STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

May 2, 1986

Wayne Patterson
229 9th Ave.
South Charleston, WV 25303

David D. Johnson, Esq.
1600 Laidley Tower
Charleston, WV 25322

RE: WAYNE E. PATTERSON V FMC CORPORATION
ER-210-77 & REP-539-81

Dear Above Parties:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Wayne Patterson v. FMC, ER-210-77 and REP-539-81.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

The Respondent is required to provide to the Commission proof of compliance with the attached Order by affidavit, cancelled check or other means calculated to provide such proof within 35 days of service of the enclosed Order.

Sincerely yours,

Howard D. Kenney

Howard D. Kenney
Executive Director

HDK/kpv/d/w
Enclosure
CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WAYNE E. PATTERSON,

Complainant,

vs. Docket Nos. ER-210-77 & REP-539-81

FMC CORPORATION,

Respondent.

O R D E R

On the 9th day of April, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Victor A. Barone. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 21 day of April, 1986.

Respectfully Submitted,

Betty Hamilton

CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

WAYNE E. PATTERSON,

Complainant

VS. Case Nos. ER-210-77,
REP-539-81

FMC CORPORATION,

Respondent.

HEARINGS EXAMINER'S RECOMMENDED DECISION

PRELIMINARY MATTERS

As originally docketed for hearing, this case included four separate complaints by complainant Wayne E. Patterson: ER-169-74, filed June 5, 1974; ER-210-77, filed December 20, 1976; ER-23-77, filed July 27, 1976; and REP-539-81, filed May 20, 1981.

An initial pre-hearing conference was held on all four complaints on March 16, 1985. After that conference and prior to the public hearing, respondent filed motions to dismiss complaints nos. ER-169-74 and ER-23-77 on the grounds that the Human Rights Commission had previously dismissed those two cases. In support of its motion to dismiss, respondent filed copies of conciliation agreements previously entered into by the Human Rights Commission and

respondent in both cases, together with dismissal orders, dated March 30, 1977 and April 19, 1979, respectively, dismissing the complaints in each case. Neither of these conciliation agreements had been signed by the complainant. Nevertheless, the dismissal orders had been entered and the two cases were considered "closed" by the Commission.

A second pre-hearing conference was held on April 30, 1985 and the public hearing commenced on May 2, 1985. After a total of 12 days of hearing, the hearing concluded on August 23, 1985. Over 100 exhibits were introduced by the two parties. The combined transcripts of the testimony totaled over 2,000 pages. Complainant called seven witnesses and respondent called twenty-six.

Inasmuch as the presence of a hearing commissioner was not waived, Russell Van Cleve, a member of the Human Rights Commission, attended all sessions of the public hearing. Mr. Van Cleve concurs in the findings, conclusions and recommended decision herein.

The parties submitted their briefs in early November, 1985. The Hearing Examiner has now considered the entire record and the submission and arguments of counsel.

ISSUES - CONTENTIONS OF THE PARTIES

At the commencement of the public hearing, respondent renewed its motions to dismiss complaints nos. ER-169-74 and ER-23-77. Complainant opposed the motions on the grounds that he had not signed the conciliation agreements, had not received notice of the dismissals and had no opportunity to contest them.

The Hearing Examiner sustained the motions to dismiss because in his opinion (in which the Hearing Commissioner concurred) the hearing panel would have no jurisdiction to hear cases which the Commission had dismissed. Whether the Commission was legally correct in dismissing those cases is immaterial. The fact is they were dismissed, and the hearing panel's authority does not extend to hearing dismissed cases. Complainant may or may not have valid legal grounds for objecting to the dismissals of the two complaints; however, only the Commission or a court of competent jurisdiction has the power to reinstate the cases to the hearing docket. See, e.g., Currey v. State of West Virginia Human Rights Commission, 273 S.E. 2d 77 (W.Va. 1980).

Accordingly, the public hearing proceeded with respect to the remaining two cases: ER-210-77 and REP-539-81. Complainant's contentions are contained in the pertinent portions of these complaints quoted below.

In ER-210-77, complainant says:

"[Date of incident, on or about October 27, prior to and continuing 1976.] The facts on which the aforesaid charge is based are as follows:

I am a Black male.

I began working at FMC on August 10, 1972. At one point, I was employed in the Cell Repair Department with 14 or 15 other Blacks.

A foreman said, "We are going to run those niggers out of here." This meant the Cell Repair Department. Subsequently, the work load was increased for everyone in this department. The Blacks were harassed and had to tolerate racial grafitti (sic) on the rest room walls. The working conditions were so bad, that going to work became difficult. Eventually, the work load became so heavy, that all of the Blacks bid out of this department, or asked to be transferred.

