

members of the Association's bargaining team advised Assistant Superintendent Brandmeyer that the Crisis Team had recommended that bargaining unit members report sick on January 18. In addition, the fact that 195 out of 372 bargaining unit members were absent on January 18 and that among those absent were several Association officers and bargaining team members leads us to the conclusion that the Association, its officers, and bargaining team engaged in and encouraged unlawful concerted activity.

CONCLUSION

Based on the facts set forth above, we conclude that the Association and the employees it represents engaged in a strike, work stoppage, slowdown, or other withholding of services in violation of Section 9A(a) of the Law on January 18, 2000. We further conclude that the Association has induced, encouraged, and condoned the strike in violation of Section 9A(a) of the Law.

ORDER

1. The Shrewsbury Education Association, its members and officers, shall immediately cease and desist from engaging in any strike, work stoppage, slowdown, or other unlawful withholding of services.
2. The Shrewsbury Education Association shall immediately cease and desist from encouraging, condoning, or inducing any strike, work stoppage, slowdown, or other unlawful withholding of services.
3. Immediately upon receipt of a copy of this Interim Order, the Shrewsbury Education Association shall take necessary steps to inform the employees whom it represents of the contents of this Interim Order.
4. The Commission retains jurisdiction of this matter to set further requirements as may be appropriate.
5. The Shrewsbury Education Association shall notify the Commission by 9:00 a.m. on Monday, January 24, 2000 of the steps taken to comply with this order.

* * * * *

In the Matter of BRISTOL COUNTY

and

RAYMOND SOUSA

Case No. MUP-2100

63.7 *discrimination - union activity*
 65.71 *small plant doctrine*
 91.1 *dismissal*

January 28, 2000

Robert C. Dumont, Chairman
Helen A. Moreschi, Commissioner
Mark A. Preble, Commissioner

Robert Novack, Esq. Representing Bristol County Commissioners
Michael Manning, Esq. Representing Raymond Sousa

DECISION¹

Statement of the Case

Raymond Sousa (Sousa) filed a charge of prohibited practice with the Labor Relations Commission (the Commission) on May 4, 1998, alleging that Bristol County (the Respondent) had engaged in prohibited practices within the meaning of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on March 19, 1999. The complaint alleged that the Respondent had violated Section 10 (a) (3) and, derivatively, Section 10 (a) (1) of the Law by retaliating against Sousa because of his organizing activity on behalf of the National Association of Government Employees (the Union). The Respondent filed its answer on April 30, 1999. The Respondent filed a Motion to Dismiss on May 18, 1999. Sousa filed an opposition on June 1, 1999. The Commission denied the Respondent's Motion to Dismiss on June 10, 1999.

Cynthia A. Spahl, a duly-designated Hearing Officer of the Commission (the Hearing Officer), conducted a hearing on August 4, 1999, August 5, 1999, and August 12, 1999 at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. The Respondent orally filed a second Motion to Dismiss. The Hearing Officer took the Respondent's motion under advisement. Following the hearing, both parties filed post-hearing briefs. The Hearing Officer issued Recommended Findings of Fact on October 18, 1999. Neither party filed challenges to the Recommended Findings of Fact.

Stipulations

1. The Respondent is a public employer within the meaning of Section 1 of the Law.

1. Pursuant to 456 CMR 13.02 (1), the Commission designated this case as one in which the Commission shall issue a decision in the first instance.

2. From approximately 1990 until on or about March 16, 1998, Sousa was employed by the Respondent as a maintenance worker at the Bristol County Sheriff's Department.
3. On or about February 2, 1998, the Union filed representation petitions with the Commission (Case Nos. MCR-4663 and MCR-4668).
4. On or about February 9, 1998, the Respondent suspended Sousa with pay pending the outcome of an investigation regarding whether Sousa had brought certain contraband to inmates at the Bristol County House of Correction.
5. On or about March 16, 1998, the Respondent terminated Sousa.
6. Sousa brought a submarine sandwich to the House of Correction in November or December of 1997.
7. Sousa admitted to investigators that he brought a submarine sandwich to an inmate at the House of Correction.

