received. Also, the Union presented no evidence indicating whether this unidentified deputy was a Union supporter. Therefore, the Union failed to present sufficient evidence regarding this incident to yield the inference that Williams was treated differently because of his union activity. Accordingly, disparate treatment was not established on the record.

Williams also testified that he was contacted by two sergeants at the Prison who informed him that one of the on-call deputies was written up because he had alcohol on his breath while he was bringing a prisoner into the Prison. This was the extent of the evidence offered by the Union. Moreover, Williams admitted that he did not know whether the deputy was disciplined, rather he only knew that the deputy was not suspended as a result of the incident. However, Sheriff DeLeo testified that he was made aware of the alcohol incident two days after the incident occurred. He also testified that, by this time, there was no way to verify whether the deputy was under the influence of alcohol. Regardless, the Sheriff did counsel the deputy. The Union failed to offer evidence establishing the status of this deputy in the system of progressive discipline that is in place in the Sheriff's Office. Although the Sheriff was notified a second time about the deputy having alcohol on his breath, he testified that he was again unable to verify whether he in fact was under the influence of alcohol. Absent evidence that the deputy was similarly situated within the

system of progressive discipline and that this deputy was not a union supporter and given the Sheriff's reasonable explanation regarding the lack of verification of the incident, the Union failed to establish disparate treatment with respect to this incident. Accordingly, the Board agrees with the Hearing Examiner's conclusion that the Union failed to present sufficient evidence to establish that other similarly situated employees were treated less harshly for comparable conduct within a relevant time frame.

The Union's fifth exception objects to the Hearing Examiner's conclusion that neither the County nor the Sheriff committed unfair practices under Section 1201(a)(1) and (3). In the Union's sixth exception, it objects to the Hearing Examiner's dismissal of all charges and rescission of all amended complaints in PDO-2. The issues presented by exceptions 5 and 6 are identical to the issues set forth in exceptions 1 through 4 inclusively. Accordingly, exceptions 5 and 6 were adequately addressed above because the analyses and resolutions of exceptions 5 and 6 are subsumed within those set forth above.

After a thorough review of all matters of record, the Union's exceptions to the Proposed Decision and Order, issued July 17, 2000, are hereby dismissed in their entirety.

#### **ORDER**

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

#### **HEREBY ORDERS AND DIRECTS**

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed and the Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Edward G. Feehan, Member, this twenty-first day of November, 2000. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

MEMBER L. DENNIS MARTIRE DISSENTS.