I believe that the Blacks were discriminated against and harrassed because of their race.

I therefore charge the FMC Corporation with race discrimination in employment which is in violation of the West Virginia Human Rights Act."

As previously noted, ER-210-77 was filed on December 20, 1976.

REP-539-81 states:

"1. On February 19, 1981, I was discharged from my employment as Instrument Mechanic.

2. The Respondent alleged that I had a record of chronic absenteeism; falsification of time card and avoidance of mandatory training.

3. I believe that Respondent has engaged in acts of retaliation in that:

a. I had filed a complaint of employment discrimination with the West Virginia Human Rights Commission on July 28, 1980. Docket Number ER 40-81."

The respondent denied all of the allegations of discrimination and retaliation in both complaints. Further, at the commencement of the hearing and in its post-hearing brief, respondent moved to dismiss ER-210-77 on the grounds that it had not been timely filed within the 90-day period required by West Virginia Code Section 5-11-10. The complainant's position is that ER-210-77 alleged continuing acts and that therefore the respondent's "statute of limitations" argument is without merit. This motion was taken under advisement at the hearing and will be ruled upon herein in light of the evidence.

At the commencement of the hearing, respondent also moved to dismiss both complaints on a number of constitutional grounds including alleged violations of due process, equal protection, separation of powers and lack of jurisdiction (the latter two relating to the Supreme Court's involvement in the proceedings). All of these constitutional points were taken under advisement and the Hearing Examiner now recommends that the Commission deny said motions.

With the above procedural history as background, the Hearing Examiner adopts the respondent's statement of the issues that remained for hearing:

(1) Should the complaint in ER-210-77 be dismissed because it was not timely filed?

(2) If ER-210-77 is not dismissed as untimely then:

Did the respondent discriminate against the complainant in Cell Repair with respect to terms, conditions or privileges of employment in any of the following respects: (See complaint in ER-210-77).

(i) By discriminating in work assignments?

(ii) By harassing black employees?

(iii) By permitting racial graffiti?

(3) Has the respondent engaged in a reprisal against the complainant by discharging complainant from his employment in March, 1981 because he opposed practices or acts forbidden by the West Virginia Human Rights Act or filed a complaint under the Act (See complaint in REP-539-81)?

FINDINGS OF FACT

1. Complainant, Wayne E. Patterson, is a black male. He was employed by the respondent (hereinafter "FMC" or "the company") on August 10, 1972 at its South Charleston plant. He was initially hired as a yard laborer, the normal entry level job at the plant. Within a short time, he "bid out" of the yard labor job, through the union contractual procedures then in effect. He briefly worked at two other positions, and then bid for and received the job titled "cell repairman". The "cells" referred to were devices used in producing chlorine.

2. Complainant commenced the cell repairman job on October 16, 1972, and remained there until he bid into a job titled "instrument mechanic helper" (in the maintenance department) on June 17, 1974, at which time he left the cell repair department and did not return to it.

3. Complainant remains employed by FMC at the same South Charleston plant. Since becoming an instrument mechanic helper, he has advanced through the grades or ranks of instrument mechanic "Class III" and "Class II" and is now rated an instrument mechanic "Class I".

4. All of the allegations in complaint ER-210-77 relate to events occurring in the cell repair department during complainant's service in that department. No competent evidence was introduced to describe conditions or

events in the cell repair department between the time complainant left in June, 1974 and the filing of complaint No. ER-210-77 in December, 1976.

5. The first accusation in complaint No. ER-210-77 is that: "A foreman said, 'We are going to run those niggers out of here'. This meant the Cell Repair Department." However, in his testimony at the hearing, complainant was unable to testify of his own knowledge that the quoted statement was made. He admitted that he personally did not hear the statement but thought it might have been overheard by other employees. Complainant's exact words were : "I think that this ... statement was overheard by some white employees". The foreman who allegedly made the statement was Marlin Cook, but no other witness was provided who claims to have heard the statement. Complainant's somewhat uncertain hearsay testimony as to said statement was stricken from the record. However, during the process of deliberating toward a decision, the Hearing Examiner has considered the stricken testimony on the premise that any doubt as to admissibility should be resolved in favor of admission. In this instance, it could be argued that West Virginia Rules of Evidence 801 together with 805 serve as a basis for admitting the statement. The weight accorded to it, of course, is another matter.