Findings of Fact²

Background

Sousa began working for the Respondent in the Bristol County Sheriff's Department (the Department) as an Assistant Maintenance Engineer on May 7, 1990. He was promoted to Maintenance Engineer on December 19, 1993. In February 1998, Sousa worked Monday through Friday on the first shift with three other employees in the Dartmouth facility of the Bristol County House of Correction (the BCHC).

Contraband

According to the rules and regulations of the BCHC, it is a violation for any employee, including maintenance personnel, to give contraband to or receive contraband from an inmate.³ Contraband is defined as anything an inmate is not supposed to possess. For example, if an inmate is allotted a specific amount of clothing or food items, anything above the allotted amount is contraband. Also, any item that an inmate is not allowed to possess, like drugs or alcohol, is contraband. Even small or apparently insignificant items of contraband can be troublesome. For example, seemingly innocuous items of contraband can conceal dangerous items of contraband.⁴ Also, an inmate could blackmail an employee into bringing many items of contraband into the BCHC by threatening

to report that employee for previously bringing in one small item of contraband.⁵

The BCHC rules and regulations prohibit contraband for the following reasons. First, it is illegal. Second, an inmate possessing contraband may be perceived by other inmates as an informant or as someone who is favored by the staff. As a result, other inmates might assault that inmate or might be reluctant to report that inmate's wrongdoing. Third, possessing contraband could compromise employee and inmate safety if it is fashioned into a weapon or poses a fire hazard.

After Thomas M. Hodgson (Sheriff Hodgson) succeeded David R. Nelson (Nelson) as Sheriff of Bristol County in May or June 1997, he met with all of the employees in June 1997 to announce that he planned to strictly enforce all of the institution's rules and regulations. Sheriff Hodgson emphasized to the employees that anyone who gave contraband to or received contraband from an inmate would be terminated. The employee did not need to commit another infraction to warrant termination. Sousa was not present at the meeting, because he was on vacation. Nevertheless, he learned about the meeting the following week when he returned to work.

Inmate Work Programs

Inmates may participate in work programs during their incarceration in an effort to receive good time.⁶ Sheriff Hodgson's current policy on inmate work programs is codified in 103 CMR 944.00-.04 and became effective on July 24, 1998.⁷ Neither the current policy nor the prior policy permitted employees to bring food to inmate workers from outside of the facility. However, Sheriff Hodgson is authorized to do so under Section 944.04 (I)(B)(3)⁸ and Section 944.04 (I)(B)(1)⁹ of the policy.

Submarine Sandwich Incident

While employed by the Respondent, Sousa worked in secured areas of the facility with different inmates who were participating in work programs. The last inmate with whom Sousa worked was Thomas Duval (Duval). Sousa worked with Duval approximately one to one and a half years.

As Sousa was going out to lunch one day in November or December 1997, Duval asked Sousa to bring him a submarine sandwich. Sousa purchased submarine sandwiches for himself and for Duval, brought the sandwiches through security without being searched,

2. The Commission's jurisdiction is uncontested.

3. The Respondent considers giving and receiving contraband to be one violation of the rules and regulations rather than two separate violations.

4. As an illustration, a family member or a friend who works in a restaurant could hide drugs, weapons, or cuff keys in food unwittingly brought to the inmate by a staff member.

5. For example, an inmate could blackmail an employee into bringing a pack of gum or cigarettes into the BCHC if that employee previously brought in one stick of gum or one cigarette.

6. Good time is a reduction of the inmate's sentence.

7. The current policy replaced the prior inmate work policy that had been in effect at the time of the events in question. The record does not indicate the full extent to which the current policy and the prior policy were either similar or dissimilar.

8. Section 944.04 (I)(B)(3) of the policy provides, in part, that the Sheriff may grant special awards to inmates who perform exceptional services that are not a part of their regular assignment like: acts of outstanding heroism; voluntary acceptance and satisfactory performance of unusually hazardous assignment; acts that protect the lives of Bristol County staff members or Bristol county property; suggestions which shall improve operations or save tax dollars; and any other exceptionally meritorious or outstanding service consistent with the general character of the preceding cases.

