Issues: Qualification – Management Actions (Recruitment/Selection and Assignment of Duties), Discrimination – (Age, Race, Gender), and Retaliation (Grievance Activity and Other Protected Right); Ruling Date: March 10, 2010; Ruling #2010-2436, 2010-2484; Agency: Department of Criminal Justice Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Criminal Justice Services
Ruling Numbers 2010-2436 and 2010-2484
March 10, 2010

The grievant has requested a ruling on whether her August 7, 2008 and September 30, 2009 grievances with the Department of Criminal Justice Services (DCJS or Agency) qualify for a hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

The grievant is employed as a Policy and Planning Specialist II with DCJS. On or about June 17, 2008, the grievant applied for a General Administration Manager III position within the agency ("Position #00308"). On July 10, 2008, the grievant learned that she had not been selected for an interview for Position #00308. The grievant subsequently challenged her failure to be selected for an interview by initiating a grievance on August 7, 2008 (Grievance #1). In Grievance #1, the grievant asserts that the agency's failure to interview her for Position #00308 was a misapplication of policy and discriminatory. In addition, the grievant alleges that she has been harassed by her former supervisor (the hiring authority for Position #00308) based on her race, sex and age.

During the pendency of Grievance #1, one of the grievant's job functions, Freedom of Information Act (FOIA) Officer for the agency, was taken away and was assigned to other employees at DCJS. The grievant challenged the removal of this duty by initiating a grievance on September 30, 2009 (Grievance #2). In Grievance #2, the grievant asserts that the removal of this duty was retaliatory and harassing based on the grievant's race.

The agency head failed to qualify for hearing either Grievance #1 or Grievance #2 and the grievant now seeks qualification determinations from this Department.

DISCUSSION

Grievance #1

The grievance procedure recognizes management's exclusive right to manage the operations of state government, including the hiring or promotion of employees within an

agency.[1] Inherent in this right is the authority to weigh the relative qualifications of job applicants and determine the "best-suited" person for a particular position based on the knowledge, skills, and abilities required. Accordingly, a grievance challenging the selection process does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, discipline, or a misapplication of policy tainted the selection process.[2] In this case, the grievant claims that the agency misapplied or unfairly applied state and agency hiring policies and has discriminated against her. The grievant's claims will be discussed below.

Discrimination/Harassment

Under the grievance procedure, a claim of discrimination and/or harassment arising from membership in a protected class (in other words, on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex) may qualify for a hearing.[3] In this case, the grievant asserts that her supervisor has engaged in discriminatory and harassing behavior on the basis of the grievant's race, sex and age.

For a claim of race, sex and/or age discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. The grievant must present facts that raise a sufficient question as to whether she was not interviewed for the position *because of* her membership in a protected class.[4] In order to establish a claim for unlawful discrimination in the hiring or selection context, the grievant must present evidence raising a sufficient question as to whether: (1) she was a member of a protected class; (2) she applied for an open position; (3) she was qualified for the position, and (4) she was denied the position under circumstances that create an inference of unlawful discrimination.[5] Where the agency, however, presents a legitimate, non-discriminatory reason for the employment action taken, the grievance should not qualify for a hearing, unless there is sufficient evidence that the agency's stated reason was merely a pretext or excuse for discrimination.

As an initial note, the grievant's discrimination claim seems to be based at least in part on the agency's selection of an African American for Position #00308.[6] However, the legitimacy of the ultimate selection decision among the interviewees in this case did not adversely affect the

[1] *See* Va. Code § 2.2-3004(B).
[2] *Grievance Procedure Manual* § 4.1(c).
[3] Va. Code § 2.2-3004(A); *see* Footland v. Daley, No. 00-1571, 2000 U.S. App. LEXIS 26632, at *2-3 (4th Cir. Oct. 23, 2000)(unpublished decision).
[4] *See* Hutchinson v. INOVA Health Sys., Inc., Civil Action 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *3 (E.D. Va. Apr. 8, 1998) (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)).
[5] *See* Dugan v. Albemarle County Sch. Bd., 293 F.3d 716, 720-721 (4th Cir. 2002); EEOC v. Sears Roebuck & Co., 243 F.3d 846, 851 (4th Cir. 2001).
[6] For instance, the grievant challenges the hiring authority's prior personal and professional relationship with the selected candidate and asserts that prior to the selection determination, a co-worker opined that the grievant would not be selected for the position because she is not the "right skin color."

grievant because she was not interviewed for the position.[7] Accordingly, this Department will assess only whether there is sufficient evidence that discriminatory animus tainted the screening process for selecting interviewees, not the ultimate selection decision itself.

