



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**WV HUMAN RIGHTS COMMISSION**

**1321 Plaza East**

**Room 104/106**

**Charleston, WV 25301-1400**

**GASTON CAPERTON**  
GOVERNOR

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February 23, 1990

**Quewanncoii C. Stephens**  
Executive Director

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Union Carbide Corp.  
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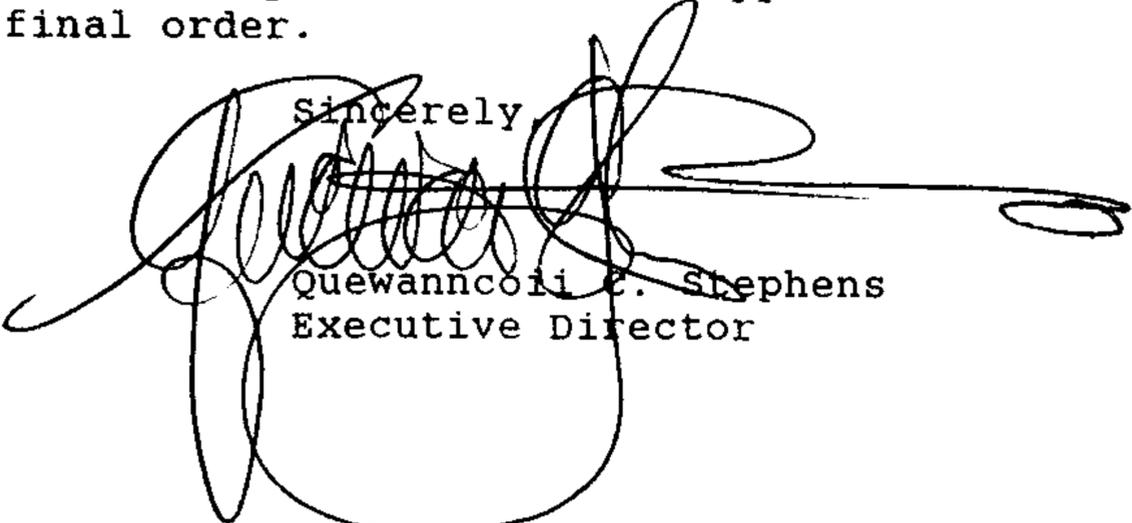
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2018 Kanawha Blvd. E.  
Charleston, WV 25301

Re: Shah v. Union Carbide Corp.  
ENO-585-82A & EANC-586-82A

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely



Quewanncoii C. Stephens  
Executive Director

QCS/mst

Enclosures

**CERTIFIED MAIL-RETURN RECEIPT REQUESTED**

## NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a non-resident of this state, the non-resident may be required to file a bond with the clerk of the supreme court.

In some cases the appeal may be filed in the Circuit Court of Kanawha County, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

NARESH R. SHAH,

Complainant,

v.

DOCKET NO. ENO-585-82A and  
EANC-586-82A

UNION CARBIDE CORPORATION,

Respondent.

FINAL ORDER

On 10 January 1990 the West Virginia Human Rights Commission considered the Request to Reopen Hearing filed by the complainant herein and, finding that the request failed to establish good cause for reopening this matter, decided to, and does hereby, deny said request in its entirety.

The Commission then reviewed the proposed order and decision of the hearing examiner, James Gerl. After consideration of the examiner's proposals and the exceptions filed thereto, the Commission decided to, and does hereby, adopt said proposed order and decision as its own, encompassing the findings of fact and conclusions of law therein, without modification or amendment.

It is therefore, ADJUDGED, ORDERED and DECREED that the hearing examiner's proposed order and decision, encompassing findings of fact and conclusions of law, be attached hereto as this Commission's Final Order and that as a result thereof