9. Section 944.04 (I)(B)(1) of the policy provides that special consideration shall be made to inmates by way of food and/or canteen services for jobs performed by inmates to be exceptionally well done within the Dartmouth House of Corrections.

ate his sandwich with Duval in the receiving area of the facility, and returned to work. Sousa wanted to buy Duval the submarine sandwich because Duval had always been a good worker and had never given Sousa any problems. Sousa knew that he was breaking the BCHC rules by bringing the submarine sandwich to Duval, but he did not think that his actions were as serious as if he had brought drugs for Duval.¹⁰ Sousa also knew when he purchased the submarine sandwich for Duval that other employees had been fired for bringing newspapers and donuts to inmates.

Union Organizing Efforts

The BCHC employees began to talk about joining a union in October or November 1997. The employees wanted to join a union because they were concerned about: 1) the status of their jobs after Sheriff Hodgson was appointed; 2) the difference in their pay compared to the pay of Commonwealth employees; 3) the Commonwealth taking over the County's correctional system; and 4) working conditions. Sousa wanted to join a union because he was concerned about his job and wanted to be protected from termination.

Lloyd Martin (Martin), who worked in the maintenance department at the David R. Nelson Correctional Alcoholic Center, first contacted the Union and spoke to Vice President Jack Foley (Foley).¹¹ Martin proposed a unit consisting of maintenance workers only. When Sousa and Perry heard Martin's organizing plans, they decided that it would be preferable to include all BCHC employees in the unit. Consequently, Sousa and Perry contacted Foley and told him that they wanted a broader unit than the one Martin had proposed. Foley agreed to this proposal.

The organizing campaign took place sometime in December 1997 or January 1998. Sousa and Perry were key organizers. However, Sousa did not mention his organizing activities to Sheriff Hodgson or to members of the administration and did not engage in any organizing activities in front of these individuals.¹² Sousa's only organizing activity on the Respondent's premises was distributing and collecting union authorization cards. Sousa estimated that he distributed fifteen blank cards to employees and gave a stack of blank cards to Perry.¹³ It took Sousa a few seconds to pass out the cards. Sousa was unaware of whether anyone from the administration was present when he distributed the blank cards.

10. When initially asked during direct examination whether he was aware of any regulation prohibiting employees from bringing food to inmate workers, Sousa responded negatively. However, Sousa admitted during subsequent direct and cross-examination that he knew he had broken the BCHC's rules by bringing the submarine sandwich to Duval. Therefore, the Hearing Officer credited Sousa's admission that he knew about the BCHC's rules and regulations regarding contraband when he brought the submarine sandwich to Duval.

11. The Hearing Officer credited the testimony of Richard Perry (Perry) with regard to the initial organizing activity because he had the clearest recollection of these events. Perry worked with Sousa in the maintenance department.

12. Likewise, Perry did not engage in organizing activities during work hours in front of anyone who worked in the Sheriff's wing.

13. During direct examination, Sousa testified that he had given out cards to Perry on the Respondent's premises and estimated that he had distributed fifteen cards. During cross-examination, Sousa testified that he had passed out fifteen blank cards to employees and had given a stack of blank cards to Perry. Sousa's testimony

during cross-examination appeared to be an attempt to clarify his direct examination testimony. Therefore, the Hearing Officer credited Sousa's cross-examination testimony concerning the extent of his activity distributing blank cards.

Perry distributed the most cards, and Sousa distributed the second most number of cards. Sousa collected signed cards once or twice in the parking lot during coffee and lunch breaks. He was unaware whether anyone from the administration was present while he collected the signed cards. The remainder of Sousa's organizing activities occurred off the Respondent's premises. For example, Sousa held one organizing meeting at his home and attended meetings at the VFW hall in New Bedford. There were no Union signs¹⁴ or notices of off-premises Union meetings posted around the BCHC. Employees were notified of the meetings by word of mouth.