The grievant is under the age of 40 and as such, is not entitled to protection on the basis of age under the law and the grievance procedure.[8] As to her claim of discrimination based on race, the grievant has sufficiently alleged that she is a member of a protected class[9] and that she applied for an open position. However, assuming for purposes of this ruling only that the grievant was qualified for the position, she has failed to raise a sufficient question that she was denied an interview because she is White.

In this case, five individuals were selected to be interviewed for the Position #00308. Of those five, three were White, one was African American and one failed to disclose her race. As such, the majority of those selected for an interview were of the same race as the grievant and therefore, this Department cannot conclude that the agency inappropriately denied the grievant an interview based on her race.[10] As the grievant has failed to raise a sufficient question of whether she was denied an interview due to her race, her claim of discrimination based on race does not qualify for a hearing.

In addition to the failure to be interviewed for Position #00308, the grievant claims that she has been harassed based on her race in various other ways as well. More specifically, the grievant claims that her former supervisor (hiring authority for Position #00308) (1) accused the grievant of requesting to see another employee's personnel file and discussing the contents of another employee's personnel file and personal business; (2) telling another employee that a co-worker was going to receive a Written Notice; (3) not preserving confidentiality with respect to her duties, particularly as the FOIA officer; and (4) demanded to know why the grievant looked at her own personnel file and ordered the grievant to provide her with a written narrative of her conversation with the human resource staff regarding this issue; (5) issued a directive that she be informed of all interaction between the grievant and the human resources department; (6) asked the grievant which policy would apply to the grievant's assertions regarding confidentiality when

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[7] *See* also *Grievance Procedure Manual* § 2.4 (an employee's grievance must pertain directly and personally to the employee's own employment).

[8] It is unlawful for an employer to discriminate against an employee on the basis of age. *See* 29 U.S.C. §§ 621, et seq. (ADEA). However, the ADEA's protections extend only to those who are at least forty years old. 29 U.S.C. § 631. The grievant asserts that she is not "seeking to proceed with her claim of age discrimination … as it relates to the [ADEA]." Age discrimination is also a violation of state policy, which incorporates by reference state and federal laws relating to discrimination, which would include the provisions of the ADEA. *See* DHRM Policy 2.05. As such, because state policy applies a "40 years old and over" standard in determining who is entitled to protection in claims involving age discrimination, this Department applies the same standard for purposes of determining whether a grievant has met the requisite criteria for qualification of her age discrimination claim for hearing.

[9] Neither Title VII nor state policy restricts race discrimination claims to only minority employees. Indeed, such claims of so-called "reverse discrimination" have been recognized by the United States Supreme Court since the 1970s. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-79 (1976); *see also* Lucas v. Dole, 835 F.2d 532, 533-34 (4th Cir. 1987).

[10] Similarly, all of the applicants interviewed were, like the grievant, female. Accordingly, this Department cannot conclude that the agency inappropriately denied the grievant an interview based on her sex. As such, her claim of sex discrimination does not qualify for a hearing.

speaking with human resource staff; and finally (7) issued the grievant a counseling memorandum.[11]

For a claim of harassment or hostile work environment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[12] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[13]

However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status.[14] Here, the grievant has not sufficiently alleged that any of the above stated actions by her former supervisor were based on the grievant's race nor has this Department found evidence of such. Rather, the facts cited in support of the grievant's claim can best be summarized as describing general work-related conflict between the grievant and her former supervisor.[15] Claims of general work-related conflict such as those at issue in this case are not among the issues identified by the General Assembly that may qualify for a hearing.[16]

Based on the foregoing, this Department concludes that the grievant has failed to present sufficient evidence that she has been subjected to workplace harassment based on race. Accordingly, this issue does not qualify for a hearing.[17]

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[11] The issuance of the counseling memorandum occurred on October 7, 2008, two months after the filing of Grievance #1. Under the grievance procedure, "[o]nce the grievance is initiated, additional claims may not be added." *Grievance Procedure Manual* § 2.4. Accordingly, while the October 7, 2008 counseling memorandum cannot be addressed substantively, it can be viewed and considered as evidence in light of the grievant's assertion that the counseling memorandum represents "continued harassment."

[12] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

[13] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

[14] *See also, e.g.*, DHRM Policy 2.30, *Workplace Harassment* (defining "Workplace Harassment" as conduct that is based on "race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability").

