STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

TERRY LYMON, Complainant, vs. UAW LOCAL UNION 2209, Respondent.	ICRC NO.: EMra12041133 EEOC No.: 24F-2012-00491

DATE FILED
OCT 21 2019
ICRC
COMMISSION

FINAL ORDER

On August 21, 2019, Hon. Caroline A. Stephens Ryker, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") issued her Initial Findings of Fact, Conclusions of Law, and Order ("Order"). The Parties had opportunity to object to the Order, and both Complainant and Respondent objected to the Order on September 4th and 5th of 2019, respectively. IC 4-21.5-3-29. While both Parties were afforded the opportunity to file a brief in this matter, only Respondent filed a brief. Complainant filed his Request for the ICRC Commission to Hear Additional Evidence on October 15, 2019, to which Respondent objected on October 17, 2019. The Commission held oral arguments on the Parties' objections on October 18, 2019. After due consideration of the complete record in this matter, the Commission adopts the following and HEREBY Orders:

THE COMMISSION HEREBY ORDERS:

1. Complainant's Request for the ICRC Commission to Hear Additional Evidence is DENIED.
2. The findings of fact and conclusions of law as stated in the Order, a copy of which is attached hereto, are incorporated herein by reference. IC 4-21.5-3-28(g)(2).
3. The Order is AFFIRMED under IC 4-21.5-3-29 and hereby becomes the Final Order disposing of the proceedings. IC 4-21.5-3-27(a).

Either party to a dispute filed under IC 22-9 may, not more than thirty (30) days after the date of receipt of the Commission's final appealable order, appeal to the court of appeals under the same terms, conditions, and standards that govern appeals in ordinary civil actions. IC 22-9-8-1.

ORDERED by the Commission majority vote of 4 Commissioners on this 18 day of October, 2019

Chair Steven A. Ramos
Indiana Civil Rights Commission

Certificate of Service

Served this 21 day of October, 2019 by United States Mail on the following:

Terry Lymon
2418 Palisade Drive
Fort Wayne, IN 46806
oldgold2273@yahoo.com
Certified Mail #

9214 8901 0661 5400 0143 9190 50

UAW LOCAL UNION 2209
5820 East 900 North
Roanoke, IN 46783
Certified Mail #

9214 8901 0661 5400 0143 9192 27

Macey Swanson & Allman
Robert A. Hicks, Esq.
445 N. Pennsylvania Street, Suite 401
Indianapolis, IN 46204
rhicks@MaceyLaw.com
Certified Mail #

9214 8901 0661 5400 0143 9192 65

And served personally on the following:

Michael C. Healy, Esq.; Staff Counsel
Indiana Civil Rights Commission
Indiana Government Center North
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
mhealy@icrc.in.gov

Docket Clerk,
Anehita Eromosele

STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

TERRY LYMON,
Complainant,

vs.

UAW LOCAL UNION 2209,
Respondent.

ICRC NO.: EMra12041133

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INITIAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The presiding Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"), Caroline A. Stephens Ryker, held a public Hearing in this matter on February 6th and March 1st of 2019. Complainant Terry Lymon ("Complainant") appeared personally along with Staff Attorney for the ICRC, Attorney Michael C. Healy, in support of Complainant's complaint and on behalf of the public interest. Respondent UAW Local Union 2209 ("Respondent") appeared by counsel Attorney Robert A. Hicks of MACEY SWANSON & ALLMAN.

The Hearing was conducted because on July 24, 2013, the ICRC Commission, after conducting a neutral investigation, issued a Notice of Reversal in which the Commission found probable cause with respect to Complainant's April 23, 2012 complaint in which Complainant alleged that Respondent discriminated against him on the basis of race in violation of the Indiana Civil Rights Law, Indiana Code 22-9, *et. seq.* ("ICRL"). The Parties submitted a Joint Prehearing Statement ("JS") on December 14, 2018, which was supplemented by the (Second) Revised Joint Prehearing Statement ("ALJ Ex. 1") that summarized the Parties' allegations and defenses as well as provided stipulations concerning facts and evidence.

At the beginning of the proceeding, the ALJ granted Complainant's oral motion for the witnesses to be separated, and the Parties waived opening arguments. Complainant's witnesses included Complainant, Ronnie Bond ("Bond"), Joseph Watkins ("Watkins"), and LaVon Kelly ("Kelly"), and Complainant's admitted exhibits included: CX 6, CX 7, CX 9 through CX 11, CX 13 through CX 15, CX 19, CX 21, CX 22, CX 24, CX 26, CX 27, CX 29 through CX 31, CX 34,

CX 37 through CX 41, CX 43 through CX 51.[1] Complainant and Watkins served as Complainant's rebuttal witnesses. Respondent's witnesses included David Matthews ("Matthews"), Brenda Marshall Robinson ("Robinson"), Dwight Wilson ("Wilson"), and Amy Richardson ("Richardson"). Respondent did not call any rebuttal witnesses. The following stipulated exhibits were admitted: SX 1 through SX 27.[2] Additionally, ALJ Ex. 1 was admitted.[3] Both Parties waived closing arguments.