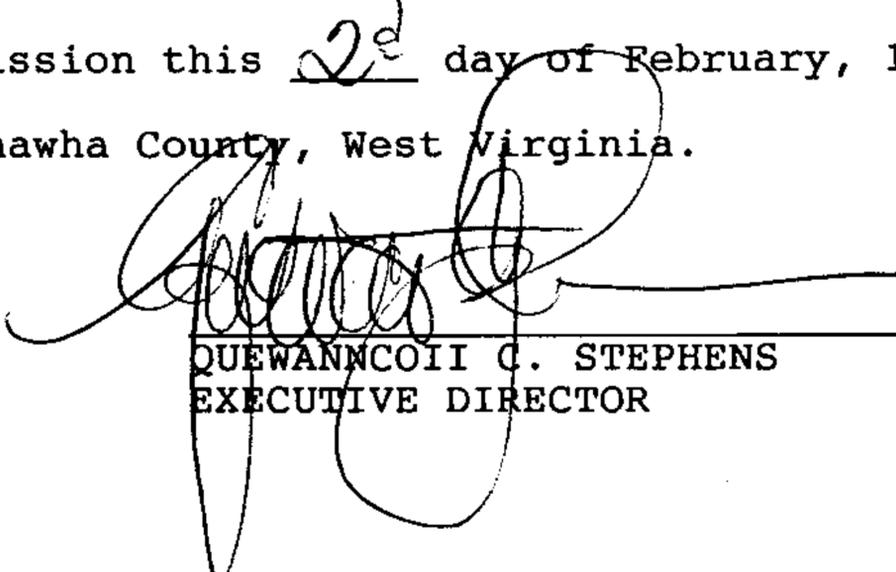
the complaint filed in this matter by Naresh R. Shah against Union Carbide Corporation be, and the same is hereby, DISMISSED with prejudice.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, the parties are hereby notified that they have ten (10) days to request a reconsideration of this Final Order or they may seek judicial review.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 2<sup>d</sup> day of February, 1990, in Charleston, Kanawha County, West Virginia.



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QUEWANNCOLL C. STEPHENS  
EXECUTIVE DIRECTOR

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

NARESH R. SHAH,

Complainant,

vs.

DOCKET NOS. ENO-585-82A,  
EANC-586-82A

UNION CARBIDE CORPORATION,

Respondent.

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W.V. HUMAN RIGHTS COMM.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on July 21-22 and December 11-12, 1986, in Charleston, West Virginia. Commissioner Jack McComas served as Hearing Commissioner. The complaints were filed on June 23, 1982. The notice of hearing was issued on February 21, 1986. A telephone status conference was convened on April 1, 1986. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant

or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

#### CONTENTIONS OF THE PARTIES

Complainant contends that respondent fired him because of his national origin, India, and because of his ancestry, Oriental. Respondent maintains that the complaint was not timely filed and that complainant was fired for incompetence.

#### FINDINGS OF FACT

Based upon the parties' stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. Complainant was born in Guyarat, India. Complainant is a member of the Hindu religion.
2. Complainant became a naturalized United States citizen in September, 1977.
3. Complainant resides in Kanawha County, West Virginia, and has so resided for approximately the last twelve years.
4. Complainant began employment with respondent in June of 1974.
5. Complainant received a Bachelor of Science degree in Chemical Engineering in 1968 from Baroda University, Baroda, India.
6. Complainant was awarded a Master of Science degree in Chemical Engineering in 1970 from Wayne State University, Detroit, Michigan.

7. Before working with respondent, complainant worked approximately 4.5 years in research, development and quality control areas of commercial urethane chemistry. Two years of this experience was a production and quality control supervisor.

8. Complainant was employed in respondent's Research and Development Department, Urethanes Section, from June, 1974, until October, 1979.

9. On October 1, 1979, complainant was transferred to the Synthesis Gas to Ethylene Glycol project (informally known as the SYN-GAS project).

10. The chain of command from June, 1981, through complainant's termination was Beisner, Group Leader; Kearns, Group Leader; Brown, Associate Director; and Saunby, Director. Group Leader is synonymous with Group Manager.

11. Complainant's employment with respondent was terminated effective February 28, 1982.

12. Complainant continued on respondent's payroll until May 30, 1982.

13. Complainant received approximately three weeks of vacation pay after May 30, 1982.

14. Complainant became employed at the Department of Natural Resources, State of West Virginia, on June 22, 1982, as Engineer I.

15. During complainant's tenure at the Department of Natural Resources, he received increases in his salary.

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

16. On February 5, 1982, complainant was notified by respondent that he would be terminated.

17. Complainant filed an "Employment Complaint Background Information" form with the Human Rights Commission on May 5, 1982.