6. Complainant did testify that he personally heard Cook say, "I'd trade ten niggers for a milk cow". However,

complainant's testimony on this statement was prefaced by the words "from what I remember" and followed by "or something to that effect". Cook appeared as a witness for respondent and said he "most certainly did not"make the statement attributed to him. No other witness corroborrated complainant's version of the quote. For those reasons and because complainant's testimony was somewhat equivocating, the Hearing Examiner must find that complainant has not proved the statement. In any event, it was not the statement alleged in the complaint.

7. During complainant's stay in the cell repair department, it is true, as alleged in his complaint, that the work load increased for those remaining in the department, that working conditions became more difficult and that a number of blacks (and whites) left the department or asked to leave it. However, the reasons for these events were not racial in origin. Complainant testified that the working conditions became more difficult for all employees in the department -- both black and white -- and employees of both races left the department. The causes for these changed conditions were technological changes and different work requirements or rules imposed by the company. The technological changes increased the life of the chlorine-producing cells and ultimately resulted in a significant reduction of the work force in cell repair.

8. In 1972, when complainant entered cell repair,

there were approximately forty cell repairmen. Upon completion of the technological conversion in 1973, there were fourteen. By 1975, after complainant had left cell repair, there were nine. It is not clear that any of the cell repairmen lost employment. The reduction was accomplished mainly by employees, both black and white, bidding into other departments on the basis of seniority. As previously noted, complainant himself bid into the instrument work group in the maintenance department.

9. Complaint No. ER-210-77 includes a statement that blacks "had to tolerate racial graffiti on the rest room walls" in the cell repair department. At the hearing, complainant testified on that subject; he says he indeed observed graffiti in the restrooms, although not all of it was racial. He also testified that during that period (1972-74), cell repair was called "niggersville" by a "lot of people". Complainant did not produce any other witnesses to corroborate this nor did he name any FMC employee who used that term. Complainant further testified that at one point, the word "nigger" was written on a clock in cell repair; that it stayed there about a month, or "a long time", in plain sight of management personnel, but it was not removed until he complained about it to a foreman. No other witnesses for complainant testified to that specific incident. FMC witnesses - foremen and higher management personnel - deny ever seeing the word on the clock.

Complainant also testified that the word "niggersville" was written on a door in the "break" room and that it was there for about a week until it was removed by a black employee. Again, no other witnesses corroborate this, and FMC witnesses deny seeing it.

10. Complainant did produce witnesses who confirm the existence of racial graffiti generally at the FMC plant although it does not appear from the record whether they were referring to the cell repair department in 1972-74. As previously noted, none of these witnesses referred to the specific incidents described by complainant (relating to the writing on the clock and "break" room door). Most of the racial graffiti appeared to be in the restrooms, particularly toilet stalls. Much of the restroom graffiti was non-racial.

Complainant's witnesses indicate that FMC did make efforts to remove graffiti and prevent its recurrence. One witness said that at one time the graffiti proliferated so fast that FMC "couldn't keep up with it". The same witness acknowledged that at one point, the company repainted wooden stalls, then replaced them with stainless steel ones in the problem areas, after repainted stalls were repeatedly defaced. Industrial relations personnel inspected the problem areas and took pictures. Memos were posted and circulated by management announcing that company policy prohibited graffiti and threatening discipline for violation

of the policy. Another of complainant's witnesses, a white FMC employee, said that graffiti was not necessarily limited to the restrooms but was all over the plant. This employee, who was a union steward at that time, routinely carried a spray paint can which he used to cover the graffiti whenever he saw it. He acknowledges that a policy memo was published by plant management on the subject. Again, however, it does not appear that any witness for complainant, other than complainant, testified specifically with respect to graffiti in cell repair in 1972-74. Further, with regard to complainant's own testimony on these matters, FMC witnesses who worked in or had frequent occasion to visit cell repair during 1972-74 deny seeing the racial graffiti described by complainant.

11. Complaint No. ER-210-77 also alleges that black employees (in cell repair) were "harassed" because of their race. Complainant did not produce any witnesses to corroborate his own testimony in this regard. All of complainant's witnesses appeared to testify about events in the plant generally occurring subsequent to complainant's period of service in cell repair. Complainant's own testimony as to harassment primarily dealt with specific incidents involving himself rather than other black employees in cell repair, with the exception of the testimony and allegations regarding the workload and working conditions in cell repair generally. However, as previously noted, the

changes in workload and working conditions were not shown to have been due to racial motivation either instigated or knowingly tolerated by company management. As to the incidents which complainant considers harassment of him personally, these apparently are several incidents of discipline imposed upon complainant during that period. The Hearing Examiner does not find that these events were racially motivated but rather were provoked by complainant's own conduct.