The ALJ set an April 29, 2019 deadline for filing any motions to correct exhibits as reflected in the final exhibit log and set a June 10, 2019 deadline for the submission of suggested decisions under 910 IAC 1-11-3, which was later extended until July 10, 2019. Neither Complainant nor Respondent filed any motions to correct exhibits; both Complainant and Respondent timely filed suggested decisions. Accordingly, the ALJ took the matter under advisement. Having carefully considered the evidence and being duly advised in the premises, the presiding ALJ for the ICRC proposes that the Commission enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The Parties

1. Complainant is an African American man who worked for General Motors ("GM") and was a member of Respondent between March 8, 1995 and August 2, 2004. (S1; S2.)
2. Respondent is the Union that was tasked with representing Complainant in disputes between Complainant and GM. (S3.)
3. During time relevant to Complainant's complaint, Respondent's relationship with GM was governed by the September 18, 2003 Agreement between General Motors Corporation and the UAW ("the Agreement"), and Complainant's appeal rights were governed by the 2006 and 2010 Constitution of the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Constitution"). (S6; S7; SX 2; SX 3; CX 6.) Both the

[1] The following exhibits are duplicative: CX 31 and SX 20, CX 26 and SX 13, CX 27 and SX 14, CX 37 and SX 12, and CX 38 and SX 5. The following exhibits offered by Complainant were admitted with an objection by Respondent noted for the record: CX 10, CX 22, CX 34, and CX 40. The remaining exhibits offered by Complainant were admitted without objection. CX 44 was admitted per the April 12, 2019 Post-Hearing Nondispositive Order.
[2] All Stipulated Exhibits were admitted without objection from either Party.
[3] Admitted without objection. Stipulations as to fact included in ALJ Ex. 1 will be cited as "S#."

Agreement and the Constitution outline Complainant's and Respondent's rights and responsibilities during a dispute with GM and with each other. (SX 2; SX 3; CX 6 .)

4. On April 23, 2012, Complainant filed a complaint with the ICRC against Respondent in which Complainant alleged that Respondent discriminated against him in the area of employment on the basis of race. Specifically, the complaint alleged:

> On March 22, 2012, Respondent denied my right to equal representation. I believe Respondent discriminated against me on the basis of race (African American) because:...Respondent informed me it was taking my grievance under advisement; however, I am certain Respondents [sic] intentions are to deny my grievance claiming I failed to initiate the process in a timely manner. I assert that I am the only individual who has had a grievance withdrawn by Respondent and was not notified; therefore, there was no way for me to have been able to stay within the ninety (90) day time frame, which subjected me to a denial of equal representation...

(S37, S38; S39; S40; S41; SX 1.)

Chronology of Events

5. On July 21, 2004, Complainant, after taking time off of work for an injury, received a letter from GM advising him that he must return to work within five (5) working days or forfeit his seniority. (S8; S9; S10; S11; S12; SX 2 at 49-50; SX 4; CX 19; CX29; Tr. 270:11-22; Tr. 285:19-288:1; Tr. 344:15-348:8.)
6. On July 28, 2004, Complainant returned to work and informed GM that he was unable to perform the assigned job because the job was not compatible with his medical restrictions. (S13; CX 24; Tr. 287:7-289:8; Tr. 346:5-351:8; Tr. 363:10-367:10.)
7. That day, GM's physician assessed Complainant's injury and determined that the assigned job was within Complainant's medical restrictions. (Tr. 275:6-276:4; Tr. 365:12-367:18.) Complainant was told to immediately return to the assigned job, but he did not. (S14; S16; Tr. 367:22-371:17; Tr. 374:1-15.)
8. GM terminated Complainant's employment on August 2, 2004 for failure to return to work under paragraph 64(d) of the Agreement. (SX 5; CX 38; Tr. 288:2-9; Tr. 294:5-18.)
9. Respondent grieved Complainant's discharge by seeking an opinion from an Impartial Medical Examiner ("IME") whose opinion would be final and binding under paragraph 43 of the Agreement with the understanding that GM would reinstate Complainant if the IME

determined the assigned job was not compatible with Complainant's restrictions. (SX 2 at 33-35; CX 14 at 2; CX 45 at 2; Tr. 294:23-295:20; Tr. 378:2-381:4; Tr. 387:11-388:19; Tr. 529:3-532:9; Tr. 539:6-541:21; Tr. 578:21-579:21; Tr. 585:6-12.)