During the organizing campaign, Foley met with prospective Union members in the Respondent's parking lot ten or fifteen times,¹⁵ at Sousa's home once, and at halls in North Dartmouth, New Bedford, and Acushnet four or six times. There were no administrative employees present when Foley met with employees in the parking lot. Foley did not send signed cards to Sheriff Hodgson's office or tell anyone that Sousa had signed a card.¹⁶

The Union filed a representation petition in case number MCR-4663 on February 2, 1998 seeking to represent a bargaining unit comprised of various maintenance workers, the storekeeper, and the voke teacher. The Union filed two other petitions around the same time seeking to represent a unit of captains and majors and a unit of administrative/clerical employees (MCR-4668). The Respondent and the Union agreed to a consent election in case numbers MCR-4663 and MCR-4668 on April 21, 1998. The Commission held an election on May 20, 1998 and certified the Union as the exclusive representative on June 3, 1998 for the following bargaining units: 1) Unit A — administrative/clerical employees, including professional employees; and 2) Unit C — maintenance and food service workers.

Investigation and Discipline

Peter Larkin (Larkin) and Captain Kurt Espinola (Espinola) worked as investigators at the BCHC.¹⁷ They started investigating Sousa several weeks prior to February 6, 1998 because they had received information from a confidential inmate informant that Sousa was selling cigarettes to Duval, and that Duval was selling the cigarettes to other inmates in the unit.¹⁸ The investigators also suspected that Sousa was placing bets on professional sporting events for Duval.

14. Although there were Union signs posted outside of the Respondent's premises, the record does not reflect where they were posted.

15. Foley spoke to employees either in small groups or one-on-one as they came out of work.

16. During breakfast meetings with Foley, Sheriff Hodgson told Foley that he had been a union officer. Foley believed that Sheriff Hodgson had a favorable attitude toward the Union.

17. Investigators investigate all criminal activity among inmates and staff.

18. Possession of tobacco products inside the prison was illegal for both employees and inmates after November 1997.

The investigators wanted to catch Duval in possession of cigarettes, so he would divulge his knowledge of Sousa's actions. However, they were unable to do so. Duval refused to speak to the investigators when they attempted to interview him.

Larkin and Captain Greg Centeio (Centeio) next interviewed Sousa on February 6, 1998. Sousa denied that he had been selling cigarettes and placing bets.¹⁹ However, Sousa admitted that he had brought contraband to Duval. In particular, Sousa admitted that he: 1) brought Duval a submarine sandwich; 2) allowed Duval to take leftover donuts from the maintenance area back to the housing unit; 3) allowed Duval to read a newspaper; and 4) gave him black pens,²⁰ pieces of copper, and various wood items.²¹ Sousa initially denied that Duval had asked him to bring cigarettes into the BCHC, but subsequently recanted his statement and admitted that Duval had asked him to bring cigarettes into the BCHC once. The Respondent placed Sousa on administrative leave with pay on February 10, 1998 pending the outcome of the investigation.

Sheriff Hodgson sent a notice of a disciplinary/termination hearing to Sousa dated March 9, 1999. Sousa was charged with giving contraband²² to an inmate and lying to investigators. The hearing was held before Sheriff Hodgson on March 13, 1998. During the hearing, Sousa admitted the charges and did not claim that the Respondent had discriminated against him for his Union activity. Sheriff Hodgson sent Sousa a termination notice effective March 16, 1998. Sousa requested a hearing before the Bristol County Personnel Board (the Board) by letter dated March 20, 1998. The hearing was held on or about April 7, 1998. Sousa again did not claim that he had been terminated due to his Union activities. The Board issued a notice of decision dated April 10, 1998 upholding Sheriff Hodgson's decision to terminate Sousa. There is no record of any prior discipline in Sousa's personnel file.

Other Terminations

From Sheriff Hodgson's June 1997 meeting to August 1999, any employee caught giving contraband to or receiving contraband from an inmate was terminated. There was no other kind of discipline imposed during this time period. The following employees were terminated for violating the contraband prohibition, among other things.

A correction officer, Candice Neil (Neil), was terminated for passing notes from one inmate to another inmate and for giving

cigarettes to an inmate. Her termination occurred within several days of Sheriff Hodgson's address to the employees in June 1997. She was a new officer with less than one year on the job and with no prior discipline.

