

**STATE OF INDIANA
CIVIL RIGHTS COMMISSION**

LYNNE FARMER)	ICRC No.: EMra16061244
)	EEOC No.: 24F-2016-00688
Complainant,)	
vs.)	
)	
EVANSVILLE VANDERBURG SCHOOL)	
CORP.,)	DATE FILED
)	FEB 15 2019
Respondent.)	
)	ICRC
)	COMMISSION

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On Monday, February 12, 2018, the presiding Administrative Law Judge for the Indiana Civil Rights Commission (ICRC), the Hon. John F. Burkhardt, held a public hearing in this case at the Vanderburg Central Public Library located at 200 S.E. Martin Luther King, Jr. Boulevard, Evansville, Indiana.

Complainant Lynne Farmer (“Farmer”) appeared personally and served as a witness in support of her June 17, 2016, complaint of discrimination which was presented by ICRC Staff Attorneys Frederick S. Bremer and Caroline Stephens Ryker in the public interest. The Evansville Vanderburg School Corporation (“Respondent”) appeared personally and by counsel, Jean M. Blanton of Ziemer Stayman Weitzel Shoulders, LLP.

The Parties agreed that the issue in this case is, as stated in the December 12, 2016, Prehearing Order, “whether Complainant was denied a promotion due to her race, African American.” The Parties stipulated that Farmer sought a promotion and was denied such promotion. Farmer alleges that the Respondent denied her a promotion based upon her race. Respondent denies the allegations and avers that the hiring process was race-neutral.

At the hearing, the Parties submitted a joint exhibit book composed of the Parties' pre-marked exhibits corresponding to the enumerated exhibits in the Parties' August 10, 2017, Joint Prehearing Statement. The Parties stipulated to the authenticity and admissibility of the exhibits, with the exception of all hand-lettered portions of items number 9-21.

PROCEDURAL POSTURE

Following the hearing and pursuant to the Administrative Law Judge's order, the Parties each filed proposed findings of fact, conclusions of law, and orders. Having considered the evidence presented in the matter and being duly advised, Administrative Law Judge Burkhardt issued his findings of fact, conclusions of law, and order on August 17, 2018, dismissing the complaint.

Farmer filed timely objections to Administrative Law Judge Burkhardt's order on September 4, 2018. The ICRC accepted the Parties' briefs and held oral arguments on the objections on December 21, 2018. Upon its own motion, the ICRC reopened the hearing record to receive new evidence discussed during oral argument. Upon thoughtful consideration of the evidence and being duly advised, the ICRC issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

I. Respondent Background

1. Respondent is a public school system operating schools in and outside of Evansville within Vanderburgh County, Indiana. Respondent employed and paid at least six (6) employees at all times material to this case.

2. Dexter Elementary School (“Dexter Elementary”), Glenwood Leadership Academy (“Glenwood”), and Lodge Community School (“Lodge”) are schools in Respondent’s system.
3. The principal of Lodge was Robert W. Eberhart, Jr. (“Eberhart”), a Caucasian male. (Tr. p. 53, 206). Eberhart has been principal of Lodge since November 2009. (Tr. p. 206). Prior to serving as principal, Eberhart served as the assistant principal at Lodge from July 2009 to November 2009. (Tr. p. 206).

II. Complainant Background

4. Farmer was at the time of the material facts a licensed teacher in the state of Indiana. (Tr. p. 34-35). She received a Bachelor of Science degree in Education from the University of Southern Indiana and a Master’s degree from Indiana Wesleyan University. (Tr. p. 34). She did not hold an administrator’s license. (Tr. p. 35).
5. Farmer is an African American female. (Tr. p. 22).
6. At the time of the hearing, Farmer resided in Evansville, Indiana, and was employed by Respondent. (Tr. p. 22). Farmer had been employed by Respondent for approximately six years. (Tr. p. 23). At the time of the hearing, she had been teaching fifth grade at Dexter Elementary for approximately a year and a half. (Tr. p. 22-23).
7. Prior to her employment by Respondent, Farmer taught at Joshua Academy charter school for twelve years. (Tr. p. 23). Farmer taught most levels during her employment at Joshua Academy and was teaching fifth grade when she left her employment there. (Tr. p. 24).

8. After leaving Joshua Academy, she served as a professional development substitute at Glenwood. (Tr. p. 24). During her second year at Glenwood, Farmer was hired as a new teacher mentor. (*Id.*).
9. As a professional development substitute, Farmer substituted for teachers while they were working in professional learning communities, where teachers are able to collaborate and discuss teaching-related data. (Tr. p. 25).
10. After the term of Farmer's employment ended at Glenwood, she applied for an Academic Coach position at Lodge, a kindergarten through eighth grade school in Respondent's school system. (Tr. p. 30-31).
11. Eberhart hired Farmer for the Academic Coach position at Lodge. (Tr. p. 119). Farmer was selected over multiple Caucasian candidates. (Tr. p. 285-286). At the time that Farmer accepted the Academic Coach position she had been teaching for approximately twelve years. (Tr. p. 34).

III. Complainant's Employment at Lodge

12. Academic Coach was a teaching position providing support to teachers within the classroom by instructing on techniques and pedagogy to strengthen the classroom. (Tr. p. 216).
13. Farmer reported to Eberhart when she served as the Academic Coach at Lodge. (*Id.*)
14. Lodge had received a failing grade from the State of Indiana for multiple years and underwent an annual school readiness audit. (Tr. p. 209-210). Mass Insight was an outside consultant that had been working with Lodge for several years to improve performance. (Tr. p. 210-211). Along with other suggestions, Mass Insight

suggested Lodge add an additional administrator to its staff as a Professional Development Specialist (PDS). (Tr. p. 211-212). The PDS would be responsible for managing the school improvement plan, (tr. p. 211-212), and would be the point person for all professional development at Lodge, (tr. p. 293). Administrators, including Eberhart, determined after working with Mass Insight to eliminate the Academic Coach position in order to create the PDS position. (Tr. p. 213-214, 330-332, 341-342).

15. In February 2016, Eberhart and Assistant Principal Amy Bonenberger (“Bonenberger”) met with Farmer to advise her that the Academic Coach position was being eliminated. (Tr. p. 40; Comp.’s Ex. 9). They further advised Farmer that she was ineligible to fill the new PDS position because she did not hold an administrator’s license. (Tr. p. 40).
16. Because the Academic Coach position was being eliminated, Eberhart offered Farmer a position teaching in a classroom so that she could maintain a contract position at Lodge. (Tr. p. 40-41). This required one teacher at Lodge to be moved, or “excessed,” to another school. (Tr. p. 46-47). Farmer expressed interest in volunteering to move to another school, but Eberhart advised her that he would need to offer all the teachers the opportunity to move schools. (Tr. 48-49). Eberhart advised the staff of the opportunity to excess at an afterschool meeting attended by the teachers, Eberhart, and Farmer. (Tr. p. 49; Resp.’s Ex. 12).
17. Farmer asked Tammy Dexter (“Dexter”), Respondent’s Director of School Support (DSS) and Eberhart’s supervisor, if Farmer could apply for the PDS position if she agreed to pursue her administrator’s license. (Tr. p. 50-51, 59-60, 105). Dexter

informed Farmer that she could apply for the position if she were pursuing her administrator's license. (Tr. p. 58, 348-349). Dexter also told Farmer she could volunteer to excess (Tr. p. 58-60; Comp.'s Ex. 15; Comp.'s Ex. 16). The job posting for the PDS position stated that the position required a "valid Indiana's administrator's license or ability to demonstrate that the requirements will be completed for such certification prior to the beginning of the administrative assignment." (Comp.'s Ex. 1; Resp.'s Ex. 2).