10. On August 4, 2004, the IME issued his opinion in which the IME ultimately determined that Complainant could perform the assigned job. (SX 6; CX 21; Tr. 296:8-18.)
11. Complainant was notified of the result of the IME's assessment, and his employment remained terminated by GM under paragraph 64(d) of the Agreement. (S16; SX 2 at 49-53; CX 14 at 2; Tr. 300:1-301:12; Tr. 387:4-388:19; Tr. 454:12-19; Tr. 537:10-539:18.)
12. Complainant asked Respondent's employees Keith Gay ("Gay"), Dennis Funk ("Funk"), and Matthews to write him a grievance concerning his termination on two grounds: 1) the IME was not impartial because Complainant had previously seen the IME, and 2) Complainant should not have been terminated under paragraph 64(d) of the agreement because he did return to work, but he could not perform the job assigned. (SX 27 at 2-3; CX 14 at 2; CX 21 at 2; CX 22; Tr. 290:1-9; Tr. 298:20-22; Tr. 301:13-302:11; Tr. 398:3-17; Tr. 576:15-22; Tr. 583:18-22.)
13. Matthews believed that a grievance could not be filed for Complainant because the IME's decision was final and binding. (Tr. 291:4-9; Tr. 540:1-542:20.)
14. However, on October 11, 2004, Respondent, through Matthews, filed a grievance for Complainant after Complainant complained that Respondent had refused to file a grievance on Complainant's behalf. (S17; SX 7; SX 27 at 3; CX 43; Tr. 302:12-303:13; Tr. 310:2-11; Tr. 449:8-450:22; Tr. 532:10-536:15; Tr. 539:19-23; Tr. 583:18-22.) The grievance only included Complainant's 64(d) allegations. (SX 7.)
15. GM continued to oppose Complainant's grievance, and Respondent escalated Complainant's grievance through to the third step of the grievance process. (SX 8; CX 9; CX 45; Tr. 543:11-18; Tr. 603:6-604:19.)
16. In 2005, Matthews was elected to the position of Respondent's Shop Chairman. (Tr. 521:7-13.) He continued to work with GM's managers on behalf of Respondent to resolve Complainant's grievance. (S18; S19; SX 8; CX 9; Tr. 522:14-18; Tr. 544:1-546:22.)
17. On June 15, 2007, Respondent, through Matthews, withdrew Complainant's grievance without precedent. (S20; SX 8; Tr. 313:19-314:3; Tr. 549:2-561:17.)

18. Respondent, acting through Matthews, did not orally notify Complainant of the withdrawal of Complainant's grievance and did not send a written notice of the withdrawal to Complainant by certified mail. (Tr. 332:1-334:5; Tr. 565:1-4.)
19. Respondent settled over one hundred (100) grievances at the third step during Matthews's tenure as Respondent's Shop Chairman. (Tr. 553:2-19.)
20. On the same day that Complainant's grievance was settled, Respondent, through Matthews, settled a total of fourteen (14) grievances for individual members. (S46; SX 8; Tr. 481:20-482:1; Tr. 547:6-548:21.) Twelve (12) of the grievants were Caucasian, and two (2) of the grievants were African American. (S46.)
21. Out of those twelve (12) grievants, only Complainant was permanently discharged as a result of the settlement reached. (Tr. 482:2-6; Tr. 562:1-563:8; Tr. 622:1-624:18.)
22. In April of 2008, Matthews left his position as Respondent's Shop Chairman. (Tr. 523:2-13.)
23. On April 16, 2011, Complainant called Respondent's current Shop Chairman, Mark Orr ("Orr"), to inquire about the status of Complainant's grievance. (S21; Tr. 312:5-16.) Orr told Complainant that Complainant's grievance had been withdrawn, which Orr confirmed in a letter mailed to Complainant. (S22; S23; S24; SX 9; Tr. 313:1-18; Tr. 401:5-402:18.)
24. On May 16, 2011, Complainant filed an appeal with Respondent in which he alleged that his grievance should not have been withdrawn. (S32; SX 10; CX 11; Tr. 317:7-321:13; Tr. 403:1-404:7.)
25. On June 6, 2011, Respondent, through the unanimous vote of its seven-member Shop Committee, denied Complainant's appeal because it was not timely filed. (SX 2 at 15; SX 3 at 89; SX 11; CX 46; Tr. 320:17-321:13; Tr. 728:4-729:8; Tr. 724:10-726:11.)
26. On August 8, 2011, Complainant appealed the determination to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("International Union"), which is a separate and distinct entity from Respondent. (S4; S5; S33; S34; SX 2; SX 13; SX 14; SX 15; SX 20; CX 26; CX 27; CX 31; Tr. 321:14-324:11; Tr. 411:8-412:6; Tr. 417:6-420:16.)
27. On September 16, 2011, Mike Klepper ("Klepper"), an International Union employee, withdrew Caucasian-employee Jonathan Burget's ("Burget") grievance at the third step. (S47; CX 34 at 9; Tr. 736:11-740:20.) On the same day, Klepper sent a written notice of the withdrawal to Burget by certified mail that mentioned the right to appeal the decision under

Article 33 of the Constitution. (CX 34 at 9.) Because Klepper was an International Servicing Representative, Burget's appeal was made directly to the International President's Office instead of to Respondent. (CX 34 at 7; Tr. 736:11-740:20.) Burget did not work for GM; he worked for Caravan Knight and was governed by a different contract than the Agreement. (Tr. 736:11-740:20; Tr. 706:2-707:22.)