12. Complainant, over respondent's objections, was permitted to introduce voluminous testimony not related to complainant's specific charges as set forth in his complaints. Such evidence was offered for the stated purpose of showing the "general atmosphere" or "pattern and practice" at FMC. Except for a statistical study sponsored by an expert witness (which will be discussed infra) most of this evidence was anecdotal, to the effect that discipline at the plant was administered unevenly and along racial lines. Complainant's witnesses suggested, through such anecdotes, that blacks were disciplined for conduct which whites were permitted to do without penalty, or that whites were not disciplined as severely as blacks for the same conduct. In many cases, complainant's witnesses appeared to assume that whites had not been disciplined for certain conduct. However, FMC responded with numerous examples of whites having received discipline for various conduct, such as excessive absenteeism, failing to report off, sleeping on

the job, improper use of the plant parking lot, leaving the plant during working hours, substance abuse, and violations of the "beard" policy (the latter relating to the need to have a smooth facial surface in the event that gas masks must be worn during an emergency). Moreover, two of complainant's witnesses who are white FMC employees, testified that they have received discipline for absenteeism, leaving the plant without permission, failing to report off, and noncompliance with the beard policy.

13. Complainant offered statistical evidence, including testimony and a report by Dr. Daniel W. Krider, an Assistant Professor of Mathematics at Concord College. In response, FMC introduced testimony and a report by Dr. Carl C. Hoffmann, President of Hoffman Research Associates of Mebane, North Carolina. Dr. Hoffmann has a Ph.D. in sociology from the University of North Carolina specializing in demography and statistics. Both of these witnesses were qualified as experts. Both used data taken from FMC's personnel records. The thrust of complainant's expert testimony and statistical study is that blacks were disciplined disproportionately in relation to their numbers in the work force. Dr. Krider's data included disciplines and discharge for all reasons. Dr. Hoffmann, the respondent's expert, agrees that blacks were disciplined at a rate greater than whites but he points out that blacks created more incidents of discipline, particularly in regard

to absenteeism. Dr. Hoffmann's conclusion is that when the statistical studies are controlled for absenteeism, there is no significant statistical difference in the disciplinary treatment of blacks and whites.

14. Complainant's witnesses testified extensively about Ku Klux Klan activity in the FMC plant. This testimony and exhibits related thereto was received over respondent's objections. Again, it was offered and admitted on the theory that it illustrated the general atmosphere or "pattern and practice" at the plant. The Klan activity was not definitely fixed in time by any witness for complainant but appears to have occurred in the 1982-1983 period. This testimony centered around an FMC employee named Ada Richards who is a guard at one of the plant gates. Her specific work station is at a "guard shack" at the plant gate. Her husband is not an FMC employee but was identified as an official or leader of the Ku Klux Klan in West Virginia. Complainant introduced a copy of the articles of incorporation of the "Ku Klux Klan of West Virginia", showing that Ada M. Richards and Edward L. Richards were among the incorporators. Complainant testified that he saw Ada Richard's husband in the plant on several occasions, the implication being that both Ada Richards and her husband were engaging in Klan recruiting or other activity. However, complainant admits he never saw the husband actually in the plant but only sitting or standing in the

guard shack or sitting in a car outside the plant, and that this was during the 1983-84 period. Respondent offered evidence indicating that it was not unusual for non-employees to come to the plant gate to bring lunches to employees, pick up paychecks, or for other reasons, and in any event, that non-employees were not prohibited from being in the guard shack. No witness testified that Ada Richards was actually seen passing out Klan literature or otherwise engaged in Klan activity on FMC premises, including the guard shack. Complainant claims to have seen another FMC employee leaving the guard shack with some "campaign posters", which simply said "Ada Richards for House of Delegates". The campaign literature did not mention the Ku Klux Klan. This was seen, according to complainant, in 1984 some time prior to the election.

15. Complainant and several of his witnesses testified that they observed Klan literature in the plant, in the form of Klan "recruiting" posters, "business cards" and racially scurrilous material, including one hand-drawn sign saying "Die Nigger - KKK". Copies of these items were introduced as exhibits during complainant's testimony. A black foreman who testified on behalf of FMC said that he has not seen Klan material in the plant, (including the materials introduced as exhibits by complainant) nor has he seen any Klan activity at the plant gate where Ada Richards works. Complainant again did not tie the appearance of these

materials to a specific time but said that they appeared over a three or four month period. From the record, including the testimony of other witnesses, the inference may be drawn that the materials appeared sometime during the 1982-33 period, which was long after the filing of complaint No. ER-210-77 and approximately a year after the filing of complaint No. REP-539-81.

