STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL B. CARTER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-10513
	)	
CITY OF POMPANO,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes, before Edward T. Bauer, an administrative law judge of the Division of Administrative Hearings (DOAH), on June 28 and 29; July 1; and October 12, 13, and 14, 2011, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Jamison Jessup, Qualified Representative
557 Noremac Avenue
Deltona, Florida 32738

For Respondent: Erin Gill Robles, Esquire
City of Pompano Beach
Post Office Box 2083
Pompano Beach, Florida 33061

STATEMENT OF THE ISSUES

Whether Respondent committed the unlawful employment practices alleged in the Charge of Discrimination filed with the Florida Commission on Human Relations ("FCHR") and, if so, what relief should Petitioner be granted.

PRELIMINARY STATEMENT

On June 24, 2010, Petitioner, an African-American male, filed a Charge of Discrimination ("Complaint") with FCHR, which alleged as follows:

> I believe I have been discriminated against pursuant to Chapter 760 of the Florida Civil Rights Act, and/or Title VII of the Federal Civil Rights Act . . . for the following reasons(s):
>
> I am an African American male. I have worked for the said employer since January 1981. My title is Public Works Streets/Ground Superintendent. I am well qualified for my position. I am the only African American Superintendent. I was informed by Michael Smith (W/M) and Robert McCoughan [sic] (W/M) that a reorganization of the departments was taking place. On June 23, 2009, my responsibilities were decreased within my department and all the directors became distant to me and refused to communicate with me. They also refused to allow me to fill vacant positions which is causing disruption in the work areas. No other department was reorganized. No other Superintendent is within my race. I still have decreased responsibilities and this discrimination is now effecting [sic] my performance evaluations. I believe I am being discriminated against by my employer due to my race.

On November 4, 2010, following the completion of its investigation of the complaint, FCHR issued a Notice of Determination: No Cause. Petitioner elected to pursue administrative remedies, timely filing a Petition for Relief with FCHR on December 6, 2010. Subsequently, on December 9, 2010, FCHR referred the matter to DOAH for further proceedings.

During the final hearing, Petitioner testified on his own behalf and presented the testimony of Michael Smith, Arnold McRay, Robert McCaughan, Lisa Williams, Roger Palermo, Bernard King, Leonard Mateya, Gladys Williams, Sherry Loochkartt, Ernestine Price, Patrick Sweny, Nathaniel Johnson, Jeffrey Sneed, and Ronald Rolle. In addition, the following pages of Petitioner's exhibit book were admitted into evidence: 32; 38-40; 78; 277-280; 585; 615; 618; 619; 726; and 728. Respondent presented the testimony of Rita Craig, Phyllis Korab, Michael Smith, Robert McCaughan, Russell Ketchum, Kristie Newbold,[1/] and Willie Hopkins. Respondent's Exhibits 1-6, 7, 9-17, 19-21, 23-24, 25, 26, 28-29, 31-32, 34-39 were offered and received into evidence.

The Transcript of the first three days of the final hearing was filed with DOAH on August 1, 2011, and the remainder of the Transcript was filed on November 15, 2011.

Pursuant to a succession of unopposed motions to modify the due date for the submission of proposed recommended orders, the

undersigned extended the deadline to January 4, 2012. Petitioner and Respondent timely submitted proposed recommended orders, both of which have been considered in the preparation of this Recommended Order.[2/]

Unless otherwise indicated, citations to the Florida Statutes refer to the 2010 Florida Statutes.

FINDINGS OF FACT

A. Background

1. At all times material to this proceeding, Petitioner, an African-American male, was employed in the Public Works Department ("Public Works") of the City of Pompano Beach ("the City" or "Respondent").

2. In or around 1995, Petitioner——who had worked for the City since 1981——was promoted to a superintendent position and assigned to oversee two separate divisions within Public Works: the streets division and the grounds division.

3. Although Petitioner was described in personnel documents as "Streets Superintendent," his functional title within Public Works was "Streets and Grounds Superintendent."

4. In September 2006, the City hired Robert McCaughan——a retired civil engineering officer with the United States Air Force——to serve as its new Director of Public Works, the top position within the department. Mr. McCaughan is Caucasian.

5. At the time of his hire (and until June 22, 2009, when a reorganization occurred), Public Works was structured such that four superintendents——all Caucasian with the exception of Petitioner——reported to Mr. McCaughan: Petitioner, who headed the streets and grounds divisions and oversaw approximately 100 employees, including five supervisors; Roger Palermo, the superintendent of building maintenance, who had roughly 15 employees under his authority, including one supervisor; Mark Stevens, the superintendent of the fleet maintenance division, who oversaw approximately ten employees, including one foreman; and Steve Rocco, the airpark manager, who had six employees under his authority, including one supervisor.