28. The International Union held a Hearing concerning Complainant's appeal on March 22, 2012 during which Matthews and Richardson testified on behalf of Respondent and for which Respondent provided documents to the International Union. (S36; SX 17; SX 20 at 2; CX 31 at 1; Tr. 417:6-418:23; Tr. 573:5-10; Tr. 733:23-734:9.)
29. On June 26, 2012, the International Union upheld Respondent's determination that Complainant's appeal was untimely. (SX 20; CX 31; Tr. 324:6-11.)
30. On June 30, 2012, Complainant appealed the International Union's finding to the Public Review Board, which is a separate and distinct entity from Respondent. (S43; SX 2; SX 21; SX 22; SX 23; SX 24; SX 25; SX 26; SX 27; Tr. 328:1-329:10-13; Tr. 420:17-421:14.)
31. On December 17, 2012, the Public Review Board upheld the International Union's determination that Complainant's appeal was untimely. (S45; SX 26; SX 27; Tr. 329:10-13; Tr. 422:19-429:2.) The Public Review Board's decision did not hinge on a specific date of notification and instead it relied on the "...reasonably should have become aware..." deadline and the factual determination that Complainant "...had long since abandoned his employment at GM..." by the time he made his appeal based on Complainant's "...seven (7) years of silence." (SX 27 at 9-11.)
32. Although both the International Union and the Public Review Board discussed the reasons that Complainant's grievance was withdrawn, under the Agreement, the only binding decision the International Union and Public Review Board could make concerned the timeliness of Complainant's appeal. (SX 3; SX 13; SX 20; SX 23; CX 27 at 1; CX 31.)

Respondent's Notification Policies and Practices

33. The Agreement and the Constitution are silent as to whether Respondent must notify grievants of the withdrawal of a grievance in writing by certified mail. (SX 2; SX 3; SX 12 at 1; CX 6; CX 37 at 1; Tr. 723:7-9; Tr. 567:1-569:2)
34. While the UAW Ethical Practices Codes ("Codes") make the general assertion that "[a]ll Union rules and laws must be fairly and uniformly applied and disciplinary procedures,

including adequate notice, full rights of the accused and the rights to appeal, all be fair and afford full due process to each member," the Code does not require actual or written notice sent by certified mail of an appealable event. (CX 6; CX 7 at 135-138.)

35. Each of Respondent's Shop Chairmen implement and set Respondent's notification practices for the duration of the Shop Chairman's term. (Tr. 128:18-129:11; Tr. 131:5-16; Tr. 176:16-179:15; Tr. 167:8-23; Tr. 626:1-13; Tr. 642:11-19; Tr. 723:21-724:9.)
36. Respondent's notification practice during the tenure of Shop Chairmen serving before and after Matthews was to consistently provide grievants with written notice of the withdrawal of a grievance by certified mail. (SX 9; Tr. 125:21-130:11; Tr. 132:13-133:10; Tr. 312:7-23; Tr. 744:1-22.) As observed by the Public Review Board, "[i]t appears that Local Union 2209 [Respondent] routinely notifies its members by mail of matters affecting their rights..." (SX 27 at 9.)
37. An appeal must be filed within sixty (60) days of the date that the grievant received actual notice of the appealable event or of the date that the grievant "...reasonably should have become aware..." of it. (S26; S27; SX 3; Tr. 711:1-720:9; Tr. 774:11-775:13.)
38. However, during Matthews's tenure as Shop Chairman, Respondent only provided oral notice of the withdrawal of a grievance; Respondent, through Matthews, never provided written notice sent by certified mail to any grievant. (Tr. 565:1-569:2; Tr. 570:20-571:2; Tr. 625:4-627:3; Tr. 642:11-643:5; Tr. 740:21-741:6.) Specifically, Respondent's practice, as set by Matthews, was to instruct the District Committeeman who drafted the grievance to orally notify the grievant of the result. (Tr. 565:18-566:16.)
39. Although Watkins and Kelly testified that Respondent's only practice was to provide written notice of a withdrawal by certified mail, they did not have personal knowledge of the practice used by Respondent while Matthews was Shop Chairman. (Tr. 119:11-16; Tr. 126:1-15; 133:1-134:22; Tr. 158:19-159:9; Tr. 166:1-168:13; Tr. 175:9-179:14; Tr. 190:11-14; 204:12-21; Tr. 230:9-231:20.) Kelly testified that he knew the practice was continued by Respondent because he "...checked on that...;" however, Kelly could not identify with whom he spoke to confirm that the practice was still in use. (Tr. 167:14-23.)
40. Bond, an African American GM employee who filed a grievance in 2013 after Matthews was Shop Chairman, testified that he received only oral notice of the result of his 2013 grievance

from his Committeeman and that he did not remember receiving written notice for any other grievance that he had filed in the past. (Tr. 81:8-83:11; Tr. 103:3-5; Tr. 108:5-15.)

Background Allegations

41. During the Hearing, Complainant alleged that 1) his grievance was wrongfully withdrawn by Respondent, 2) Respondent failed to select an impartial IME, and 3) Respondent failed to timely write a grievance for his termination. (SX 27 at 2-3; CX 14 at 2; CX 46; Tr. 290:10-295:20; Tr. 298:20-299:19; Tr. 381:5-18; Tr. 445:1-450:22; Tr. 466:2-469:4; Tr. 605:11-607:14; Tr. 822:6-19.)