18. After receiving confirmation from Dexter that she was eligible to apply, Farmer applied for the PDS position, as did Melissa Daniels ("Daniels"), a Caucasian female who was, at the time, a teacher at Lodge. (Tr. p. 67-69).
19. Before Farmer applied to the position but after Farmer was informed she was eligible to apply, Eberhart told Farmer that there was no point in applying to the position because two other candidates had already obtained the requisite credentials. (Tr. p. 66).
20. Farmer and Daniels were both selected as part of a group of five finalists from an initial pool of thirteen applicants for the PDS position. (Tr. p. 224-225, 337-338).
21. Daniels was also eligible to apply for the position, although she did not have a Master's Degree or an administrator's license, and she would have been able to acquire the requisite degree and license during the same time period it would take Farmer to acquire her license. (Tr. p. 185).
22. Daniels did not have experience as an Academic Coach, although she had served as a teacher mentor. (Tr. p. 89).

23. The three interviewers, Eberhart, Bonenberger, and Dexter, testified that their approach to hiring was a collaborative one and that no one person held ultimate hiring authority. (Tr. p. 225, 293, 299, 338). However, Bonenberger was Eberhart's Assistant Principal, and Dexter believed that the hiring decision should ultimately rest with Eberhart. (Tr. p. 335-336).
24. When Eberhart completed a certified interview report for his July 14, 2014, interview of Farmer for the Academic Coach position, he indicated that Farmer was "Outstanding" in the categories of "mental alertness," "oral expression," "personality," "knowledge of subject area," "general knowledge & information," and "motivation." (Resp.'s Ex. 6). He indicated that Farmer was "Above Average" in the categories of "intelligence & education," "personal appearance," and "goals & ambitions." *Id.*
25. When Eberhart completed a certified interview report for his March 29, 2016, interview with Farmer for the PDS position, he indicated that she was "Average" in each of the same categories. (Resp.'s Ex. 5). Eberhart did not make any written comments regarding Farmer's performance in any of the categories; he did make written comments for each of the other four applicants. *Id.* Eberhart noted his "overall impression" that Farmer was "[n]ot a good fit for [the] position." *Id.*
26. Each of the three interviewers assessed Farmer as "Average" in every category. *Id.* None of the three interviewers assessed any of the other four candidates as "Average" or below in any category. *Id.* This includes the category of "personal appearance," described as "[r]eaction to taste in clothes, neatness, [and] physical characteristics." *Id.*

27. The chief differences between the Academic Coach and PDS positions were that the PDS would exercise authority over the teachers and filled a supervisory and evaluative role. (Tr. p. 138, 222-223). Eberhart testified that an Academic Coach “can make suggestions and stuff, but there’s really no power – I don’t want to say ‘power.’ They just don’t have the ability to really say, ‘You got to get this done.’” The PDS, on the other hand, did have that authority. *Id.*
28. Eberhart testified that, in Farmer’s second year as an Academic Coach, he observed that Farmer lacked initiative and did not “run with” a task when given “a lot of leeway.” (Tr. p. 219). However, Eberhart never reprimanded, disciplined, wrote up, or otherwise criticized Farmer’s performance as an Academic Coach during her time in that position. (Tr. p. 80).
29. We therefore infer that the disparity in Eberhart’s evaluation of Farmer for the Academic Coach position and for the PDS position two years later is not reasonably explained by objective criteria or by a subjective analysis of Farmer’s professional performance. We decline to infer that Eberhart or Respondent demonstrated a lack of unlawful discriminatory purpose by hiring Farmer to the Academic Coach position.

IV. Ultimate Factual Issues

30. Based on the foregoing, Respondent’s proffered legitimate, nondiscriminatory reasons for selecting a candidate other than Farmer action are found to be false.
31. It is inferred from the falsity of respondent’s proffered reasons for the adverse employment action and the evidence presented in support of Farmer’s prima facie

case of discrimination that the reasons proffered are merely pretexts for unlawful discrimination.

32. Based on the evidence presented to the commission and the inferences drawn therefrom, Farmer has shown by a preponderance of the evidence that Respondent intentionally engaged in a discriminatory practice on the basis of her race and denied her equal opportunity for employment on the basis of race.

V. Damages

33. Farmer seeks monetary damages equal to the difference in her actual salary earned and her potential salary as a Professional Development Specialist. (Tr. p. 129).

34. The contract amount for Farmer's position at the time she applied to the Professional Development Specialist position was \$51,149 per year, or \$1967.27 per bi-weekly pay period. (Tr. p. 130) (Resp.'s Ex. 9).

35. The Professional Development Specialist contract amount was \$79,331 per year, or \$3051.19 per bi-weekly pay period. (Tr. p. 130) (Resp.'s Ex. 9).

36. The difference in gross bi-weekly salary between the two positions is \$1083.92 plus benefits in the amount of \$216.83 per pay period, equaling \$1300.75 per pay period. (Resp.'s Ex. 9).

37. Melissa Daniels's hire date was August 8, 2016. (Resp.'s Ex. 9). The date of the hearing on this matter was February 12, 2018. Therefore, thirty-nine (39) pay periods elapsed between the adverse employment action and the hearing.

38. Farmer's lost wages equal thirty-nine (39) pay periods times \$1300.75 per pay period, or \$50,729.25.¹

¹ We note that Farmer testified that she "ha[d] no reason to disagree" that her annual lost wages were \$15,610, (tr. p. 130), and that approximately one and a half years elapsed between the adverse employment action and the February 12, 2018, hearing.

39. We decline to find that Farmer is entitled to interest on any lost wages.

CONCLUSIONS OF LAW

1. The ICRC has jurisdiction over the subject matter and the Parties in this case.
2. Farmer and Evansville Vanderburgh School Corporation are each a “person” as that term is defined in Indiana Code § 22-9-1-3(a).
3. Evansville Vanderburgh School Corporation is an “employer” as defined in Indiana Code § 22-9-1-3(h). *Cf.* 910 IAC 1-1-1(H)(1).
4. Farmer’s claim is subject to adjudication according to the Indiana Civil Rights Law, Ind. Code § 22-9-1 *et seq.*, and the Indiana Administrative Orders and Procedures Act, Ind. Code § 4-21.5. It is appropriate for the commission to consult cases decided under Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. 2000(e), when interpreting and applying the Indiana Civil Rights Law. *E.g. Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009); *Indiana Civil Rights Comm’n v. Culver Educ. Found.*, 535 N.E.2d 112, 115-16 (Ind. 1989).
5. The Indiana Civil Rights Law provides that “[e]very discriminatory practice relating to . . . employment . . . shall be considered unlawful unless it is specifically exempted by this chapter.” Ind. Code 22-9-1-3(l). “Discriminatory practice” means “the exclusion of a person from equal opportunities because of race” *Id.*

Farmer clarified that “[w]ithout me knowing what that position – I have to take this at face value and say yes, because I didn’t know what that position earned.” (Tr. p. 130-131). Upon examination of Respondent’s Stipulated Exhibit 9, we find that counsel’s question mistakenly identified \$15,610 as the annual difference in wages between the two positions. The \$15,610 figure represents the difference in the two positions over “12 pays,” or 24 weeks. (Resp.’s Ex. 9). This amount is arithmetically less than the difference between the annual teacher salary and the annual PDS salary, that difference being \$28,182. We find that the relief sought by Complainant Farmer is nevertheless clear: “the difference between what you [Farmer] earned in a classroom teacher position and what you could have been earning as a specialist from the time you were turned down for that job[.]” (Tr. p. 130).