A corrections officer, Sean Fitzgerald (Fitzgerald), who had been assigned to the canteen staff was terminated in the late summer or early fall of 1997 for bringing grape juice, a newspaper, and a Playboy magazine to an inmate and for sharing personal details about his life with an inmate.²³ He had been employed by the Respondent for seven or eight years. He did not have any major infractions noted in his personnel record.

A kitchen steward, Alfred Levesque (Levesque), was terminated prior to November 1997 for receiving cigarette coupons²⁴ from inmates and for testing positive for marijuana. He had been employed by the Respondent for six to seven years and had a spotless personnel record.

An individual who managed the property room, David Croll (Croll), was terminated in the fall of 1997 for: 1) allowing inmates to take unutilized television sets to their cells; and 2) bringing inmates' wood projects home to put finishing touches on them. He had been employed by the Respondent for approximately seven to eight years with no prior discipline.

The head of the canteen, L. Rendeck (Rendeck), was terminated in the fall of 1998 or the early winter of 1999 for diverting county property, Little Debbie snack cakes, to an inmate.²⁵ He had been employed by the Respondent for eight or nine years and had a good personnel record.

Another canteen employee, S.P.,²⁶ was terminated²⁷ around the same time as Rendeck for receiving an inmate meal.²⁸ He had been employed by the Respondent for eight or nine years and had no prior discipline on record.

Opinion

A three-step analysis is employed when reviewing alleged violations of Section 10 (a) (3). *Commonwealth of Massachusetts*, 16 MLC 1519, 1524 (1990); *Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559, 565-566 (1981). First, the charging party must establish a *prima facie* case of discrimination. To establish a *prima facie* case of discrimination based on protected

19. He was neither charged with nor disciplined for either purported infraction.

20. Black pens are deemed contraband because internal BCHC documents are signed in black pen to ensure their authenticity. Inmates are allowed to possess blue pens only.

21. When questioned on cross-examination about what he admitted to the investigators, Sousa was evasive. Therefore, the Hearing Officer credited Larkin's testimony with respect to what Sousa admitted during the interview.

22. Each item of contraband Sousa gave Duval (e.g., submarine sandwich, black pens, wood, and copper) is considered a separate offense. Nevertheless, the separate offenses were categorized as giving contraband.

23. Although sharing a personal detail with an inmate is not a terminable offense in and of itself, the infraction was included in the termination notice in accordance with the investigators' practice of including both major and minor infractions in their reports.

24. Cigarette coupons came with cigarette packages and could be redeemed to obtain items like dartboards, pool tables, and clothing.

25. This termination occurred after Sousa had been fired.

26. This employee's name is not in the record.

27. This termination also occurred after Sousa had been fired.

28. Only inmates are supposed to consume the meals prepared for them. Any extra inmate meals are supposed to be discarded.

activities, the charging party must produce evidence to support each of the following elements: 1) the employee engaged in protected activity; 2) the employer knew of this activity; 3) the employer took adverse action against the employee; and 4) the adverse actions was motivated by the employer's desire to penalize or discourage the protected activity. *Town of Dedham*, 16 MLC 1235, 1242 (1989). Once the charging party has established a *prima facie* case, the employer may rebut it by producing evidence that the action was motivated by a legitimate reason. If the employer produces that evidence, the Commission must determine whether the employer would not have taken the adverse action "but for" the employee's protected activity. *Id.* Here, it is undisputed that: 1) Sousa engaged in concerted, protected activity by participating in the Union organizing drive; and 2) the Respondent took adverse action when it terminated Sousa. The remaining issues we must consider are whether the Respondent: 1) knew about Sousa's concerted, protected activity; and 2) was unlawfully motivated when it terminated him.