42. Complainant's witnesses, Bond, Watkins, and Kelly, and Respondent's witnesses, Robinson and Wilson, testified generally as to Respondent's and GM's culture with respect to race. The portions of their testimony that are relevant to Complainant's complaint include:

    a. Bond's, Watkins's, and Kelly's collective allegations that Respondent achieved better outcomes for Caucasian grievants than African American grievants through the grievance process between 2004 and 2012, which Robinson denied during her testimony.[4] (Tr. 85:6-88:4; Tr. 120:1-19; Tr. 206:5-208:15; Tr. 137:5-142:12; Tr. 180:7-181:3; Tr. 191:4-7; Tr. 195:3-200:9; Tr. 210:12-214:10; Tr. 251:2-5; Tr. 676:1-18.)

    b. Kelly's allegations that two of Respondent's employees involved in processing Complainant's appeal engaged in racist behavior in the 1990's. (Tr. 192:2-14; Tr. 199:3-202:12; Tr. 212:7-214:10; Tr. 238:15-241:22; Tr. 243:22-251:5.) Neither of the identified employees had control over Respondent's final decision to deny Complainant's appeal. (SX 2 at 15; SX 3 at 89; SX 10; SX 11; CX 46.) However, one employee identified was a member of Respondent's Shop Committee that denied Complainant's appeal. (SX 2 at 15; SX 3 at 89; SX 10; SX 11; CX 46; Tr. 519:1-4.)

    c. No allegations from Bond, Watkins, or Kelly that Respondent's decision-maker Matthews had previously treated Respondent's members differently based on their race, which Wilson affirmed during his testimony. (Tr. 72:10-109:11; Tr. 181:4-17; Tr. 202:13-204:21; Tr. 230:22-232:2; Tr. 688:3-7.)

[4] Bond's testimony focused on the period between 2013 and 2015. Watkin's testimony focused on the period between 1986 and 2008. Kelly's testimony focused on the period between 1986 and 2006. Robinson's testimony focused on the period between 2004 and 2012. However, the time period relevant to Complainant's complaint is between 2004 and 2012.

Credibility Determinations

43. Both Complainant's credibility and Matthews's credibility were called into question by the evidence presented. First, Complainant's and Matthews's testimony directly conflict as to whether on June 18, 2007 Complainant received oral notice from Matthews that Complainant's grievance was withdrawn. (*Compare* Tr. 332:1-334:5 *with* Tr. 563;16-564:23; Tr. 607:15-608:17.) Second, Matthews's testimony that he provided oral notice to Complainant was weakened by evidence 1) that documented a changing story concerning how that contact was initiated and 2) that demonstrated Matthews's assertion that Complainant's address and number had changed was false. (SX 11; CX 49; CX 50; CX 51; Tr. 571:3-573:4; Tr. 610:9-619:5; Tr. 730:20-732:1; Tr. 748:2-752:21; Tr. 760:3-22; Tr. 779:13-22; Tr. 817:21-821:17.)
44. Ultimately, Complainant's testimony concerning the timeline of events, including a lack of written or oral notice, was credibly supported by the consistency of his allegations in his oral testimony and as reiterated through the documentary evidence provided.
45. Similarly, Matthews's testimony that he never provided written notice of the withdrawal of a grievance to a grievant was credibly supported by the testimony of Richardson as well as by Complainant's failure to identify any grievant who Respondent notified in writing by certified mail of the withdrawal of a grievance while Matthews was Respondent's Shop Chairman. (Tr. 740:21-741:6)
46. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

Jurisdiction

1. The ICRC has jurisdiction over the subject matter of Complainant's race-based, employment discrimination complaint under the ICRL and over the Parties because Respondent is an Indiana-based Labor Organization and Complainant is an employee. IND. CODE § 22-9-1-2; IND. CODE § 22-9-1-6; IND. CODE § 22-9-1-3(a), (i), (j), (o), and (p).
2. Indiana Courts look to federal law and precedent for guidance when interpreting the ICRL. *Filter Specialists v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009).