6. A complainant may make a showing of intentional discrimination directly using evidence of the decision maker's motivation or indirectly by following the method of proof set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Cheek v. Peabody Coal Co.*, 97 F.3d 200 (7th Cir. 1996); *Hill v. Burrell Communications Group, Inc.*, 76 F.3d 665, 667 (7th Cir. 1995).
7. Under the *McDonnell* framework, a presumption of discrimination will attach if the complainant makes a prima facie showing of unlawful discrimination by a preponderance of the evidence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981).
8. A complainant can make a prima facie showing of unlawful discrimination by showing (1) that she is a member of a protected class, (2) that she applied for the position, (3) that she was qualified for the position, (4) that her application was rejected, and (5) that the position remained open. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Gore v. Indiana University*, 416 F.3d 590, 592 (7th Cir. 2005); *Bennet v. Roberts*, 295 F.3d 687, 694 (7th Cir. 2002).
9. There is evidence before the commission:
 - a. that Farmer is African American and is a member of a protected class;
 - b. that she applied for the position of Professional Development Specialist;
 - c. that she was qualified for the position by virtue of her education, experience, and willingness to engage in additional training and receive further licensing;
 - d. that her application was rejected; and

- e. that the position of Professional Development Specialist remained opened and was subsequently filled by Melissa Daniels, a Caucasian applicant.

Farmer therefore established by a preponderance of the evidence a prima facie case that she was unlawfully denied a promotion due to her race.

10. After a complainant establishes her prima facie case, a presumption of discrimination attaches unless the respondent can rebut that presumption. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). To do so, the respondent must produce evidence that, if taken as true, would permit the conclusion that the respondent's actions were taken for a legitimate, nondiscriminatory reason. *Id.*
11. Respondent offered evidence that its decision to promote Melissa Daniels rather than Farmer was based on the applicants' performance during a three-phase interview process and on soft criteria, including the interviewers' opinions that Daniels was a better "fit" for the position. This evidence, if taken as true, would permit the conclusion that Respondent's actions were based on a legitimate, nondiscriminatory reason and is sufficient to rebut the presumption of discrimination.
12. The ultimate burden of persuasion lies at all times with the complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 511. After making a determination as to any presumption of discrimination, the trier of fact returns their attention to the ultimate factual question, which is whether the respondent intentionally discriminated against the complainant. *Id.* It is not sufficient for the complainant to show that the respondent's purported nondiscriminatory reasons for its actions should be disbelieved; rather, the complainant must convince the trier of fact by a preponderance of the evidence that her allegations of discrimination are to be believed. *Id.* Nevertheless, the

trier of fact is permitted to infer the ultimate fact of discrimination based on the falsity of the proffered reasons and the evidence of a prima facie case of discrimination. *Id.*

13. There is evidence before the commission:

- a. that after Farmer inquired about the PDS position, Principal Eberhart told her she was not eligible to apply for the position, although in reality she was eligible to apply;
- b. that, after conceding that Farmer was eligible to apply for the position, Eberhart discouraged Farmer from applying for the position because other candidates would be more qualified;
- c. that Farmer had academic qualifications superior to Daniels at the time of application, specifically a Master's degree;
- d. that Farmer had more experience pertinent to the requirements of the position than Daniels at the time of application, including two years of experience as an Academic Coach working with teachers at Lodge;
- e. that as an Academic Coach Farmer performed similar duties to those that were required of the new position and had received satisfactory evaluations of her performance;
- f. that the interviewers consistently assessed Farmer as "Average" across all categories of assessment, but did not assess any of the four Caucasian candidates as "Average" or below in any category;
- g. that despite Farmer's superior qualifications, Respondent rejected Farmer's application in favor of Daniels, a Caucasian applicant.

This evidence, in addition to supporting Farmer's allegations of intentional discrimination in its own right, supports the finding that the Respondent's proffered reasons for the adverse employment action were false. These findings permit the inference that Respondent's proffered reasons were a pretext for intentional discrimination.

14. Based on the foregoing findings of fact, including the permissible inferences therefrom, Farmer has met her burden of persuasion that Respondent intentionally discriminated against her on the basis of race when it rejected her application for the Professional Development Specialist position. Respondent therefore engaged in an unlawful discriminatory practice in violation of the Indiana Civil Rights Law.
15. Upon a finding that a person has engaged in an unlawful discriminatory practice, the ICRC shall cause to be served on that person an order requiring the person to cease and desist from the unlawful discriminatory practice. Ind. Code 22-9-1-6(j).
16. The ICRC shall also take such further affirmative action as will effectuate the purposes of the Indiana Civil Rights Law. Ind. Code 22-9-1-6(j).
17. The ICRC is empowered to restore the losses incurred by a complainant as a result of discriminatory treatment as is necessary to assure justice, but in the case of employment discrimination such losses shall include only wages, salary, or commissions. Ind. Code 22-9-1(j).
18. To assure justice in this matter, it is necessary to restore the losses, in the form of lost wages or salary, incurred by Farmer as a result of her discriminatory treatment. Farmer's losses are \$50,729.25.

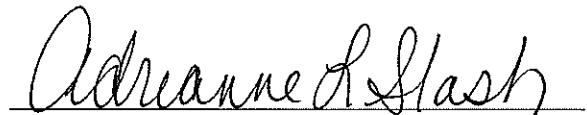
19. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

1. The August 17, 2018, Findings of Fact, Conclusions of Law, and Order issued by the Honorable John F. Burkhardt in this case are dissolved.
2. Evansville Vanderburgh School Corporation shall cease and desist all discriminatory employment practices made unlawful by the Indiana Civil Rights Law.
3. Evansville Vanderburgh School Corporation shall deliver to Farmer within thirty (30) days of the effective date of this order a check in the amount of \$50,729.25.

Adopted by the Commission by an
affirmative vote of 6 Commissioners on
February 15, 2019.



Adrienne Slash, Chair

Certificate of Service

Served this 15 day of February in 2019 by United States Mail on the following:

Lynne Farmer
2310 Lodge Avenue
Evansville, IN 47714-4217

Evansville Vanderburgh School Corp.
951 Walnut Street
Evansville, IN 47713

Lodge Community Schools
2000 Lodge Ave
Evansville, IN 47714-4295

Jean M. Blanton and Joshua B. Gessling
Ziemer, Stayman, Weitzel, & Shoulders
20 Northwest First Street
9th Floor, P.O. Box 916
Evansville, IN 47706
JBlanton@zsws.com
jgessling@zsws.com

and personally served on:

Fred S. Bremer, Esq.; ICRC Staff Attorney
Indiana Civil Rights Commission
Indiana Government Center North
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
Telephone: (317)232-2634
Fax: (317)232-6580
fbremer@icrc.in.gov



Docket Clerk,
Anechita Eromosele

**STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION**

LYNNE FARMER)	ICRC No.: EMra16061244
Complainant,)	EEOC No.: 24F-2016-00688
)	
VS.)	
)	
EVANSVILLE VANDERBURGH SCHOOL)	
CORP,)	
Respondent,)	
)	
)	

DATE FILED

AUG 17 2018

OFFICE OF THE
ADMINISTRATIVE JUDGE

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On Monday, February 12, 2018, the presiding Administrative Law Judge for the Indiana Civil Rights Commission (“ICRC”), Hon. John F. Burkhardt, held a public hearing in this case at the Vanderburgh Central Public Library located at 200 S.E. Martin Luther King, Jr. Boulevard, Evansville, Indiana.

Complainant Lynne Farmer (“Farmer”) appeared personally, and served as a witness in the case in support of her June 17, 2016 complaint of discrimination which was presented by ICRC Staff Attorneys Frederick S. Bremer and Caroline Stephens Ryker in the public interest. The Evansville Vanderburgh School Corporation (“Respondent”) appeared personally by representative Rick Cameron and was represented by Counsel Jean M. Blanton of Ziemer Stayman Weitzel Shoulders, LLP.