18. The complaints herein were filed on June 23, 1982.

19. On November 5, 1981, complainant was placed on an action plan, or probation. By the terms of said action plan, complainant was required to demonstrate satisfactory performance by January 31, 1982.

20. Respondent's personnel pamphlet entitled, "Managing Managerial Resources" requires that an action plan, or probationary period for less than acceptable performance be not less than three months nor more than six months.

21. Complainant was transferred to the SYN-GAS project on October 1, 1979, because the funding for his project in Urethanes was withdrawn.

22. Complainant admitted in a Personal Development Form which he completed in September, 1979, that since his job in Urethanes did not utilize his chemical engineering skills, they might be getting obsolete, and that he should obtain additional skills by taking university courses and by taking respondent's in-house courses.

23. During his interview with Saunby prior to joining the SYN-GAS group, complainant was advised to refresh his chemical engineering knowledge, and complainant agreed that this was something he should do.

24. Before Beisner wrote complainant's 1979 evaluation, he conferred with Van Cleve, complainant's previous Group Leader, who recommended a very good rating but noted his concern about complainant's breadth of technical competence.

25. In mid-1980, the SYN-GAS group began changing from a one step to a multi-step process which included the design and construction of a large pilot plant. The purpose of the project was to develop a process for the production of Ethylene Glycol from Syn-Gas derived from coal.

26. The assignments in the pilot plant project were of an individual nature rather than the previous team assignments. At this time, complainant's deficiencies with regard to chemical engineering skills became apparent to his supervisors. For 1980, complainant received a satisfactory performance evaluation, but Beisner noted complainant's lack of independence and his need to refresh his chemical engineering skills.

27. In April or May of 1981, Beisner suggested to Brown and Saunby that complainant was not performing at the level that a chemical engineer should be performing and suggested that complainant be moved out of his group.

28. The specific deficiencies cited by Beisner include the

following: complainant did not understand how the distillation column in the Pilot Plant worked; complainant was unable to complete an overall material balance; complainant could not calculate whether certain reactors would be running in "turbulent" or "laminar" flow; and on one occasion, complainant lacked basic chemical engineering knowledge but pretended that he did know it.

29. In view of Beisner's request, Brown contacted Urethanes Associate Director Meeker in May, 1981. Complainant's former job in Urethanes had been eliminated and there was now no other job for which complainant was qualified.

30. On June 22, 1981, Beisner informed complainant that he would be rated a 4, or unsatisfactory, if required to evaluate complainant's performance at that time. Complainant was advised that if his performance did not improve, termination would result.

31. In October, 1981, Kearnes replaced Beisner as Group Leader in the SYN-GAS project. Kearns had previously been a project scientist in the SYN-GAS group and had observed complainant's work.

32. Kearnes observed many significant errors by complainant that indicated his lack of basic chemical engineering skills. Among these errors were the following: complainant improperly designed the scrubbers on a bubble column; complainant improperly overused the technical Skill Centers to answer basic chemical engineering questions; complainant's work as interface with the computer department had to be completely redone; complainant's

design for a scrubbing unit revealed that he had no knowledge of mass transfer limitations.

33. On November 5, 1981, complainant was placed on an action plan. Complainant was given the option of spending three months on respondent's payroll while conducting a job search or else demonstrating satisfactory job performance by January 31, 1982. Complainant chose the latter option.

34. Complainant's performance evaluation for 1981 was unsatisfactory.

35. Complainant made no serious effort to take university courses or respondent's in-house courses to upgrade his chemical engineering skills until after he was placed on an action plan in November of 1981.

36. At the end of the action plan on February 1, 1982, Kearns again evaluated complainant and found his performance to be unsatisfactory.

37. During the course of the action plan, Brown continued his efforts to find another position for complainant at various facilities of respondent. His efforts were unsuccessful.

38. Complainant was originally notified that he would be separated from the payroll on February 28, 1982. Complainant requested additional consideration because his wife was pregnant and he was kept on respondent's payroll until May 30, 1982.

39. Respondent's personnel office assisted complainant with job hunting, writing resumes and sending out letters.

40. There were no ethnic jokes or insults based upon national origin at respondent's workplace.

41. Wadia and Kavasmaneck, both of Indian national origin, are associate directors in respondent's R & D Department. There are six associate director positions, which rank just below the position of department director.