16. It is not clear that complainant filed any grievance complaining of Ku Klux Klan activity. However, he did complain to supervision. In late December 1982, or early January 1983, George Vorholt, a management official, informed General Services Supervisor, Robert L. Reed, that complainant had made a complaint of KKK "activity" in the guard house. Vorholt asked Reed to investigate the complaint; and Reed "talked to a number of people who regularly are in and out of that guard house", and also talked to Ada Richards. Complainant told Reed that Ada Richards "was soliciting membership for the KKK", and that "he had two witnesses to it". Reed asked complainant to give him the names of his witnesses, saying that he would like to talk to them. However, complainant declined to reveal the names of his witnesses. Reed also checked the guard shack, including a search of the files, to see if there was any KKK literature on the premises. Reed testified that nothing was found that in any way identified or referred to the Ku Klux Klan.

Reed questioned Ada Richards on two consecutive days. He asked her if she was conducting "any KKK business in that guard house, particularly if she was soliciting for membership in the KKK, and she said absolutely not". Reed also talked to a foreman, and some of the other guards, all of whom said that they had observed no KKK activity or literature in or around the guard house.

Supervisor Reed made three written reports to Vorholt, stating in sum total that he had investigated the complaints about KKK activity, that Ada Richards wholly denied any such activity or basis for the complaint; and that he had been unable to find any evidence that Ada Richards or anyone else had engaged in any KKK activity in the plant.

17. From the record, it is clear that during his employment with FMC, complainant has filed an enormous number of complaints and union contract grievances against the company. At the time of the filing of REP-539-81 (December of 1981), complainant had filed at least five previous Human Rights complaints, including ER-210-77, the two dismissed complaints previously discussed, ER-40-81 (the one which, complainant alleges, provoked the retaliatory discharge giving rise to his filing of REP-539-81) and still another one mentioned in one of the dismissed complaints (ER-23-77). Complainant has been the subject of numerous disciplinary actions ranging from reprimands and warnings to suspensions and discharges. These have been

imposed for a variety of reasons including absenteeism, failure to report off, leaving the plant during work hours without permission, tardiness, noncompliance with the "beard" policy and improper use of the parking lot, among others.

18. Complainant's rate of absenteeism, for both excused and non-excused absences, is high and has been high ever since he began work in 1972. Also, the record unquestionably reflects that he has gone to great lengths to avoid taking mandatory instrument training courses provided by the company, and when the company repeatedly attempted to persuade or otherwise accomodate him to accomplish the training, he went to great lengths to hinder their efforts. From the testimony of numerous FMC witnesses (including a black foreman) who have been in supervisory capacities over complainant, the Hearing Examiner finds that complainant has been in repeated disputes with supervisors over productivity, willingness to work, and compliance with rules. Further, one of complainant's own witnesses, a white employee, admitted on cross-examination, that he had once told the company's Industrial Relations Department that complainant was stirring up racial tension in the plant and that such conduct had to be stopped.

19. The reasons given for the discharge of complainant in 1981, which complainant says (in REP-539-81) was actually a retaliatory discharge, were: chronic absenteeism,

falsification of time card, and avoidance of mandatory training. Complainant alleges the real reason was because complainant had earlier filed Human Rights complaint ER-40-81 on July 28, 1980. Findings have already been made, above, regarding complainant's chronic absenteeism and avoidance of mandatory training. The circumstances of the alleged falsification of time card are as follows:

Complainant was off work, without reporting off, on February 23, 1981. When his record was being reviewed with respect to his record for absenteeism and failure to report off, it was determined that the records showed that complainant had also been off work on February 3, 1981, without reporting off. Investigation of the circumstances, including a review of complainant's time card for the week ending February 9, 1981, showed that it had been initiated by Foreman Sam Ward to show that complainant had worked on February 3. Foreman Ward testified that on Thursday, February 5, the fourth day of the week, complainant had brought his time card to him, and asked him to initial it to show that he had worked on Tuesday and Wednesday. Complainant had worked on Wednesday but, as previously noted, was off on Tuesday, February 3, without reporting off. Ward had been off sick on Tuesday, and had no personal knowledge as to whether or not complainant had been at work. Complainant asked Ward to initial the card to show that he had worked on February 3. Having been off himself, Ward had

no way of knowing at the time that complainant had not worked. Ward asked complainant whether he wanted him to initial the card to show that he had worked "all week". Complainant said, "Yes". Ward initiated the card to show that complainant had worked on Tuesday, February 3. As a result, complainant received pay for a day that he did not, in fact, work. According to Ward, complainant was standing beside him at the time he initialed the card in accordance with complainant's request.