The Parties agreed that the issue in this case is, as stated in the December 12, 2016 Prehearing Order, “whether Complainant was denied a promotion due to her race, African-American.” The Parties already stipulated that Complainant sought a promotion and was denied such promotion. Complainant alleges that the Respondent denied her a promotion based upon her race and Respondent denies the allegations and avers that the hiring process was race-neutral.

At the hearing, the parties submitted a joint exhibit book composed of the parties’ pre-marked exhibits corresponding to the enumerated exhibits in the parties August 10, 2017 Joint

Prehearing Statement. The parties stipulated (with the exception of all hand-lettered portions of items numbered 9-21) to the authenticity and admissibility of the exhibits.

Following the hearing, the Parties each filed – pursuant to the Administrative Law Judge’s order under Ind. Code § 4-21.5-3-17(b) & 27(f) and 910 IAC 1-11-3 – **proposed findings of fact, conclusions of law, and orders.**

Having carefully considered the foregoing and being duly advised in the premises, the presiding Administrative Law Judge for the ICRC issues – pursuant to IC 4-21.5-3-27 – the following findings of fact, conclusions of law, and order. **In the absence of an objection by a party under IC 4-21.5-3-29(d) or the ICRC’s voluntary administrative review under IC 4-21.5-3-29(e), the ICRC shall affirm this order and it will become the final order disposing of this case.** (IC 4-21.5-3-27(a), 29(c)).

FINDINGS OF FACT

I. Respondent Background

1. Respondent is a public school system operating schools in and outside of Evansville within Vanderburgh County, Indiana; Respondent employed and paid at least six (6) employees at all times material to this case.

2. Dexter Elementary School (“Dexter”), Glenwood Leadership Academy (“Glenwood”), and Lodge Community School (“Lodge”) are schools in Respondent’s system.

3. The Principal of Lodge was Robert W. Eberhart Jr. (“Eberhart”), a Caucasian male. (Tr. 53). Eberhart had served as Principal of Lodge for nine years. (Tr. p.205). Prior to serving as Principal, Eberhart served as the Assistant Principal at Lodge. (Tr. p.206). Prior to his service at Lodge, Eberhart was the principal for two years at First Immanuel Lutheran School in Wisconsin. *Id.* Prior to serving in administrative roles, Eberhart taught 7th and 8th grade science, 4th grade science, and 2nd grade spelling. *Id.* He also previously taught science in 7th and 8th grade classrooms in Warrick County, Indiana for eighteen years. (Tr. p.17).

II. Complainant Background

4. Farmer is an Indiana state licensed teacher; she did not hold an administrator’s license, but held a Bachelor of Science Degree in Education from the University of Southern Indiana and a Master’s Degree from Indiana Wesleyan University. (Tr. p. 34-35).

5. Farmer, is an African American female who, at the time of the hearing, resided in Evansville, Indiana and was employed by Respondent. (Tr. p.22). Farmer had been employed by Respondent for approximately six years. (Tr. p. 23). At the time of the hearing, she was teaching 5th grade at Dexter and had been serving in that capacity for approximately a year and a half. (Tr. p. 22-23).

6. Prior to her employment by Respondent, Farmer taught at Joshua Academy, a charter school, for twelve years. (Tr. p.23). Farmer taught all levels during her time at Joshua Academy, but when she left Joshua Academy she was teaching 5th grade. (Tr. p. 24).

7. After leaving Joshua Academy, she served as a professional development substitute at Glenwood. (Tr. p.24). During her second year at Glenwood, Farmer was hired as the new teacher mentor. (Tr. p.24).

8. As a professional development substitute, Farmer substituted for teachers while they were working in professional learning communities where teachers are able to collaborate and discuss teaching-related data. (Tr. p.25).

9. Farmer did not have a contract position at Glenwood, so when the school year ended, her job ended. (Tr. p.30). As a result, Farmer applied for an academic coach position at Lodge, a kindergarten through 8th grade school with Respondent. (Tr. p.31).

10. Eberhart hired Farmer for the Academic Coach position at Lodge, selecting her over multiple Caucasian candidates. (Tr. p.285-286). At the time that Farmer had accepted the Academic Coach position, she had been teaching for approximately twelve years. (Tr. p.34).

III. Complainant's Tenure at Lodge

11. Farmer was interviewed and selected as the successful candidate for the Academic Coach position at Lodge by Emily McCormick Smith and Eberhart. (Tr. p.32, 53, 205).

12. Academic Coach was a teaching position providing support to teachers within the classroom by instructing on techniques and pedagogy to strengthen the classroom. (Tr. p.216).

13. Farmer reported to Eberhart when she served as the Academic Coach at Lodge. (*Id.*).

14. Eberhart felt he had "a positive relationship" with Farmer. (Tr. 217). He describes Farmer as "always pleasant" and "always kind;" he considered that, though staff joke about him "not having warm and fuzzies" in general, he "always felt like [he] was pleasant to her." (*Id.*).

15. Farmer and Eberhart pleasantly interacted outside of school as well. During Farmer's first year as Academic Coach, she was in a play. Eberhart, seeing that Farmer was excited about it, purchased tickets for himself, his wife, his daughter, and his son-in-law. (Tr. p.217). Eberhart went to the play and "enjoyed it," finding it "a wonderful play" and "enjoyable evening." (Tr. p.217).

16. During Farmer's first year as Academic Coach, Eberhart gave very specific directives as to performance of her position. (Tr. p.218 "The first year coming in, I had a lot more structure on it, and she was coming in new."). As Farmer began her second year, Eberhart focused on creating "distributive leadership" and to trying to help develop people into self-starters who would come up with and work towards solutions. (*Id.*).

17. As the first year progressed, Eberhart "backed off a lot," giving "more of a parameter" through comments like: I need these kind of things done. (*Id.*). Eberhart then began working upon things to which he had previously not been able to devote time. (*Id.*).

18. Eberhart testified that, at that point, he saw a general lack of "initiative" as manifest when, in response to "a lot of leeway" in a task, Farmer did not "run with it." (Tr. p.219). Farmer's take on this dynamic was that Eberhart was unfair in his vague multiplicity of jobs which she unrelentlessly did. (Tr. 144 "with that school being the high-need school that it is, you know, he would ask me to do things that were not in my job description, and I never told him no;" Tr. 145 "I did not think it was fair of him to pile job after job after job on me and then not specify what was most important, where I had to come to him and say what do you need done first?").

19. For the two years Farmer performed as the Academic Coach, Principal Eberhart never reprimanded, disciplined, or wrote up Farmer or criticized her performance. (Tr. p.80).

A. Changes at Lodge

20. Many changes had been implemented at Lodge in recent years due to Lodge's performance in state testing. (Tr. p.40, 209-212). Lodge had received successive years of failing grades from the State of Indiana and was at risk for the State of Indiana to take over the school. (Tr. p.211-212). Lodge was a chronically underperforming school and had received failing grades from the State of Indiana for 4 successive years heading in to the 2015-2016 school year. Testimony indicated that following the fourth F, Indiana schools have a hearing before the State

Department of Education and in the fifth year, if an F is received, the State Department of Education is permitted to take over the school. (Tr. p. 326-327). These circumstances weighed upon Respondent's personnel needs and decisions.

21. In the course of conducting the annual school readiness audit with Lodge, Mass Insight, an outside consultant, had been working with Lodge for several years in order to bring best practices to Lodge; Mass Insight recommended to Lodge to create "job-imbedded professional development in a way that brings best practice out of the places where it's being successful and finding those things and bringing them into the classroom." (Tr. p.211-212). Mass Insight also recommended, in light of the impending hearing with the Department of Education, adding as an administrator on the administrative team a professional development specialist ("PDS"). (Tr. p.212). The PDS would be responsible for managing the school improvement plan. (Tr. p. 211-212).