Subject Matter of Hearing and Decision

3. The Commission may only assert jurisdiction over a sufficiently complete complaint. IND. CODE § 22-9-1-3(o). A sufficiently complete complaint must, in addition to meeting all other statutory requirements, 1) name a Respondent and 2) be filed within 180 days from the date the discriminatory practice occurred. IND. CODE § 22-9-1-3(p).
4. As only Respondent is named in Complainant's complaint, only Respondent's actions are considered for the purpose of assessing liability and damages. (SX 1.)
5. Complainant evokes the continuing violation theory to include Respondent's June 15, 2007 failure to provide notice and Respondent's June 6, 2011 denial of Complainant's appeal, which both occurred outside of the ICRC's 180 day statute of limitations, as appropriate topics of litigation, anchored by Respondent's participation in the International Union's March 22, 2012 Hearing, which occurred thirty-two (32) days before Complainant filed his complaint, by characterizing the sum of Respondent's actions a "...denial of equal representation..." (SX 1.)
6. The continuing violation theory is properly applied when an act that falls outside of the statute of limitations is inseparable from an act that falls within the statute of limitations and the actions are not discrete, separate acts. *Jones v. Res-Care, Inc.*, 613 F.3d 665, 669 (7th Cir. 2010); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).
7. Complainant's allegation that he was denied "...equal representation..." by Respondent during the appeal process describes a discriminatory action that encompasses both the alleged failure to provide notice as well as the continued actions taken by Respondent to ensure Respondent's action was validated as more than "...single occurrence[s]" of discrimination because the alleged denial was incomplete until Respondent's participation in Complainant's appeal ended. (Stip. Ex. 1.); *Nat'l R.R. Passenger Corp,* 536 U.S. at 111. Accordingly, Complainant's allegation that Respondent denied him equal representation during the appeal process, beginning on June 15, 2007 and ending on March 22, 2012, was timely filed within 180 days of Respondent's last act of participation in Complainant's appeal. *Jones,* 613 F.3d at 669.
8. However, the allegations not included in Complainant's complaint (*see,* Background Allegations at (a)) are discrete acts that cannot be anchored. *Id.* Additionally, as allegations unalleged in a complaint, the Commission may only consider them if heard by the

Commission with the "...express or implied consent..." of Respondent. 910 IAC 1-2-8(d). Respondent's timeliness defense as well as Respondent's continued objections throughout the Hearing emphasize that Respondent neither expressly nor implicitly consented to the litigation of Complainant's additional allegations.[5] However, untimely and unfiled allegations may be used "...as background evidence..." by Complainant. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

9. Additionally, Respondent argues that Complainant's allegations are moot because no remedy is available to Complainant under the Agreement if his grievance was to be reinstated. "A case is moot when no effective relief can be rendered to the parties before the court." *State ex rel. Indiana State Bar Ass'n v. Northouse*, 848 N.E.2d 668, 673 (Ind. 2006). Complainant's complaint is not moot because an award of injunctive relief or monetary damages from the Commission could make Complainant whole and because under the Constitution, Complainant's appeal was decided on timeliness grounds and not on its merits.
10. Accordingly, the issues to be decided by the Commission are 1) whether Respondent failed to provide equal representation to Complainant under the Agreement *because of his race* by giving him subpar notice that his grievance was withdrawn and by taking all necessary steps to ensure the validation of Respondent's action and 2) if so, to what damages is Complainant entitled. *Filter Specialists*, 906 N.E.2d at 846.

Discrimination Complaint

11. A labor organization commits an unlawful act of employment discrimination if it excludes "...a person from equal opportunities because of race..." or creates a "...system that excludes persons from equal opportunities because of race..." IND. CODE § 22-9-1-3(l) and (j). Importantly, "[e]very discriminatory practice relating to ... employment...shall be considered unlawful unless it is specifically exempted by..." the ICRL, and the ICRL "...shall be construed broadly to effectuate its purpose." IND. CODE § 22-9-1-3(l); IND. CODE § 22-9-1-2(g).
12. Complainant may prove his claim under the direct method or indirect method. Under the direct method, Complainant must provide direct evidence of Respondent's discriminatory

[5] References to Respondent's timeliness defense and objections that relate to Complainant's unalleged complaints include, but are not limited to: ALJ Ex. 1; Tr. 24:11-21; Tr. 25:5-13; Tr. 27:10-18; Tr. 455:2- 458:11; Tr. 464:13-21; Tr. 469:11-470:12; Tr. 588:17-589:8; Tr. 597:4-13; Tr. 605:1-2; Tr. 825:13-19; Tr. 828:7-10; and Tr. 839:7-840:15.

intent or circumstantial evidence from which the Commission could reasonably infer evidence of discriminatory intent. *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860-62 (7th Cir. 2007). Under the indirect method, Complainant may utilize the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green. Filter Specialists*, 906 N.E.2d at 839-40.

13. The Commission may only find discrimination has occurred if Complainant has established his claims by a preponderance of the evidence through the provision of reliable evidence in support of his allegations. *Filter Specialists*, 906 N.E.2d at 840-41; IND. CODE § 4-21.5-3-14(c).

Direct Method

14. The relevance of alleged prior acts of discrimination on the part of a Respondent as evidence of intent or motive depends on "... many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008); *see generally*, *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008), *as corrected* (Jan. 21, 2009).
15. Although Complainant's witnesses testified that Respondent had a past pattern of treating grievants differently because of their race, none of Complainant's witnesses attributed race as a motivator for Respondent's decision-maker Matthews, who controlled Respondent's notification practices at the time Complainant's grievance was withdrawn and who testified on Respondent's behalf at the March 22, 2012 Hearing.
16. Additionally, although Kelly testified that one member of the Shop Committee that denied Complainant's appeal had engaged in past, racially discriminatory behavior, the Shop Committee was comprised of seven (7) members who collectively made the unanimous decision to deny Complainant's appeal because it was not timely filed. Complainant's witnesses did not attribute race as a motivating factor to any of the remaining six (6) Shop Committee members or designate evidence that demonstrates that the remaining six (6) members did not exercise their own judgment when making the decision.
17. Furthermore, the circumstances surrounding the Shop Committee's decision illustrate that the past behavior of one member does not support the inference that the Shop Committee acted with or was influenced by a racially discriminatory motive. The Shop Committee's decision was made at least ten (10) years after the alleged discriminatory behavior occurred. In

addition, the Public Review Board, which is a separate entity, reached the same decision on timeliness without relying on Matthew's testimony that he orally notified Complainant of the withdrawal.