At the Incident Review meeting (a step in disciplinary proceedings) on March 2, 1981, complainant claimed that Ward initialed his time card to approve pay for a day not worked, through an "oversight or lack of communication". It was Foreman Ward's conclusion, however, that complainant's procurement of his initialing his time card for February 3, 1981, so as to enable him to be paid for that week, was deliberate and purposeful. In his recommendation after the Incident Review meeting, Foreman Ward stated: "Mr. Patterson's actions represent a deliberate attempt to falsify his time with the intent of receiving unearned compensation. I recommend that he be discharged." This incident, which came to light concurrently with complainant's absence, without reporting off, on February 23, 1981, was then used as an additional reason for complainant's discharge on March 2, 1981. (Although REP-539-81 states that complainant was discharged in

February 1981, and some confusion arose during the hearing concerning the exact date, it appears the official discharge date was March 2, 1981.)

20. After his 1981 discharge, complainant was off the payroll of FMC for a period of approximately 14 months. As a result of a grievance instituted by complainant under the union contract, his discharge eventually was rescinded by a labor arbitrator, who reduced the discipline to a 5-day suspension. Pursuant to that decision, complainant was paid all of his lost straight time earnings during the period of his discharge. This arbitrator's decision involved the application of union contract principles and did not constitute a finding of race discrimination.

COMMENT REGARDING THE FINDINGS OF FACT

The Hearing Examiner trusts it will be understood that when a record such as this one, which, including exhibits, expert witness reports and transcripts of testimony, amounts to several thousand pages, it is simply not practicable to provide detailed summaries of the testimony of each witness or to mention -- much less analyze -- each separate issue of fact that arose during the hearing. Further, the foregoing findings are not intended to imply that the Hearing Panel believed none of complainant's evidence while accepting respondent's as absolute truth. As in most cases, the truth probably is somewhere in between the parties' sharply divergent versions of the facts. The findings of fact should be read, however, in light of complainant's burden to prove his case by a preponderance of the evidence.

At this point, it is perhaps relevant to note that if complainant's testimony is taken at face value, he has either criticized, been criticized, warned, reprimanded, disciplined -- or otherwise had problems with -- virtually every supervisory employee he has come in contact with at FMC, including a black foreman. It would not be difficult to attribute racial prejudice or motivation to one or a few supervisors. As the numbers increase, however, it becomes more and more difficult to believe that all of these people are "out to get" complainant because of his race.

CONCLUSIONS OF LAW

INTRODUCTION

In applying the West Virginia Human Rights Act and relevant case law, it is perhaps worthwhile to point out what this case is not. It is not a complaint about FMC's hiring or promotion practices nor is it a multi-party claim, although the allegations in complaint no. ER-210-77 are couched in terms of blacks generally rather than complainant personally. Complainant was permitted, over objection, to introduce considerable evidence about the plant's "general atmosphere" or "pattern and practice". (Some of this evidence included testimony about discriminatory promotion practices). Nevertheless, it must be remembered that FMC is not "on trial" for the various incidents described in such "pattern and practice" evidence. Although this evidence was admitted for such weight and relevance as it might have, this single complainant in the end was still required to prove the allegations in his own complaints by a preponderance of the evidence.

THE "STATUTE OF LIMITATIONS" DEFENSE AS TO COMPLAINT NO. ER-210-77

As noted in the discussion under "Issues - Contentions of the Parties", respondent contends that complaint No.

ER-210-77 was not filed within the 90-day period required by West Virginia Code Section 5-11-10. That section provides in pertinent part (now and in 1977):

> "Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice shall make, sign and file with the commission a verified complaint .... Any complaint filed pursuant to this article must be filed within ninety days after the alleged act of discrimination."

Complaint No. ER-210-77 was filed on December 20, 1976. Respondent argues that inasmuch as the allegations in the complaint relate only to the cell repair department, and complainant left that department in 1974, the complaint could not have been filed within 90 days after the "alleged act of discrimination". Respondent cites West Virginia Human Rights Commission v. United Transportation Union, 280 S.E. 2d 653 (W.Va. 1981) for the holding that the 90-day limit is a jurisdictional, non-waivable prerequisite for maintenance of a claim.

Complainant counters with the argument that the complaint alleges violations of a "continuing nature" and that the very same West Virginia Supreme Court case cited by respondent therefore overcomes the statute of limitations argument. Complainant's "continuing violation" argument is apparently based upon the portion of the printed complaint form which has a blank to be filled in after the words: "Date of incident, on or about ...". The blank was filled in by complainant with the type-written words: "October 27, prior to and continuing [19]76."