Employer knowledge

Knowledge of an employee's union activities may be proved by direct or circumstantial evidence. *William S. Carroll, Inc.*, 5 MLC 1562, 1569 (1978). However, the mere coincidence in time between the employee's union activities and the employer's adverse action is insufficient to raise an inference of knowledge on the employer's part of the employee's union activity without some direct or persuasive circumstantial evidence of knowledge. *Lexington Taxi Corp.*, 4 MLC 1677, 1683 (1978). In cases where the workplace qualifies as a small plant,²⁹ a charging party may prove employer knowledge by invoking the small plant doctrine. This doctrine provides a basis for inferring employer knowledge in circumstances where impermissible motivation has been established but knowledge cannot be proved directly. However, the smallness of the plant alone does not justify invoking the doctrine. The employee's protected, concerted activity must have taken place on the work premises in a manner or at a time that the employer must have noticed them. *Boston Water and Sewer Commission*, slip op., Case No. MUP-1677 (December 16, 1999); *Blue Hills Regional School District*, 9 MLC 1271, 1279 (1982); *Lexington Taxi Corp.*, 4 MLC at 1683-1684. The small plant doctrine does not apply to off-hour, off-the-premises meetings or telephone calls. *Lexington Taxi Corp.*, 4 MLC at 1684; *Watuppa Oil Company*, 2 MLC 1032, 1037 (1975).

Here, there is direct evidence that Sousa attempted to conceal his organizing activity from the Respondent. For example, Sousa testified that he did not mention his organizing activities to members of management and did not engage in any organizing activities in their presence. There is also direct evidence that the Union conducted a low-key organizing campaign. In particular, Union organizers did not post signs or notices inside the BCHC to announce off-site meetings. Rather, they relied upon word of mouth. Further, employer knowledge cannot be inferred using the small plant doctrine for the following reasons. First, Sousa's

on-site organizing activities were not conducted in a manner that the Respondent would have noticed them. Sousa's sole organizing activity on the Respondent's premises was distributing and collecting union authorization cards. He estimated that it took a few seconds to distribute the blank cards. He collected signed cards once or twice in the parking lot during coffee and lunch breaks. He was unaware of management's presence when he distributed and collected the authorization cards. Second, Sousa's only other organizing activity, attending organizing meetings, took place off-site. Third, Sousa failed to establish the unlawful motivation element of his *prima facie* case, as discussed in more detail below. Consequently, the Commission cannot conclude that the Respondent knew of Sousa's concerted, protected activity when it terminated him.

Unlawful motivation

Absent direct evidence of improper employer motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. *Commonwealth of Massachusetts*, 6 MLC 2041, 2045-46 (1980). There are several factors that may suggest unlawful employer motivation including: 1) timing of the alleged discriminatory act, *Town of Somerset*, 15 MLC 1523, 1529 (1989); 2) triviality of reasons given by employer, *Commonwealth of Massachusetts*, 14 MLC 1743, 1748 (1988); 3) an employer's deviation from past practices, *Everett Housing Authority*, 13 MLC 1001, 1007 (1986); or 4) expressions of animus or hostility towards a union or the protected activity, *Town of Andover*, 17 MLC 1475, 1483 (1991). Here, Sousa points to several pieces of circumstantial evidence and asks the Commission to draw an inference that the Respondent was improperly motivated when it terminated him. We will examine each piece of evidence in turn.

Sousa first argues that the Respondent expended a considerable amount of time trying to avoid presenting witnesses. He draws attention to the Respondent's motions to dismiss and concludes that the motions establish inconsistent or shifting reasons for his discharge. However, Rule 13.07 of the Commission's regulations allows parties to file motions prior to and on the day of the hearing. Moreover, there is nothing in the Respondent's motions to contradict the expressed reasons for Sousa's termination. Thus, we are unpersuaded by Sousa's argument on this point.

Sousa next questions why he was terminated if the Respondent's inmate work policy allows inmates to be rewarded for good service with food items. He asks the Commission to draw a negative inference from Hodgson's failure to testify about this apparent contradiction. However, the inmate work policy that was in effect at the time of Sousa's termination did not permit employees to bring food to inmates from outside of the facility. Therefore, the record does not support Sousa's contention and Hodgson's failure to testify does not raise a negative inference.