22. Testimony indicated Respondent expected the State Department of Education to be looking for proactive changes from the school, and the school was preparing for its hearing at the time Mass Insight made its recommendation. (Tr. p. 212, 294).

23. The decision to eliminate the Academic Coach position and transition to a PDS position was made after Respondent's Director of School Support ("DSS"), Tammy Dexter ("Dexter"), a Caucasian female, Eberhart, and Assistant Principal, Amy Bonenberger ("Bonenberger") debriefed with Mass Insight, which had indicated that there was need to clarify specific roles and responsibilities. As a result, it was discussed with Dexter that other of Respondent's schools had experienced success with having a PDS in the school. (Tr., p.213-214, 330-332, 340-342).

24. Dexter serves as the DSS for the Bosse District, which includes Lodge. The DSS is a new position created with Respondent also modeled after Mass Insight's recommendations. The DSS provides accountability and support for principals in the schools to help them follow their School Improvement Plan ("SIP"). (Tr. p.323).

25. The State of Indiana required Lodge to have a School Improvement Plan ("SIP"). (Tr. p.246). Lodge had three strategies within its SIP in which the PDS would have an integral role: (i) conferencing with students and setting rigorous goals; (ii) working with professional learning communities to integrate the trainings the school receives from Learning Sciences, an outside agency; and (iii) structure and operation of the professional learning communities. (Tr. p.246-

248). The SIP is fluid; as the school learns things from the collection of data relating to student performance, the school makes adjustments. (*Id.*; Tr. p.249-250).

26. The PDS would be the point person for all professional development of Lodge teachers and would have the ability to evaluate teachers and would be in a supervisory position over Mentor Teachers. (Tr. p.293). The formal creation of Mentor Teacher positions also was a result of Lodge's work with Mass Insight. Lodge had previously given teachers time to assist with coaching of other teachers, but after working with Mass Insight created formal positions for mentor teachers. (Tr. p.293-294).

27. In February, 2016, Eberhart and Bonenberger met with Farmer to advise her that the Academic Coach position was being eliminated and instead Lodge would employ a PDS, and that she would be unable to serve as the PDS, because she did not hold an administrator's license. (Tr. p.40; Exhibit 9). This was Eberhart's understanding based on the job description. (Tr. p.220).

28. Based on the same job description referenced to Farmer, Eberhart communicated the same licensure requirement to Melissa Daniels ("Daniels") who had expressed interest in the PDS position, advising that she would also be unable to apply because she lacked an administrative license. (Tr. p. 220).

29. Eberhart did not seek to terminate Farmer's employment despite the elimination of her current position, but rather, he offered her a classroom teaching position, so that she could maintain a contract position at Lodge. (Tr. p.40-41). Placing Farmer in a classroom would result in one excess teaching position at Lodge. When a teacher is "excessed" at a school, they are given an opportunity to teach at another. (Tr. p.46-47). Farmer expressed interest in being excessed, but Eberhart advised her that he would need to advise all teachers of the excess opportunity first. (Tr. p.48-49, 284). Eberhart advised the staff of the excess position at an after-school meeting attended by the teachers, Eberhart, and Farmer. (Tr. p. 49; Exhibit 12).

30. Farmer asked Dexter, who serves as Eberhart's supervisor, if she could apply for the PDS position if she agreed to pursue her administrator's license. (Tr. p.50-51, 60, 105). Dexter asked the Deputy Superintendent of Teaching and Learning, Velinda Stubbs, if someone who did not have an administrator's license could apply; Dexter was informed that the school district previously allowed someone without the credentials to have an administrative position. As a result, Dexter advised Farmer that she could apply for the PDS position so long as she was

pursuing the administrator's license. (Tr. p.58, 348-349). Dexter also told Farmer that she could volunteer to excess. (Tr., p.58-60; Exhibits 15-16).

31. However, Eberhart believed from the job posting which had the School District Position Description attached to it that the PDS position required both a Master's Degree and an administrator's license. (Tr. p.250-251, 269-270; RP's Exhibit 2; CP's Exhibit 1) Specifically, in the Position Description it stated that a "valid Indiana administrator's license or ability to demonstrate that the requirements will be completed for such certification prior to the beginning of the administrative assignment." (*Id.*).

32. Farmer subsequently volunteered to be excessed from the teaching position that she was offered at Lodge. (Tr. p.61; Exhibit 17).

33. Farmer acknowledges that Eberhart may have believed he was doing her a favor by offering her a teacher position when the Academic Coach position was eliminated. (Tr. p.80).

34. In addition to Farmer being permitted to apply for the PDS Position after Dexter advised her that a candidate could be pursuing the requirements, Daniels was also permitted to apply and could enroll to acquire her Master's Degree and her administrative licensure in an 18-month period, which would be the same period of time in which Farmer could acquire her administrative licensure. (Tr. p.185).

35. With the licensure requirement addressed, Eberhart thought Farmer deserved the opportunity to show them whether she could perform as a PDS by doing the exercises that were to be conducted during the interview process for the PDS position, because Eberhart saw positive qualities in Farmer for the PDS position from her first year as an Academic Coach at Lodge. (Tr.p.232-233).

B. Hiring the PDS

36. Respondent had a lot riding on its PDS candidate; Respondent had need of the candidate to help impress the State of Indiana which was monitoring Lodge's prospects for institutional success. (Tr. p.341-342).

37. Eberhart, Bonenberger, and Dexter selected five (5) finalists of thirteen (13) applicants to interview for the PDS position. Farmer was one of those candidates. (Tr. p.224-225, 337-338). The three interviewers applied a collaborative approach and no single one of the three had ultimate decision-making authority to select the successful candidate. (Tr. p.225, 293, 299, 338). This approach varied from the time period in which Eberhart hired Farmer for the Academic

Coach position formerly. When he selected her for the Academic coach position, he had sole decision making authority. (Tr. p.225-226).

38. Once the interviewers were informed that candidates could apply for the position even if they did not then presently have a Master's Degree or administrator's license, the interviewers did not score the candidates on whether they currently possessed a Master's Degree or administrator's license. The Master's Degree or administrator's license were not discussed during the interviews. (Tr. p.267-268, 272-273).

39. The three interviewers knew all five finalists, with the exception that Bonenberger did not know Holly Sidebottom prior to the interviews. Eberhart and Dexter expected that Holly Sidebottom and Holly Pate would perform well in the interview process because both previously worked in PDS roles in other of Respondent's schools. (Tr. p.226-227, 288-289, 295, 339-340).

40. The finalists each were required to prepare in advance a fifteen minute long professional development session for a team of teachers. The exercise asked the finalists to review data and make a decision about what should be focused upon in working with the teachers. The interviewers weighed each performance to determine whether the finalist performed the exercise as was instructed. (Tr. p.236; RP's Stipulated Exhibit 3).

41. Eberhart and Bonenberger believed Holly Pate performed the exercise the candidates received in advance the best out of the candidate finalists. (Tr. p.236-237, 300-301). According to testimony, Holly Pate's was engaging in that she performed the exercise as if the interviewers were teachers to whom she was delivering professional development, and she was the only finalist who performed the exercise in such a manner. (*Id.*)

42. The finalists were also required to perform an exercise that they received at the time of the interview which consisted of watching a video clip and subsequently constructing an email addressed to teachers containing feedback. The candidates were also asked to answer interview questions. (Tr. p 238-239, 300).

43. The interviewers – Eberhart, Bonenberger, and Dexter – each individually scored the email drafts completed by the candidates and the emails were reviewed without the names of the finalist at the top of the email such that the emails would be reviewed anonymously. The interviewers then met collectively to discuss each finalist's performance with the exercises and reached a consensus as to the selection of the successful candidate and also measured their performance based upon a rubric from Mass Insight that contained common pitfalls and qualities

that the interviewers should look for among the candidates in their performance of the interviews. (Tr. p. 240, 254-255; RP's Stipulated Exhibit 3).