The question is whether violations are "continuing" simply because the complaint makes a conclusory allegation that they are. In the United Transportation Union case, supra, the West Virginia Supreme Court found that a continuing violation could exist where past discriminatory practices were perpetuated by current ones being followed by the union. The case involved union-wide activity rather than, as here, allegations about a specific department in an industrial plant.

A fair reading of Complaint ER-210-77 leads to the conclusion that complainant is referring to what happened in the cell repair department, not in the plant generally. The acts of discrimination alleged in the complaint clearly are phrased in the past tense. The complainant's evidence referred to what happened in cell repair while he was there. As already noted, he left that department on June 17, 1974. He did not present direct evidence of what happened in cell repair after he left. Thus, his somewhat ambiguous entry, "October 27, prior to and continuing [19]76" really adds nothing of significance for purposes of the 90-day limitation period.

Complainant could have phrased his complaint in terms of what was going on throughout the plant, rather than just in the cell repair department; or he could have alleged what "continued" to happen in that department after he left. He could have filed his complaint while he was still in the

cell repair department and within 90 days of the acts of discrimination of which he complained. However, he waited until December 20, 1976, two and a half years after he left cell repair, and restricted his allegations to that department, again, in the past tense: "I believe that the blacks were discriminated against ..." (emphasis supplied). Thus, assuming that the complainant was the actual victim of discriminatory acts while in the cell repair department (which he left on a definite date) he still has not satisifed the second and third tests in the West Virginia Supreme Court's definition of "continuing violations" with regard to those discriminatory acts that occurred in 1972-74. West Virginia Human Rights Commission v. United Transportation Union, 280 S.E. 2d at 659. The syllabus points in that opinion use the phrases "present practices that perpetuate pre-Act discrimination" (Pt. 3, Syll.) and "Prior ... practices perpetuated by ..." (Pt. 5, Syll.). This language indicates that some act within the 90-day period must be capable of linkage with the past acts.

Under these circumstances, to apply the "continuing violation" concept to keep this claim alive would render the language of Code 5-11-10 meaningless. It would enable tardy claimants to revive stale claims merely by using the magic word "continuing" in their complaints. Such "bootstrapping" does not seem to be what the Legislature intended when it said: "within ninety days after the alleged act of

discrimination".

Accordingly, the Hearing Examiner agrees that complaint no. ER-210-77 is barred by the provisions of Code 5-11-10.

COMPLAINANT FAILED TO CARRY THE BURDEN OF PROOF AS TO COMPLAINT NO. ER-210-77

Even if complaint no. ER-210-77 had been timely filed, complainant was still required to prove his allegations by a preponderance of the evidence. The findings of fact enumerated above demonstrate that he did not.

The complaint, fairly read, appears to describe a related sequence of events. That is, it first recites the allegations that the foreman had said: "We are going to run those niggers out of here", followed by allegations of increased workloads, harassment, and bad working conditions, all presumably calculated to achieve the purported goal of driving the black employees "out of here". Complainant's evidence as to the quoted statement was tenuous; and, as noted in the findings of fact, the changes in workload and working conditions -- the main thrust of the complaint -- were not proved to be racially motivated. Thus, even assuming the truth and admissibility of the statement attributed to the foreman (later identified as Marlin Cook) the evidence did not demonstrate a link between that statement and the subsequent events.

The allegations in the complaint about racial graffiti referred to the restroom walls. The Hearing Examiner believes that there was indeed racial graffiti in the restrooms during complainant's cell repair employment as well as in the plant generally since then. However, the complainant did not

sufficiently demonstrate that this condition was condoned, let alone instigated by the FMC management. Witnesses for complainant acknowledged that efforts were made in varying degrees to control or prevent the graffiti when management was informed of its existence.

Again, as suggested earlier, we do not mean to suggest that FMC has been a perfect employer in the area of race relations. One of FMC's witnesses in this hearing was a black foreman who had himself filed a Human Rights complaint against the company in 1974, but had subsequently dropped it after being promoted to foreman. At one point, he testified to the effect that although there has not necessarily been a 100% improvement since he filed the 1974 complaint, significant progress has been made by FMC in the treatment of black employees. However, whether the company's overall record is good, bad or fair, is not necessarily relevant in this case, which involves one black employee and his specific allegations contained in two complaints.

COMPLAINANT FAILED TO CARRY THE BURDEN OF PROOF AS TO COMPLAINT NO. REP-539-81

Complainant alleged that he was discharged in February, 1981, because he had filed a complaint (No. ER-40-81) against FMC in July of 1980. The company says that the reasons for the discharge were those it stated at the time;

i.e., chronic absenteeism, falsification of time card, and avoidance of mandatory training.