18. Complainant has not connected the alleged prior, discriminatory actions taken by some of Respondent's employees, who were minimally involved in Complainant's notification process and appeal process, to actions taken by Respondent's decision-makers, who made final decisions with respect to Respondent's actions taken towards Complainant.
19. Accordingly, Complainant has not met his burden under the direct method to establish that Respondent discriminated against Complainant on the basis of race.

Indirect Method

20. Under the indirect method, Complainant must prove that Respondent "...intentionally discriminated..." against Complainant in employment on the basis of race using a three-part burden-shifting test. *Filter Specialists*, 906 N.E.2d at 846, *quoting U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). As this matter proceeded to a "...full hearing on the merits...," Complainant's prima facie case is "...no longer relevant...," and the three part burden-shifting analysis "...drops from the case..." *Id.* 841-842, 846. Instead, the ultimate "...factual inquiry..." becomes whether Respondent "...treat[ed] some people less favorably than others because of their race..." *Id.* at 846; *Green v. Am. Fed'n of Teachers/Illinois Fed'n of Teachers Local 604*, 740 F.3d 1104, 1106 (7th Cir. 2014).
21. Although Complainant bears the ultimate burden of persuasion on his discrimination claim, Respondent has the burden of production with respect to identifying legitimate, nondiscriminatory reasons for its allegedly discriminatory actions. *Filter Specialists*, 906 N.E.2d at 841-842, 846-847, *quoting U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).
22. If Respondent meets its burden, then Complainant must demonstrate that Respondent's proffered reasons are pretextual, which Complainant can prove through evidence "...(1) that the proffered reason[s] ha[ve] no basis in fact, (2) that the proffered reason[s] did not actually motivate the adverse employment action or (3) that the proffered reason[s] w[ere] insufficient to motivate the adverse employment action." *Filter Specialists*, 906 N.E.2d at 846-847.
23. An action is adverse if it is more than "...a mere inconvenience or an alteration of job responsibilities." *de la Rama v. Illinois Dep't of Human Servs.*, 541 F.3d 681, 685 (7th Cir.

2008)(internal quotations removed). The adverse action must cause a "...quantitative or qualitative change in the terms and conditions..." offered to Complainant. *Id.* at 686 (internal quotations removed). Complainant's allegation that Respondent denied Complainant equal representation in his discharge dispute with GM by using the timeliness of Complainant's appeal of the withdrawal of his grievance to prevent Complainant from contesting the merits of the withdrawal constitutes an adverse action because if true, Respondent's actions prevented Complainant from fully disputing his discharge and had a "...tangible impact on [the]...benefits" Respondent provided to Complainant. *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1120 (7th Cir. 2009).

24. Respondent met its burden of production by proffering legitimate, nondiscriminatory reasons for its actions: 1) Respondent notified Complainant of the withdrawal of his grievance in line with the notice practices established by Matthews, the Shop Chairman in office at the time of the withdrawal and 2) Complainant's appeal was dismissed as untimely pursuant to article 33 of the Constitution.
25. Complainant contends that Respondent's stated reasons are pretextual. Specifically, Complainant contends that Respondent did not notify Complainant of the withdrawal and that Respondent prevented Complainant from appealing the merits of his withdrawal because of Complainant's race. Complainant's contentions are based on evidence of Respondent's and Respondent's employees' past behavior and on comparator evidence. However, Complainant has failed to connect Respondent's actions to Complainant's race, and accordingly, Complainant has not met his burden of demonstrating that Respondent intentionally discriminated against Complainant.
26. First, as discussed previously, Bond's, Watkins's, and Kelly's testimony does not demonstrate that a member's race had any impact on the decisions made by Respondent's relevant decision makers: 1) Matthews and 2) the Shop Committee.
27. Second, Complainant did not establish that Respondent more carefully protected the appeal rights of similarly situated Caucasian members than the appeal rights of African American members by providing Caucasian members with written notice of appealable events sent by certified mail.

a. No policy existed during Matthews's tenure as Shop Chairman that required Respondent to provide written notice by certified mail to Complainant when Complainant's grievance was withdrawn;
b. Although Shop Chairmen other than Matthews had practices in place requiring that Respondent give grievants written notice of the withdrawal of a grievance sent by certified mail, Respondent did not enforce such a practice while Matthews was Shop Chairman;
c. Respondent's practices concerning notification are set by each individual Shop Chairman, whose practices can vary, and Complainant did not demonstrate Respondent's practice, as directed by Matthews, was selected for the purpose of discriminating against grievants on the basis of race; and
d. Complainant did not establish that similarly situated Caucasian grievants received written notice by certified mail from Respondent while the notification practices set by Shop Chairman Matthews were in effect, including showing that Respondent provided written notice to any of the fourteen (14) grievants who also had their grievances settled the same day as Complainant or to any of the other approximately one hundred (100) grievants who had grievances settled at the third step by Matthews while he was Shop Chairman.