Sousa further asserts that he was the only employee who was terminated solely for giving contraband to an inmate. He argues that the other employees who were terminated had been charged

29. The Commission has previously held that the small plant doctrine applies in workplaces with a small number of full-time employees working under close

supervision in a confined area. See, *Plymouth County House of Correction and Jail*, 4 MLC 1555 (1977).

with additional violations of the rules as well as the contraband prohibition. However, the Respondent discharged a majority of the other employees strictly because they had brought contraband into the facility. For example, the Respondent terminated: 1) Neil for giving notes and cigarettes to inmates; 2) Croll for allowing inmates to take unutilized televisions sets to their cells and for enhancing inmates' wood projects at home and returning them to inmates; and 3) S.P. for receiving an inmate meal. All of these items are contraband and constitute a single violation of the BCHC rules and regulations. Similarly, the Respondent fired Fitzgerald for giving an inmate the following items of contraband: grape juice, a newspaper, and a magazine. Although the Respondent also cited Fitzgerald for sharing personal details about his life with an inmate, this is not a terminable offense. Further, although the Respondent charged Rendeck with diverting county property, it is clear that the Little Debbie snack cakes were contraband. Moreover, despite Sousa's contention that he was discharged solely for giving contraband to an inmate, the record reflects that the Respondent terminated Sousa for two violations of the BCHC rules and regulations: giving contraband to an inmate and lying to investigators. Consequently, the preponderance of the evidence does not show that the Respondent treated Sousa differently than other similarly situated employees.

Sousa next alleges that the discipline he received was harsher than the contraband violation warranted and posits that there must be another reason for his termination. However, as mentioned previously, the Respondent terminated Sousa for two offenses: lying to investigators and giving contraband to an inmate. Even if the Respondent had terminated Sousa solely for giving contraband to an inmate, the Respondent's actions would have been consistent with Hodgson's contraband policy. For example, Hodgson informed employees at the June 1997 meeting that they would be terminated for giving contraband to or receiving contraband from an inmate. Further, as discussed above, the Respondent discharged several other employees for violating the contraband prohibition. Accordingly, the record reflects that Sousa received discipline that was commensurate with his offenses.

Sousa also contends that the Respondent began to investigate him on February 6, 1998, four days after the Union filed a representation petition with the Commission. He concludes that the timing of these events is suspect. The Commission examines the timing of an adverse action in relation to the concerted, protected activity to determine whether it gives rise to an inference of improper motivation. *Town of Athol*, 25 MLC 208 (1999) (adverse action occurred less than two weeks after concerted, protected activity); *Commonwealth of Massachusetts*, 14 MLC 1743 (1988) (adverse action occurred within twelve days of concerted, protected activity). Further, timing alone is insufficient to establish unlawful employer motivation. *Southern Worcester Regional Vocational School District Committee*, 5 MLC 1525, 1544 (1978); *Watuppa Oil Co., Inc.*, 2 MLC at 1032. Here, the record reflects that Larkin and Espinola started to investigate Sousa several weeks prior to February 6, 1998. The Respondent terminated Sousa on March 16, 1998 following a long-term investigation by BCHC investigators that had spanned several weeks. Further, it is not clear from the record when Sousa engaged in any Union organizing activity.

Thus, we are unable to find a sufficient time link between Sousa's termination and his role in Union organizing activity from which to infer improper motivation.

Sousa asks the Commission to consider the following additional facts: 1) Sousa's conduct would have been condoned under Nelson's administration; 2) the items Sousa gave Duval were not contraband; 3) Sousa was ignorant of Hodgson's new policy; 4) Sousa acted out of human kindness toward Duval rather than with malice or recklessness; and 5) Sousa does not use pens often in his capacity as a tradesworker and explains his ignorance of the blue pen-black pen distinction. However, the record does not support Sousa's second, third and fifth assertions. Further, Sousa's first and fourth contentions are irrelevant to determine whether the Respondent retaliated against him for his concerted, protected activity. Accordingly, Sousa's arguments are unpersuasive.

Conclusion

Because the record reflects insufficient evidence of employer knowledge and improper motivation, we find that Sousa failed to establish a *prima facie* case and conclude that the Respondent did not retaliate against him in violation of Sections 10 (a) (3) and, derivatively, 10 (a) (1) of the Law. Accordingly, the complaint of prohibited practice is dismissed.

SO ORDERED.

* * * * *