[15] As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code" or remedy all offensive or insensitive conduct in the workplace. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); Beall v. Abbott Labs., 130 F.3d 614, 620-21 (4th Cir. 1997); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).

[16] *See* Va. Code § 2.2-3004(A).

[17] Although this issue does not qualify for a hearing, we note that mediation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. For more information on this Department's Workplace Mediation program, the parties should call 888-232-3842 (toll free) or 804-786-7994.

Misapplication of Policy

For an allegation of misapplication of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Additionally, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[18] Thus, typically, the threshold question is whether or not the grievant has suffered an adverse employment action.[19] An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[20] Here, the grievant would appear to satisfy the "adverse employment action" threshold because she is challenging her failure to be interviewed for a promotional opportunity.

Moreover, even though the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of applicants during a selection process, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions, qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[21] Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."[22]

In support of her claim that policy has been misapplied and/or unfairly applied, the grievant asserts the following: (1) she was improperly screened for the position and her qualifications were willfully disregarded; (2) the selected candidate was pre-selected; and (3) the job duties and reporting structure for the Position #00308 were changed by the hiring authority prior to the selected candidate reporting for employment.

Willful Disregard of Qualifications

The grievant first alleges that the agency misapplied policy by failing to grant her an interview despite her being qualified for the position. In screening applications, the agency created 23 screening criteria.[23] In order to be interviewed, the applicant had to meet 14 of the 23 established criteria, and those 14 criteria had to include criteria numbers 2, 4, 6, 11, 12, and 14.

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[18] *See Grievance Procedure Manual* § 4.1(b).

[19] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.

[20] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[21] *See, e.g.*, EDR Ruling No. 2007-1651.

[22] *Grievance Procedure Manual* § 9.

[23] Although 23 criteria appear on this list, there is one duplication.

According to the agency, the grievant met only 11 of the 23 screening criteria and failed to establish she had the qualifications for two of the necessary criteria: numbers 2 ("[c]onsiderable knowledge of grant making strategy and process) and 14 ("[e]xtensive advanced management experience"). The grievant disagrees with the agency's assessment of her qualifications and asserts that she was experienced in all 23 of the established criteria and as such, should have been interviewed for the position.

An agency is not required to interview every applicant who satisfies the minimal qualifications for a position; instead, an agency is free to use screening criteria to select a subset of qualified applicants for interviews, provided those criteria are in accordance with the qualifications established for the position and applied consistently.[24] In this case, the established screening criteria for Position #00308 appears consistent with the employee work profile (EWP) established for that position. Further, after careful review of the grievant's application packet, application packets of those selected for an interview, as well as other materials created by the grievant to demonstrate her qualifications and belief that she should have been granted an interview for Position #00308, this Department cannot say that the agency applied the screening criteria inconsistently or that its assessment of the grievant's experience in relation to the screening criteria was arbitrary.[25]

Based on the foregoing, there is insufficient evidence that the agency misapplied or unfairly applied policy in establishing screening criteria and selecting applicants for interviews based on those criteria. Accordingly, we cannot conclude that the agency misapplied policy in failing to grant the grievant an interview. In sum, while the grievant clearly disagrees with management's decision not to interview her for the position, and is understandably disappointed by this decision, she has not presented evidence raising a sufficient question as to whether misapplication or unfair application of policy tainted the selection process. Accordingly, this issue does not qualify for a hearing.

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[24] *See* DHRM Policy 2.10, *Hiring*.; *see also* DCJS Policy Number 12, *Recruitment and Selection*.

[25] For example, as noted previously, one of the screening criteria required of each applicant, in order to be granted an interview for Position #00308, was "significant levels of previous experience in personnel management and supervision." Here, the grievant argues that she met this requirement because during the legislative session she "oversees 30+ staff." Although the grievant appears to have experience as a team leader of a particular program, it does not appear that the grievant had the requisite level of experience in personnel management and supervision having served as a supervisor over only one individual in the past. In contrast, the applicants selected for an interview for Position #00308 appear to have had extensive experience in supervising others, having supervised numerous individuals during the course of their careers. Additionally, in order to be interviewed for Position #00308, the applicant had to have "[c]onsiderable knowledge of grant making strategy and process." In support of her assertion that she had the experience to meet this criteria, the grievant points to her experience in grant monitoring. According to the agency's website, grant monitoring consists of "reviewing a grant-funded project's implementation, activities, performance and expenditures to determine if it is operating as proposed in the approved grant application and in accordance with conditions attached to the grant." http://www.dcjs.virginia.gov/about/divisions.cfm. In contrast, according to the EWP for Position #00308, the incumbent would be expected to identify grant and funding opportunities, evaluate funding opportunities, provide assistance to program and grants management staff related to the development of grant proposals and write, review and edit grant proposals as appropriate. As such, while there appears to be no dispute that the grievant has experience in grant monitoring, her application materials appear void of the requisite experience in grant making strategy and process required of Position #00308.