44. The candidates, including Farmer, were interviewed with all three interviewers in attendance but with Bonenberger asking the questions and Dexter taking notes of the responses. The same questions were asked of each finalist. (Tr. p.255, 315; RP's Stipulated Exhibit 4; CP's Stipulated Exhibit 6, sub part D; Stipulated Exhibit 1, Tabs C, D, and E). There were questions embedded within the interview that related to specific goals that Lodge was to be working toward with its SIP. (Tr. p.255-256).

45. Eberhart was evaluating whether the finalists really answered the questions posed to them and whether the candidate finalist was able to describe "first steps," "progress," and monitoring. (Tr. p.256). Eberhart does not recall Farmer being successful in that regard. (Tr. p.256-257). For example, testimony indicated that Farmer did not include responses to all four sub-parts of question 3 and did not respond to the specific question posed by question 2. (Tr. p. 274-276). Bonenberger believes Farmer also failed to answer all portions of Question 5 by failing to discuss data, the five areas of reading, best practices, and literacy knowledge. (Tr. p.318). Dexter testified that Farmer failed to speak to specific questions that were asked during the interview and that she consistently utilized a particular technique, called Six Hats, and that she needed to "work on expanding her toolbox." (Tr. p.342-343).

46. After collaboratively deliberating concerning the candidates performances and agreeing upon the candidate finalist that they wished to recommend for hiring, the three interviewers completed a form about each candidate and all of the forms were then submitted to Respondent's Human Resources. (Tr. p.257, 281; RP's Stipulated Exhibit 5).

47. Eberhart rated Daniels as "outstanding" in all categories with the exception that he rated her above average in the personal appearance category. He also noted in the comment and overall impression section of the form that Daniels was the "best fit overall for Lodge." Eberhart believed she was the best fit overall for Lodge because of her relatability with the staff and students and because of her performance in the exercises. (Tr. p.258-260; RP's Stipulated Exhibit 5).

48. Eberhart testified that "a lot of times," "the question that was asked wasn't answered" by Farmer; he also said one thing on his mind was a comment Farmer had made earlier in their working relationship "about not ever wanting to be or not wanting to be an administrator." (Tr.

p.265-266). Eberhart noted on the interview sheet for Farmer: “not a good fit for position.” (Tr. p.266-267; RP’s Stipulated Exhibit 5).

49. Eberhart and Dexter were surprised after concluding the interviews that Daniels had outperformed Holly Pate and Holly Sidebottom because they anticipated that the two Hollys would have had a leg up on the remaining candidates given that they were currently in PDS roles in other schools and, thus, had experience that finalists Farmer, Daniels, and Hopkins lacked. (Tr. p.241, 243, 288-289, 343-344). Dexter specifically described that Daniels had excelled at providing critical feedback in a way teachers would likely accept and act on rather than reject. (Tr. p. 343-344).

50. Eberhart and Bonenberger believed that it was a close call between Holly Pate and Melissa Daniels and Dexter believed that Holly Sidebottom was a close second to Melissa Daniels, but all three interviewers agreed that Daniels performed the best of all finalists and shared a concern that Holly Pate lacked early grade reading experience, which was a focal point for Lodge. (Tr. p.240, 267, 301, 340-341; RP’s Stipulated Exhibit 5).

51. The interviewers scored the candidates but also reviewed soft qualities, including whether they would be a good fit for the teachers and grade levels and the students in the building. For example, the interviewers were concerned that Holly Pate would not be relatable to the teachers who taught early grades, including kindergarten, because her experience was limited to the middle and high schools. (Tr. p.241-243).

52. Daniels had served as a teacher at Lodge and had brought “stability” to the 3rd grade in that “she took over” and “ran the show and brought it together,” having “a very successful 3rd grade year,” a year which is significant with respect to state testing. (Tr. p.228). Respondent testified that when Daniels had been moved to the 6th grade, she did the same thing in that level as well – “constantly digging into best practice,” and “bringing things to [Respondent’s] attention about best practice that was being done across the nation” and across Respondent’s other schools. (Tr.p.228-231).

53. Farmer testified that Eberhart and Dexter had an issue with her race, however, Bonenberger also interviewed her and did not recommend her for the PDS Position and Farmer did not have a feeling one way or the other as to whether Bonenberger had an issue with Farmer’s race. (Tr. p.135-136).

54. Farmer testified that in Eberhart's mind she is good enough to be in a classroom but not good enough to lead his teachers – and that because of her race. (Tr. p.137). However, Eberhart hired Farmer to coach the teachers two years prior, and that over Caucasian candidates. (*Id.*).

55. Daniels, who is a Caucasian female, was ultimately selected for the PDS position. (Tr. p.69). Prior to her application for the PDS Position, Daniels served as a mentor teacher at Lodge so she had acquired experience with coaching teachers at Lodge. (Tr. p.89, 297-298).

56. Daniels had obtained her Master's Degree and an administrator's license by the time the hearing in this matter was conducted. (Tr. p.269).

57. Farmer raises concerns about her scores on the interview sheets by Eberhart compared to her evaluation scores. (Tr. p.110-113). She also indicates that she believes she should have been selected over Daniels since she had one of the two stated job requirements, a Master's Degree, and Daniels had neither. However, some of the other Caucasian finalists who interviewed – but did not get the position – possessed both a Master's Degree and an administrator's license. (Tr. p.270-272).

58. Prior to interviewing and being selected as the successful candidate for the PDS Position, Lodge had assigned Daniels to a 5th grade classroom for the following year. (Transcript, pp. 70-72; Stipulated Exhibit 21).

59. When Daniels was selected for the PDS position, Principal Eberhart did not anticipate that Farmer would leave Lodge and he had attempted to assign her to a 5th grade math teaching position. (Tr. p.269).

60. Though Eberhart was the one who originally hired Farmer, she testified that her race motivated his vote against her for the PDS position because, she says, “he had no grounds as far as [her] work ethic, [her] performance,” and “there was nothing wrong with what [she] did.” (Tr. p.121). Along this line of reasoning, Complainant frames this case as one where “the obvious choice” was not made in the PDS hiring, going so far as to say “[t]here *should not have been* any other interviewees.” (Tr.p.11, 138). (emphasis supplied).

61. Complainant admits that it is possible her performance during the interview process was hindered by circumstances which do not implicate race. (Tr. p.137-138).

62. The record weighs against any inference of racial animus on Respondent's part, including on the part of Dexter and on the part of Eberhart who himself hired Farmer, appeared to like her, associated with her outside of work, was “upset” when another teacher gave her problems,

recommended other positions with Respondent when her position was being eliminated, and did not manifest suspect criticism of her.

IV. Ultimate Factual Issue

63. The preponderance of the evidence does not establish that Respondent subjected Farmer to disparate terms or conditions in employment based on race when denying her promotion into the PDS position, or that Respondent's offered reasons for its actions are pretext for race discrimination. To the contrary, the record evidence – including hearing testimony and the corroboration of contemporaneous documentation – shows that Farmer did not foremostly fulfill Respondent's race-neutral standard, that Respondent had this in mind, and that this – and not Farmer's race – in fact motivated Respondent to decline her candidacy in favor of Daniels. The record evidences no similarly-situated individuals treated more favorably than Farmer with respect to any of the alleged disparate terms and conditions of employment. Instead, the record provides something of reverse-comparators: Caucasian candidates with more of the objective credentials than Farmer (i.e. administrator's licenses and previous PDS experience) who thus could have had greater expectation of the position but who were also denied the same position based on Respondent's same legitimate reason (interview performance).