42. Saunby, Director of respondent's R & D Department, is of British national origin.

43. Respondent's personnel pamphlet, "Managing Managerial Resources", is meant to be merely a guide for respondent's managers.

#### CONCLUSIONS OF LAW

1. Naresh R. Shah is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act. West Virginia Code, §5-11-10.

2. Union Carbide Corporation is an employer as defined by West Virginia Code Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant's complaints were timely filed.

4. Complainant has established a prima facie case of national origin discrimination.

5. Respondent has articulated a legitimate non-discriminatory reason for its termination of complainant.

6. Complainant has not demonstrated that the reason articulated by respondent for firing him is pretextual.

7. Respondent has not discriminated against complainant on the basis of his national origin or ancestry by firing him.

### DISCUSSION OF CONCLUSIONS

#### I. TIMELINESS OF COMPLAINTS

The Human Rights Act requires that a complaint be filed within ninety days of the alleged act of discrimination. West Virginia Code §5-11-10. This requirement is jurisdictional. Human Rights Commission v. U. T. U., 280 S.E.2d 653 (W.Va. 1982).

Respondent cites authority for the proposition that the ninety days begins to run from complainant's knowledge of the alleged act of discrimination. Respondent equates knowledge of the act with notice of the act. Respondent asserts that the ninety days should begin to run from the first notice of termination. The Hearing Examiner strongly urges the Commission to reject this proposition.

The West Virginia rule is that a statute of limitations does not begin to run until the cause of action accrues. Handley v. Town of Shinnston, 289 S.E.2d 201 (W.Va. 1982). See also, 4A

Corbin, Contracts, §989. Thus, in a case such as the instant case, which alleges discriminatory termination, the ninety-day period should begin to run from the effective date of the termination, that is, the last day that the complainant works on the job. Indeed, the alleged discriminatory act is the termination, not the notice of termination. A complainant may not seek reinstatement until he no longer works for respondent. The ninety-day period, therefore, should begin to run when the termination is complete, that is, the last day on the job.

The decision in Delaware State College v. Ricks, 449 U.S. 250 (1980), noted in complainant's brief, is distinguishable from the present case. There the alleged discriminatory act involved was denial of academic tenure. Denial of tenure to a faculty member is not merely a notice of termination. Rather, denial of tenure is a significant adverse employment action with severe employment consequences. Although denial of tenure is generally followed by termination, the consequences of tenure denial are not dependent upon a subsequent termination. In such cases, the last day of work bears no genuine relationship to the alleged discriminatory act. Thus, denial of tenure in an academic setting is fundamentally different from a notice of discharge. In any event, Ricks is an interpretation of federal law, and is, therefore, not binding upon the Commission in interpreting the West Virginia Human Rights Act.

In the instant case, complainant's last day on the job was February 28, 1982. He filed his background information form on May 5, 1982, well within the ninety-day period.

Even if the Commission were to use the date of notice of termination as the beginning of the ninety-day period, the complaints herein were timely filed. Complainant was notified by respondent on February 5, 1982, that he would be terminated and he filed his background information form 89 days later, on May 5, 1982. Although one handwritten exhibit introduced into evidence by respondent bears the date February 2, 1982, this date appears to be an error. It is contradicted by another exhibit which is dated February 5, 1982, in which Brown refers to "our meeting today", in which complainant was notified that he would be terminated. Brown's testimony concerning this topic appears to indicate that only one meeting took place at this time. Accordingly, it is concluded that complainant was given notice of his termination on February 5, 1982.

Respondent argues in a footnote that the filing of a Background Information form does not constitute the filing of a complaint. Respondent notes that the actual complaints were not filed until June 23, 1982, 139 days after the alleged discriminatory act. As the United States Supreme Court has unanimously ruled, however, a complainant cannot be penalized because of agency delays if the complainant has timely notified the agency

of his complaint. Logan v. Zimmerman Brush, 455 U.S. 422 (1982). Accordingly, the date upon which complainant filed his Background Information form constitutes the date of filing. See Rules and Regulations Pertaining to Practice and Procedure Before the West Virginia Human Rights Commission, §3.05(d)(3).