Pre-selection

The grievant has also raised the issue of pre-selection. State hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.[26] Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.[27] As such, an agency may not pre-select the successful candidate for a position, without regard to the candidate's merit or suitability, and then merely go through the motions of the selection process.

In support of her pre-selection charge, the grievant states the following: (1) the hiring authority had engaged in preferential hiring of African American employees in the past; (2) one of the interviewees (who ultimately was the selected candidate) and the hiring authority had worked together at another state agency; (3) prior to a selection determination, the hiring authority made comments such as "when your new Division Director arrives" and "talk to your new Division Director when they arrive;" (4) the final hiring authority was involved in both the screening process and the selection determination; and (5) only five of the forty-nine applicants candidates were selected for an interview for Position #00308.

The evidence in this case fails to raise a sufficient question that pre-selection may have tainted the screening process.[28] The grievant's claim of pre-selection seems to be primarily focused on the fact that the final hiring authority, who also screened the applications, has a "preference" for hiring African American applicants and demonstrated this bias in determining which candidates to interview for Position #00308. As explained in detail above, the grievant has failed to raise a sufficient question that the agency's determination of which candidates to interview was motivated by race. Accordingly, the grievant's assertion with regard to pre-selection based on race, does not qualify for a hearing. Moreover, the hiring authority's comments regarding the incumbent for Position #00308, if true, would merely appear to indicate that someone new would be occupying Position #00308, and bear no indication that a particular individual was expected to be selected for that position. Finally, agency policy states that if there are five or more qualified applicants, a minimum of five must be interviewed, which appears to have been done in this case. Accordingly, it would appear that the agency policy was correctly applied with regard to the number of applicants to interview for Position #00308. As such, it is this Department's determination that the grievant has not raised a sufficient question for the issue of pre-selection to qualify for a hearing.

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[26] *See* DHRM Policy 2.10, *Hiring*.

[27] Va. Code § 2.2-2901(A) (stating, in part, that "[i]n accordance with the provisions of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth *shall be* based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities") (emphasis added).

[28] As discussed above, because the grievant was not interviewed for Position #00308, the agency's selection determination did not adversely affect the grievant and as such, whether the agency misapplied policy in making this determination will not be discussed here.

Changes to the Position Description

The grievant also asserts that policy was misapplied when the job duties and reporting structure for Position #00308 were changed by the hiring authority prior to the selected candidate reporting for employment.[29] The grievant believes this alleged change to be "fraudulent to those who might have applied had the position been advertised truthfully" and states that as a result of this alleged change in position description, she was deemed unqualified for an interview based on criteria that were not even job related and that she was not given the opportunity to list her strengths in research activities because the position advertisement omitted that criterion. The grievant also questions the selected candidate's ability to perform the job given these alleged changes to the job description.

Even assuming without deciding that the position description has been changed as described by the grievant, management has the exclusive right to manage the methods and means by which work is accomplished, including the prerogative to revise the duties of a position description. Moreover, there is nothing to indicate that the alleged changes to the position description were contemplated prior to the selection process for this position or that the agency was attempting to "screen out" individuals or otherwise prevent them from applying. In fact, the grievant admits that the changes to the position description did not occur until sometime in early August of 2008, two months after the position was advertised. Therefore, it is difficult to understand how the agency's changing of the position's responsibilities, after the screening determination was made, adversely affected the grievant's denial of an interview for the position in July 2008. Accordingly, this issue does not qualify for a hearing.

Based on the foregoing, this Department concludes that Grievance #1 does not qualify for a hearing.

Grievance #2

Grievance #2 challenges the agency's decision to take away the grievant's FOIA responsibilities.[30] By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[31] Therefore, a grievance challenging management's assignment of duties does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, or a misapplication of policy has occurred.[32] Here, the grievant asserts that the agency "stripped" her of her FOIA duties in retaliation for her filing a grievance. The grievant also appears to assert that her FOIA duties were removed as a result of her making an official FOIA request for copies

[29] More specifically, the grievant asserts that the activities of the research center were placed under the direction of the individual selected to occupy Position #00308.