64. Farmer failed to present evidence that any of Respondent's employment actions were motivated by race-based animus and amounted to unlawful discrimination as alleged. In short, substantial evidence compels the ultimate factual finding that Respondent did not deny Farmer equal employment opportunities because she is African American.

CONCLUSIONS OF LAW

The ICRC has jurisdiction over the subject matter and the Parties, and each party is a "person" as that term is defined in Ind. Code § 22-9-1-3(a). Additionally, Respondent is an "employer" as defined in Ind. Code § 22-9-1-3(h). Farmer's complaint against Respondent of an unlawful discriminatory practice relating to employment is subject to adjudication in accordance with the provisions of the Indiana Civil Rights Law, Ind. Code § 22-9-1 *et seq.* and the Indiana Administrative Orders and Procedures Act, Ind. Code § 4-21.5 in consultation with cases decided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e, *et seq.* See Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 839 (Ind. 2009) ("In construing Indiana civil

rights law our courts have often looked to federal law for guidance”); See also Indiana Civil Rights Comm'n v. Culver Educ. Found. (Culver Military Acad.), 535 N.E.2d 112, 115 (Ind. 1989) (“federal cases interpreting Title 7 of the Civil Rights Act of 1964...are entitled to great weight”); See also Indiana Civil Rights Comm'n v. City of Muncie, 459 N.E.2d 411, 418 (Ind. Ct. App. 1984) (“federal decisions are helpful in construing Indiana's Civil Rights Act”).

“It is the public policy of the state to provide all of its citizens equal opportunity for...employment,” and such equal employment opportunities are “declared to be civil rights.” Ind. Code § 22-9-1-2. “It is also the public policy of this state to protect employers... from unfounded charges of discrimination.” *Id.*

Not all discrimination is declared “contrary to the principles of freedom and equality of opportunity” and “a burden to the objectives of the public policy of this state.” *Id.* Discrimination is simply “[t]he intellectual faculty of noting differences and similarities.” DISCRIMINATION, Black's Law Dictionary (10th ed. 2014). “The dictionary sense of ‘discrimination’ is neutral while the current political use of the term is frequently non-neutral, pejorative.” *Id.* In the “neutral” context, “[e]very employment decision involves discrimination,” and “[a]n employer, when deciding whom to hire, whom to promote, or whom to fire, must discriminate among employees.” Filter, 906 N.E.2d at 838.

While the two most common reasons for lawful employment discrimination are “an absolute or relative lack of qualifications or the absence of a vacancy in the job sought,” other reasons might include attendance, job performance, personality conflict, erroneous evaluations, and even unusual business practices.” Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977); Rose-Maston v. NME Hosps., Inc., 133 F.3d 1104, 1109 (8th Cir. 1998). In Indiana, no reason for employers’ discretion is required at all. “Indiana follows the doctrine of employment at will, which means that employment of indefinite duration may be terminated by either party at will, *with or without reason.*” Peru Sch. Corp. v. Grant, 969 N.E.2d 125 (Ind. Ct. App. 2012) (emphasis added).

Unlawful discrimination is discrimination based on *unlawful criteria*. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981) (“[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon *unlawful criteria*”) (emphasis added). Under the Indiana Civil Rights Law, unlawful “discriminatory practices” include those denying equal employment opportunities “to properly qualified persons *by reason*

of the race ...of such person” Ind. Code § 22-9-1-2(b) (emphasis added). Such discriminatory practices are “contrary to the principles of freedom and equality of opportunity” and therefore “shall be considered unlawful.” Ind. Code § 22-9-1-3.

The Parties agree that Respondent denied an employment opportunity – a promotion – to Farmer; significantly, that denial is the same employment action about which Farmer complains. Therefore, to determine as required whether Respondent “has engaged in an unlawful discriminatory practice” as alleged here, the critical inquiry is: “On what basis did the employer discriminate?” Ind. Code § 22-9-1-6; See Filter, 906 N.E.2d at 838–39 (“[T]he case is one of causation: What caused the adverse employment action...”); See also Ortiz v. Werner Enterprises, Inc., 834 F.3d 760, 763 (7th Cir. 2016) (phrasing the inquiry as “whether one fact (here, [race]) caused another (here, denial of promotion).” Was the promotion denied by reason of Respondent’s “illegal motivation” – namely, “race”? Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 154 (2000). Put another way, would [Farmer] have gotten the PDS position if she was of a different race and everything else had remained the same? Ortiz, 834 F.3d at 764. In a word, the question to be answered is: “Why?”

All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). The work of adjudicating “illegal or legal motives” “obliges finders of fact to inquire into a person's state of mind.” Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989); Aikens, 460 U.S. at 716. However, “[t]he state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.” Aikens, 460 U.S. at 716–17 quoting Eddington v. Fitzmaurice, 29 Ch.Div. 459, 483 (1885). Because the Indiana Civil Rights Law tolerates no unlawful discrimination – subtle or otherwise – the ICRC, with expertise and a charge to administer the Indiana Civil Rights Law, is in the best position to ascertain the matter. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 526 (1993); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

In the difficult enterprise of proving an employer’s motive, “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” St. Mary's, 509 U.S. at 507. To carry this burden of

persuasion, Farmer is required to “prove h[er] case by a preponderance of the evidence...” Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).

What evidence? All of it. As in any lawsuit, Farmer “may prove h[er] case by direct or circumstantial evidence,” and “[t]he trier of fact should consider all the evidence, giving it whatever weight and credence it deserves.” Aikens, 460 U.S. at 714; See also Ortiz, 834 F.3d at 764-766 (7th Cir. 2016) (requiring that “[a]ll evidence should be considered together to understand the pattern it reveals” and instructing that “all evidence belongs in a single pile and must be evaluated as a whole”).

While all evidence is considered, the ICRC Director’s previous finding of “probable cause” – other than as the warrant of the hearing in this case – is of no relevance or import; the question to be answered now is different and the hearing on the question is *de novo*: from the beginning, without regard to previous determinations. Ind. Code § 4-21.5-3-14(d). Specifically, the question is not whether unlawful discrimination *probably* occurred, but whether an unlawful discriminatory practice *actually* occurred: “discrimination *vel non*” – discrimination “or not.” Ind. Code § 22-9-1-6(j); Filter, 906 N.E.2d at 842. Therefore, the ICRC is not “erroneously focused on the question of *prima facie* case rather than directly on the question of discrimination.” Aikens, 460 U.S. at 711.

The McDonnell Douglas framework is a conventional method of allocating the burden of production to parties and providing an “orderly way to evaluate the evidence” as it pertains to the ultimate question of unlawful discrimination. St. Mary's, 509 U.S. at 525. Because Complainant in her Proposed Findings of Fact, Conclusions of Law, and Orders, presented her arguments in terms of the framework, it is where the following holistic assessment of the evidence begins. David v. Bd. of Trustees of Cmty. Coll. Dist. No. 508, 846 F.3d 216, 224 (7th Cir. 2017).

Under the framework, Farmer is expected to produce evidence establishing the case on its face – a *prima facie* case; this eliminates the most common nondiscriminatory reasons for the adverse actions and raises an inference of discrimination. See Teamsters, 431 U.S. at 358. Then, the common lawful motives off the table, Respondent must “clearly set forth” legitimate nondiscriminatory reasons for termination, thus putting Farmer on notice of the targets for her pretext arguments and affording her a full and fair rebuttal opportunity; the sufficiency of Respondent’s explanation is evaluated by the extent to which it fulfills these functions. Burdine,

450 U.S. at 256. Finally, Farmer can proceed to rebut each of Respondents identified motives as “pretext for unlawful discrimination.”