## II. MERITS

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342, 352-353 (W.Va. 1983); McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate, non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Department, supra; McDonnell-Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Department, supra; McDonnell-Douglas, supra.

In the instant case, complainant has established a prima facie case of discrimination by proving facts, which if otherwise unexplained, raise an inference of discrimination. Furnco Construction Company v. Waters, 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The parties

have stipulated that complainant is of Indian national origin and that he was discharged by respondent. Complainant has proven that respondent did not follow its stated policy with regard to length of probationary periods when complainant was placed on an action plan less than three months in duration.

Respondent has articulated a legitimate non-discriminatory reason for complainant's termination. Respondent has presented testimony and reams of documentary evidence to the effect that complainant lacked chemical engineering skills and consequently committed significant errors in his job performance. Respondent has presented evidence that complainant was urged for years to attend courses to bolster his chemical engineering skills but that he failed to do so. [Eventually respondent placed complainant on an action plan to clearly define his performance deficiencies and to define what performance is acceptable.] Complainant did not improve during his action plan, and he was terminated.

Complainant has not demonstrated that the reason articulated by respondent is pretextual. The testimony of respondent's witnesses was more credible than the testimony of complainant's witnesses and of complainant. Complainant's demeanor during cross examination was evasive. Throughout his testimony, complainant refused to admit that there was ever any problem with his job performance. The record evidence is clear that complainant's performance was unsatisfactory; Hart, complainant's own witness,

corroborated that complainant lacked an understanding of chemical engineering fundamentals. In addition, complainant's credibility is impaired by a prior inconsistent statement with regard to a pre-hire interview discussion of chemical engineering. The testimony of respondent's witnesses, on the other hand, to the effect that complainant's job performance was unsatisfactory, was credible.

Complainant's argument that he was set up to fail by being placed in SYN-GAS must be rejected. Complainant's education and training made him appear to be an ideal candidate for the position that he held. Only his lack of chemical engineering skills and his failure to heed respondent's advice to refresh those skills, caused complainant to fail.

Complainant's argument that he did not receive proper feedback or notice of his problems is not credited. As early as January, 1980, complainant was informed that management was concerned regarding his technical skills and understanding of engineering fundamentals. In September of 1979, complainant himself noted the possibility that his skills might become obsolete.

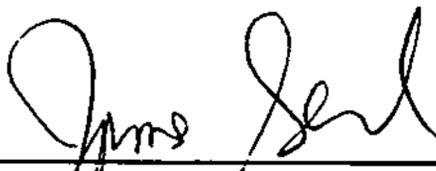
Complainant has not been able to introduce any evidence of ethnic jokes or insults based upon national origin which might tend to prove that the articulated reason is pretextual.

The quality of legal representation for both sides in this matter was unusually good, as illustrated by the attempt by counsel for complainant, in proposed findings of fact, to present

a pattern and practice argument. Despite this extensive factual recitation, the record evidence is abundantly clear that respondent treated foreign nationals no differently than employees who were not foreign nationals. The extraordinarily large number of exhibits in this case seem to reveal that respondent terminates, or permits the resignation of, any employee who does not competently perform his job. Respondent's director of R&D is of foreign national origin. Two of the six associate directors of respondent's R&D Department are of Indian national origin. It is significant that complainant did not present the testimony of an expert statistician concerning the alleged pattern and practice of discrimination. It is concluded that there was no such pattern and practice.

PROPOSED ORDER

Based upon the foregoing, the Hearing Examiner hereby recommends that the Commission dismiss the complaint in this matter with prejudice.

  
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James Gerl  
Hearing Examiner

ENTERED: March 5, 1987

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served  
the foregoing Proposed Order and Decision  
by placing true and correct copies thereof in the United States  
Mail, postage prepaid, addressed to the following:

Paul K. Reese, Esq.  
C/O Sterl F. Shinaberry  
Attorney at Law  
2018 Kanawha Boulevard, East  
Charleston, West Virginia 25311

David D. Johnson, Esq.  
1600 Laidley Tower  
P.O. Box 553  
Charleston, West Virginia 25301

on this 5th day of March, 1987.

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James Gerl