28. Although Complainant contends that Burget, a Caucasian member of Respondent who received written notice of the withdrawal of his grievance by certified mail, was similarly situated to Complainant, Respondent did not provide Burget with notice or oversee Burget's appeal. Furthermore, at the time Burget was given notice, Matthews was no longer the Shop Chairman in charge of setting the notification practices for Respondent. An individual is similarly situated when the individual is "...comparable to [the Complainant] in all material respects" based on "...all relevant factors...which depend[] on the context of the case," including being subject to the same policies, practices, and decision-maker. *Grayson v. O'Neill*, 308 F.3d 808, 817-19 (7th Cir. 2002); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000), *overruled on different grounds by Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016). Burget is not similarly situated to Complainant because Burget's appeal was processed by a different entity and decision-maker under different policies and practices.

29. Third, Complainant did not establish that Respondent more carefully protected the appeal rights of similarly situated, un-notified Caucasian members than the appeal rights of similarly situated, un-notified African American members. In consideration of the fact that grievants may not always receive actual notice, the Agreement includes a second deadline for potentially un-notified grievants based on when the grievant reasonably should have become aware of the appealable event. Complainant's designated evidence does not show that Respondent applied a more forgiving interpretation of "...reasonably should have become aware..." to any similarly situated Caucasian members of Respondent than the interpretation applied to Complainant, and accordingly, Complainant failed to demonstrate that un-notified Caucasian members were more able to substantively appeal an event than un-notified African American members.
30. In sum, Complainant did not connect Respondent's failure to notify Complainant and Respondent's denial of Complainant's appeal to Complainant's race.
31. Accordingly, Complainant has not carried his burden of demonstrating that Respondent intentionally discriminated against Complainant on the basis of race, and the Commission must dismiss Complainant's complaint. IND. CODE § 22-9-6(l).
32. Indiana Code 22-9-1-6, which outlines the Commission's powers to enforce the ICRL, does not include the authority to award reasonable expenses to successful Respondents. *Compare* IND. CODE § 22-9-1-6 *with* IND. CODE § 22-9.5-6-15(a). The Commission, as a State agency, "...exercises [its] authority subject to the confines of its enabling statute." *Fishers Adolescent Catholic Enrichment Soc'y, Inc. v. Elizabeth Bridgewater ex rel. Bridgewater*, 23 N.E.3d 1, 3 (Ind. 2015). The Commission does not have the statutory authority to award reasonable expenses to a successful Respondent under the ICRL, and accordingly, the Commission makes no assessment of the appropriateness of such an award in this matter.
33. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

1. Terry Lymon's April 23, 2012 Complaint against UAW Local Union 2209 is DISMISSED, with prejudice.
2. UAW Local Union 2209's request for an award of expenses is DENIED.

This order becomes a final order disposing of the proceedings immediately upon affirmation under Indiana Code 4-21.5-3-29. IND. CODE § 4-21.5-3-27(a).

ADMINISTRATIVE REVIEW

This Order is not final until confirmed by the Commission. IND. CODE § 4-21.5-3-29. Administrative review may be obtained by Parties not in default by the filing of a writing that identifies with reasonable particularity the basis for each objection **within fifteen (15) days after the service of this Order**. IND. CODE § 4-21.5-3-29(d). Subject to Indiana Code 4-21.5-3-1, the filing of a document in proceedings before the ICRC can be completed by mail, personal service, fax, or electronic mail to:

Docket Clerk
C/o the Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204
Fax: (317) 232-6580
Email: anermosele@icrc.in.gov

A party shall serve copies of any filed item on all parties. IND. CODE § 4-21.5-3-17(c).

SO ORDERED this 21st day of August, 2019

Hon. Caroline A. Stephens Ryker
Administrative Law Judge
Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
Anehita Eromosele, Docket Clerk
317/234-6358

Certificate of Service

Served this 21 day of AUGUST, 2019 by Certified Mail on the following:

Terry Lymon
2418 Palisade Drive
Fort Wayne, IN 46806
Certified Mail # **9214 8901 0661 5400 0141 6814 16**

UAW LOCAL UNION 2209
5820 East 900 North
Roanoke, IN 46783
Certified Mail # **9214 8901 0661 5400 0141 6816 76**

Macey Swanson & Allman
Robert A. Hicks, Esq.
445 N. Pennsylvania Street, Suite 401
Indianapolis, IN 46204
rhicks@MaceyLaw.com
Certified Mail # **9214 8901 0661 5400 0141 6817 68**

And served personally on the following:

Michael C. Healy, Esq.; Staff Counsel
Indiana Civil Rights Commission
Indiana Government Center North
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
mhealy@icrc.in.gov

The Indiana Civil Rights Commission
Chair Steven A. Ramos
c/o ICRC Docket Clerk, Anehita Eromosele
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255

Docket Clerk,
Anehita Eromosele