However, since affording Farmer a full and fair rebuttal opportunity is the purpose of the framework, when Respondent does its part and meets its burden of production – putting Farmer on notice of its explanations – “whether [Farmer] made out a *prima facie* case is no longer relevant,” “McDonnell Douglas drops out,” and the factfinder “must decide which party’s explanation of the employer’s motivation it believes.” Aikens, 460 U.S. at 715-716; Filter, 906 N.E.2d at 846. The factfinder “has before it all the evidence it needs to decide *not* . . . whether defendant’s response is credible, but whether the defendant intentionally discriminated against the plaintiff.” St. Mary’s, 509 U.S. at 519.

Since Respondent’s burden is one of production – and not persuasion – Respondent has “only to state a legitimate reason” for the adverse action. Bd. of Trustees of Keene State Coll. v. Sweeney, 439 U.S. 24, 24 (1978); Kephart v. Inst. of Gas Tech., 630 F.2d 1217, 1222 (7th Cir. 1980). Determining whether Respondent carried its burden “can involve no credibility assessment.” St. Mary’s, 509 U.S. at 509. Respondent need not even establish that it was actually motivated by its proffered reasons. Burdine, 450 U.S. at 254. Respondent may state as its reasons subjective requirements and motives. Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 135 (7th Cir. 1985).

Here, Respondent carried its burden. On this there is no dispute, rather, Farmer, in her Proposed Findings of Fact, Conclusions of Law, and Order, indeed proposes the ICRC conclude as a matter of law that “[Respondent] rebutted Farmer’s *prima facie* case” (CP’s Proposed FFCLO, p. 13, NO.15). In fact, in explaining what it has done, Respondent clearly set forth its reasons for not selecting Farmer:

“[Respondent] submitted substantial evidence of a legitimate, nondiscriminatory and race neutral reason for not selecting Farmer for the PDS Position. Specifically, Farmer did not adequately and completely respond to the interview questions and was not the candidate who performed the designated exercises in the best manner.”

(RP’s Proposed FFCLO, p.19, NO. 6).

On its face, such reasoning is legitimate and inherently business related and sufficient to retire the McDonnell Douglas framework. The ICRC is therefore “in a position to decide the ultimate factual issue in the case,” which is “whether the defendant intentionally discriminated

against the plaintiff.” St. Mary's, 509 U.S. at 519. On the state of the record at the close of evidence, the ICRC proceeds to this specific question directly. See Aikens, 460 U.S. at 715 (1983).

Farmer claims Respondent’s motivation was her race. In making her case, Farmer seeks to rebut Respondent’s proffered reasons as pretext for discrimination. Proving that Respondent’s proffered reasons are “pretext for discrimination” entails proof of the component parts: “pretext” and “discrimination.” See St. Mary's, 509 U.S. at 515 (“[A] reason cannot be proved to be ‘a pretext for discrimination’ unless it is shown *both* that the reason was false, *and* that discrimination was the real reason”); See also Radentz v. Marion Cty., 640 F.3d 754, 757, 2011 WL 1237931 (7th Cir. 2011) (“In order to demonstrate that the reason for the termination was pretextual, the plaintiffs must demonstrate that the nondiscriminatory reason was dishonest and that the defendants' true reason was based on discriminatory intent.”); See also Reeves, 530 U.S. at 147 (“[i]t is not enough ... to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.”)

In Farmer’s showing of falsity on Respondent’s part, Farmer “must specifically rebut *each* legitimate, non-discriminatory reason given” for the alleged adverse actions. Reed v. Lawrence Chevrolet, Inc., 108 Fed. Appx. 393, 398 (7th Cir. 2004) (original emphasis). Three possible ways Farmer may demonstrate the untruthfulness of a reason are “through evidence showing: (1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate the adverse employment action or (3) that the proffered reason was insufficient to motivate the adverse employment action.” Filter, 906 N.E.2d at 847.

Farmer fails to show that any of Respondent’s reasons are imagined, irrelevant to Respondent’s actions, or insufficient to motivate them. With respect to Farmer’s interview performance – the record evidence does not demonstrate falsity. No evidence was presented finally unhitching the nexus between Respondent’s reasons and the denial of promotion. To the contrary, substantial evidence corroborates the existence, nexus, and sufficiency of Respondent’s reasons for its PDS selection.

Neither are there any suspect practices, past instances of disparate treatment, unusual departures from official policy, or statistical proofs to transform the record in this case. The Indiana Civil Rights Law only warrants inquiry into the veracity – not the wisdom – of business practices, no matter how “high-handed,” “mistaken,” or “irrational.” See Pollard v. Rea Magnet

Wire Co., 824 F.2d 557, 560 (7th Cir. 1987); See also Zick v. Verson Allsteel Press Co., 644 F. Supp. 906, 911 (N.D. Ill. 1986), aff'd, 819 F.2d 1143 (7th Cir. 1987). The record evidence indicates the veracity of Respondent's stated rationale.

The record does not substantiate the "discrimination" component of the alleged "pretext for discrimination." Simply stated, the instant record evidences no employment actions taken against Farmer based on her race. A full and fair opportunity to be heard yielded no indications of race-based animus or intentional race-based adverse actions or treatment. It is simply not possible to infer intentional discrimination from this record as a whole. The record does not indicate that, had Farmer not been African American and all else remained the same, she would have got the job.

The Indiana Civil Rights Law promises equal opportunity in employment and remedy for the denial thereof based on one's race. Farmer failed to carry her burden of demonstrating by a preponderance of evidence that – because of race – she was denied equal opportunity. Respondent set forth un rebutted proofs of legitimate business-related nondiscriminatory motives. Therefore, according to the record and applicable law, it is ultimately found and concluded that Respondent did not commit an unlawful discriminatory practice as alleged.

Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

1. The above-referenced Complaint of Discrimination is **DISMISSED**, with prejudice.
2. This order becomes the final order disposing of the proceedings immediately upon affirmation under Ind. Code § 4-21.5-3-29. Ind. Code § 4-21.5-3-27(a).

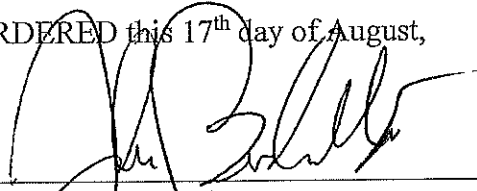
Administrative Review

Before these Findings of Fact, Conclusions of Law, and Order become the final order in this case pursuant to Indiana law, administrative review may be obtained by parties not in default by the filing of a writing identifying with reasonable particularity each basis of each objection **within fifteen (15) days after service of this order**. Ind. Code § 4-21.5-3-29(d). Subject to Ind. 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 Indiana Civil Rights Commission
100 North Senate Avenue, N300
Indianapolis, IN 46204
Fax: 317-232-6580
Email: aneromosele@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 17th day of August,



Hon. John F. Burkhardt
Administrative Law Judge
Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
Anehitia Eromosele, Admin Asst.
317-234-6358

Certificate of Service

Served this 20 day of August by U.S. Mail on the following:

Lynne Farmer
2310 Lodge Avenue
Evansville, IN 47714-4217

Evansville Vanderburgh School Corp.
951 Walnut Street
Evansville, IN 47713

Lodge Community Schools
2000 Lodge Ave
Evansville, IN 47714-4295

Jean M. Blanton
Ziemer, Stayman, Weitzel, & Shoulders
20 Northwest First Street
9th Floor, P.O. Box 916
Evansville, IN 47706
JBlanton@zsww.com

and personally served on the following attorney of record:

Frederick S. Bremer, Esq.; Staff Counsel
Indiana Civil Rights Commission
Indiana Government Center North
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
fbremer@icrc.in.gov

with copies emailed to the attorneys of record.



Administrative Assistant to the Administrative Law Judge,
Anehitia Eromosele