6. Soon after he began his employment with the City, Mr. McCaughan became aware——through the receipt of complaints from various employees, which Mr. McCaughan accepted as credible——of issues with Petitioner's management techniques and ability to behave amicably with others in the workplace. For instance, Arnold McRay, who reported directly to Petitioner and served as the grounds supervisor, complained to Mr. McCaughan that Petitioner often exhibited a dictatorial management style that made it difficult to get work done. Mr. McRay, who is African-American, also reported that Petitioner would often talk down to him and micromanage leave approvals.

7. In addition to Mr. McRay's comments, Mr. McCaughan also received complaints from two other supervisors under Petitioner's authority: Russell Ketchum, the solid waste supervisor, who advised that Petitioner exhibited a lack of communication and engaged in behavior that made it difficult to complete tasks; and Dick Tench, the grounds supervisor, who indicated that Petitioner, on at least one occasion, interfered with the discipline of an employee under his (Mr. Tench's) supervision.

8. Significantly, Mr. McRay, Mr. Tench, and Mr. Ketchum also complained that Petitioner had ordered them not to speak directly to Mr. McCaughan about work matters. Although Petitioner, when asked, denied that he made such an order, it was clear to Mr. McCaughan that Petitioner, in one way or another, had created the distinct impression among the complaining supervisors that work issues could only be addressed with him (Petitioner).[3/]

B. Reorganization of Public Works

9. Beginning in 2007, the City began to face a budgetary crisis that resulted from declining tax revenues and increasing costs. As a result, a strict hiring freeze (that continued through 2010) was instituted, in which most vacant positions throughout the City remained unfilled. Petitioner, like all

other managers within the City, was prohibited from filling any position that was not designated as essential.[4/]

10. In late 2008 or early 2009, the City Manager at that time, Keith Chadwell, considered a possible merger of Public Works with the City's Parks and Recreation Department. Although the merger concept was ultimately rejected, Mr. McCaughan decided, in an effort to improve efficiency, to move forward with a reorganization of Public Works.

11. Pursuant to the reorganization, which was implemented on June 22, 2009, the grounds and solid waste divisions were removed from Petitioner's supervision, which reduced the number of employees under his charge by approximately 80 percent (from more than 100 employees to 20). As a consequence, three of the four supervisors who previously reported to Petitioner—— Mr. McRay, Mr. Tench, and Mr. Ketchum, each of whom had lodged complaints about Petitioner——were reassigned to Mr. McCaughan's direct supervision. Petitioner retained his status as a superintendent, however, and suffered no loss of pay or benefits.

12. On June 22, 2009, Mr. McCaughan informed Petitioner of the reorganization, and, on the following day, provided Petitioner with a detailed organizational chart that placed Petitioner on notice that his supervisory duties had been diminished in the manner described above.

13. As part of the overall goal to enhance efficiency, Mr. McCaughan also decided to change the manner in which clerical services were provided within the streets, grounds, and solid waste divisions. In particular, Mr. McCaughan created a central pool of clerical workers that served the three divisions as a whole——as opposed to the previous arrangement, where superintendents such as Petitioner were each assigned assistants of their own. Under the new system, management employees that required clerical help would contact the head secretary, Ruth Bobbi, who in turn would assign the task to a member of the secretarial pool.

14. There is no credible evidence that the reorganization of the clerical staff caused Petitioner to suffer any meaningful deprivation of secretarial services. On the contrary, the evidence demonstrates that Petitioner was at all times authorized to bring assignments to Ms. Bobbi to be distributed to a secretary in the general pool.

C. Post-Reorganization Events

15. Needless to say, Petitioner disagreed vehemently with Mr. McCaughan's reorganization of the Public Works Department. Within a week of the restructuring, Petitioner filed a written complaint with Phyllis Korab, the Interim City Manager at that time, which alleged that Mr. McCaughan and Michael Smith——the

Director of Human Resources for the City, who had no authority whatsoever over Petitioner——had discriminated against him.

16. Because the City's Director of Human Resources was specifically named in the complaint, Ms. Korab decided to retain an outside investigator to examine Petitioner's allegations. Ms. Korab ultimately hired Ms. Rita Craig (of "The Craig Group"), who had previously served as the head of the Florida Commission on Human Relations.

17. At the conclusion of her investigation, Ms. Craig recommended to the City that Petitioner's office be relocated closer to Mr. McCaughan's office——to improve communications——and away from employees with whom Petitioner did not get along.[5/] Mr. McCaughan ultimately accepted the suggestion and moved Petitioner's office to the public works administration building, the location where his (Mr. McCaughan's) office was housed.