It has already been pointed out that complainant had filed other complaints against the company dating back to 1974, and had instituted numerous contract grievances prior to the 1981 discharge. It is somewhat puzzling that complainant would attribute that discharge to a desire to retaliate for one particular complaint filed seven months prior to the discharge. In any event, complainant did not establish the causal connection necessary to prove a reprisal case. Certainly there was no direct evidence of any causal connection, and complainant could not show that the reasons given by FMC were pretextual. Further, even assuming FMC was required to come forward with a "legitimate, non-discriminatory reason" for the discharge, the findings of fact show that it did so.

As noted previously, complainant was permitted over objection, to introduce evidence of the "general atmosphere" and "pattern and practice" in the plant. This evidence, including statistics, was offered to form a basis for a theory that if FMC was racially motivated in other situations, it is more likely that it was likewise motivated with regard to complainant. It is indeed true that statistics and general practices may be useful in determining whether articulated nondiscriminatory reasons are merely pretextual. E.g., Pittinger, et al. v.

Shepherdstown Volunteer Fire Department, PAS 48-77 and 483-77, see also, Shepherdstown Volunteer Fire Department v. State of West Virginia Human Rights Commission, 309 S.E. 2d 342 (W.Va. 1983).

Although the Hearing Panel appreciates the efforts of the expert witnesses at this hearing, and finds the analyses of both to be enlightening, we must also agree with the respondent that statistics are of limited value in this single-plaintiff disparate treatment case. The following portion of respondent's brief is relevant:

> "It has long been settled that statistical evidence may be particularly relevant in class action and disparate impact discrimination lawsuits. It is equally settled that statistical evidence has considerably less probative value when offered to prove individual claims of disparate treatment. As noted in B. Schlei & P. Grossman, Employment Discrimination Law, 598 (2nd Ed. 1983), "The role of statistics in the disparate treatment discharge case is quite limited." See also Ward v. Westland Plastics, Inc., 651 F.2d 1266, 1270 (9th Cir. 1980) ("Regardless of how devastating and reliable the statistics may look, the issues remain in these cases whether a particular isolated historical event was discriminatory. An individual's discharge may be justified despite overall statistics suggesting discriminatory policies."); Taylor v. Detroit Diesel Allison, 18 Fair Empl. Prac. Cas. 553 (S.D. Ind. 1978) (discharge of a probationary employee held not unlawful despite statistical showing that twice as many blacks as non-blacks were terminated during probationary period.); Rowe v. Bailar, 20 Fair Empl. Prac. Cas. 912 (D.C. 1979) (Plaintiff cannot prove a disparate treatment case solely on the basis of statistics), D. Baldus and J. Cole, Statistical Proof of Discrimination, 34 (1980) ("The usual judicial approach quote properly recognizes that proof of a policy of intentional discrimination against a class of minorities normally provides an insufficient basis for inferring bias in the treatment of any one individual.")

To the same effect is the United States Supreme Court's footnote no. 19 in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 36 L. Ed 2d 668, 93 S. Ct. 1817 (1973) where the Court cautions that statistics or "general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire".

For the same reason that statistics are of doubtful use in this kind of case, the "pattern and practice" evidence is also inconclusive. Whatever FMC may have done in other situations does not mean it was racially motivated in its treatment of this single complainant. The findings of fact reflect this premise.

Finally, it is noted that as reflected in the findings of fact, a substantial amount of evidence was heard about events occurring after the filing of REP-539-81 (filed on May 20, 1981). In particular, it appears that most or all of the Ku Klux Klan activity described in the testimony took place after 1981. Respondent argues that evidence of "post-filing" events should not be considered. The evidence in question was admitted under a liberal policy of admissibility, and specifically for purposes of complainant's "pattern and practice" theory. Although we have not excluded post-1981 evidence in reaching a decision, the fact that the events occurred after the 1981 discharge does

affect the weight of that evidence.

As indicated by the foregoing discussion, the complainant -- based on the facts and circumstances as they existed in February 1981 -- has not proved that the 1981 discharge was an act of reprisal.

The proposed conclusions and order are as follows:

1. Complaint No. ER-210-77 was not timely filed as required by West Virginia Code 5-11-10. Accordingly, respondent's motion to dismiss on that ground should be granted.

2. Even assuming timely filing of Complaint No. ER-210-77, complainant did not prove his claim by a preponderance of the evidence.

3. Complainant did not prove the allegations of Complaint No. REP-539-81 by a preponderance of the evidence.

4. Both of the said complaints should be dismissed.

Dated this 31st day of December, 1985.

Victor A. Barone

VICTOR A. BARONE
Hearing Examiner