[30] During this Department's investigation of Grievance #2, the grievant indicated that as a result of further agency restructuring, her remaining duties have been dramatically changed. As noted above, under the grievance procedure, "[o]nce the grievance is initiated, additional claims may not be added." *Grievance Procedure Manual* § 2.4. Accordingly, any changes to the grievant's job duties after she filed Grievance #2, should have been challenged in a subsequent grievance. *See, e.g.*, EDR Ruling No. 2010-2507.

[31] Va. Code § 2.2-3004(B).

[32] *Grievance Procedure Manual* § 4.1 (b) and (c).

of agency documents ultimately provided to a local news channel regarding agency expenditures. In addition, the grievant claims that removal of her FOIA responsibilities and transferring a portion of those duties to an African American female is further evidence of workplace harassment based on race. The grievant's claims will be discussed in turn below.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[33] (2) the employee suffered a materially adverse action;[34] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the materially adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[35] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[36]

Here, the grievant engaged in protected activity by filing her August 7, 2008 grievance and by asserting her rights under the FOIA.[37] However, the removal of the grievant's FOIA responsibilities do not rise to the level of a materially adverse action in this case.[38] While the grievant points to her employee work profile (EWP) in support of her assertion that her FOIA responsibilities constituted 30% of her duties, it appears that responding to FOIA requests was just one of many duties included in this 30%. Other duties comprising this 30% include "[c]ompos[ing] and prepar[ing] reports and other documents, including speeches and press releases as directed," "[p]rovid[ing] editing and input on reports and other public and internal documents, including the agency's electronic newsletter, the website and other documents," "[r]espond[ing] to all media inquiries and constituent correspondence according to agency protocol," and "[a]ssist[ing] in the orientation coordination for new Board members and draft correspondence where necessary." Accordingly, it does not appear that removal of the grievant's

[33] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[34] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006). For a grievance to qualify for hearing, the action taken against the grievant must have been materially adverse such that a reasonable employee in the grievant's position might be dissuaded from participating in protected conduct. *Id.* at 68.

[35] *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

[36] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[37] *See* Va. Code § 2.2-3004(A); Va. Code § 2.2-3700, et seq.; *Grievance Procedure Manual* § 4.1(b).

[38] *See* Stephens v. Erickson, 569 F.3d 779, 790-791 (7th Cir. 2009) ("Whether a change in job responsibilities is materially adverse 'all depends on how much of a change, and how disadvantageous a change, took place.' Our decisions involving a transfer or reassignment of job responsibilities indicate that such an action is not materially adverse unless it represents a significant alteration to the employee's duties, which is often reflected by a corresponding change in work hours, compensation, or career prospects.") (internal citations omitted).

FOIA duties constituted a significant change to her overall duties and responsibilities. In fact, during the 2007-2008 performance cycle it appears the grievant responded to approximately 22 FOIA requests during the year. Moreover, while the grievant believes the change in her duties to be a "demotion," the change did not affect the grievant's compensation. Further, the grievant has not presented sufficient evidence that the removal of her FOIA duties materially altered her work hours or career prospects, nor has this Department found evidence of such. Because the grievant has failed to demonstrate that removal of her FOIA responsibilities is a "materially adverse action," her claim of retaliation does not qualify for a hearing.

Workplace Harassment

The grievant claims that removing her FOIA duties and giving a portion of those duties to an African American employee is further evidence of race-based workplace harassment she has endured at DCJS. As stated earlier, while grievable through the management resolution steps, claims of workplace harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability.[39] Here, there is insufficient evidence that the removal of her FOIA duties was based on the grievant's race. Of significance is the fact that, according to the grievant, the FOIA responsibilities were split between an African American employee and a White employee. Accordingly, because the duties were given, at least in part, to someone of the same race as the grievant, it does not appear that the grievant's race had anything to do with the removal of her FOIA responsibilities. As such, the grievant's claim that she has been harassed based on her race does not qualify for a hearing.

Based on the foregoing, this Department concludes that Grievance #2 does not qualify for a hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this Department's qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he wishes to conclude the grievance.

Claudia Farr
Director

[39] *Grievance Procedure Manual* § 4.1(b); *see also* DHRM Policy 2.30, *Workplace Harassment*.