18. In early 2010, Mr. McCaughan conducted Petitioner's annual performance evaluation, which was finalized on March 24, 2011, and reviewed by Petitioner one week later. In the evaluation, Mr. McCaughan assessed Petitioner's overall performance as "very effective," the second highest of five possible ratings, and one ranking higher than "fully effective," which the City equates to a "clearly satisfactory level of achievement." In other words, Petitioner's overall performance was rated as exceeding the City's requirements.[6/]

D. Ostracism

19. During his final hearing testimony in this proceeding, Petitioner complained that some employees within the City refused to speak with him after the reorganization of Public Works. Petitioner's testimony on this issue, which was vague at best, is credited only to the extent that Helen Gray, the city engineer, ceased communications with Petitioner following the restructuring.

CONCLUSIONS OF LAW

A. Jurisdiction

20. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

B. Introduction

21. The Florida Civil Rights Act of 1992 ("the FCRA") is codified in sections 760.01 through 760.11, Florida Statutes, and section 509.092, Florida Statutes.

22. "The [FCRA], as amended, was patterned after Title VII of the Civil Rights Acts of 1964 and 1991 . . . as well as the Age Discrimination in Employment Act . . . . Federal case law interpreting [provisions of] Title VII and the ADEA is [therefore] applicable to cases arising under [the FCRA]." Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla.

2000)("The [FCRA's] stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964"); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009)("Because the FCRA is patterned after Title VII of the Civil Rights Act of 1964 . . . we look to federal case law").

23. Among other things, the FCRA makes certain acts unlawful employment practices and gives the FCHR the authority—— if it finds following an administrative hearing conducted pursuant to sections 120.569 and 120.57, that such an unlawful employment practice has occurred——to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay." §§ 760.10 & 760.11(6), Fla. Stat.

24. To obtain such relief from the FCHR, a person who claims to have been the victim of an "unlawful employment practice" must, within 365 days of the alleged violation, file a complaint containing a short and plain statement of the facts describing the violation and the relief sought with the FCHR, the EEOC, or "any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80." § 760.11(1), Fla. Stat.

25. "[T]o prevent circumvention of [FCHR's] investigatory and conciliatory role, only those claims that are fairly

encompassed within a [timely-filed complaint] can be the subject of [an administrative hearing conducted pursuant to Sections 120.569 and 120.57]" and any subsequent FCHR award of relief to the complainant. Chambers v. Am. Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994); see also Batcher v. City of High Springs, FCHR Case No. 2011-358 (Fla. FCHR Dec. 7, 2011)("[F]ailure to include a particular charge in one's complaint filed with the Florida Commission on Human Relations preclude[s] the inclusion of the charge in one's petition for relief"); Pamphile v. FedEx, FCHR Case No. 2010-1893 (Fla. FCHR Nov. 3, 2011)(same as Batcher).

26. With the preceding framework in mind, the entirety of Petitioner's June 24, 2010, complaint reads as follows:

> I am an African American male. I have worked for the said employer since January 1981. My title is Public Works Streets/Ground Superintendent. I am well qualified for my position. I am the only African American Superintendent. I was informed by Michael Smith (W/M) and Robert McCoughan [sic] (W/M) that a reorganization of the departments was taking place. On June 23, 2009, my responsibilities were decreased within my department and all the directors became distant to me and refused to communicate with me. They also refused to allow me to fill vacant positions which is causing disruption in the work areas. No other department was reorganized. No other Superintendent is within my race. I still have decreased responsibilities and this discrimination is now effecting [sic] my performance evaluations. I believe I am

> being discriminated against by my employer due to my race.

(emphasis added).

27. Pursuant to foregoing language, the only allegations that are "fairly encompassed" within Petitioner's complaint are that Respondent committed four discrete acts of racial discrimination, namely: (1) a diminishment of Petitioner's supervisory responsibilities, which occurred as a result of the June 22, 2009, reorganization of the streets and grounds divisions; (2) the refusal of "directors" to communicate with Petitioner; (3) a prohibition against Petitioner filling vacant positions; and (4) the issuance of negative performance evaluations. Notably, Petitioner's complaint contains no language that can be interpreted reasonably as an allegation that Respondent created a hostile work environment,[7/] nor does the complaint in any manner allege that Petitioner is the victim of unlawful retaliation——i.e., that Petitioner engaged in a protected activity and Respondent committed an adverse employment action against him as a result.[8/] As such, the undersigned must confine these proceedings to the four claims raised in the complaint, each of which is analyzed separately below. See Helm v. Ancilla Domini College, 2012 U.S. Dist. LEXIS 1661, *1 (N.D. Ind. Jan. 5, 2012)("Within its discussion of [plaintiff's] discrimination claims, the court individually

considers her allegations of discrete acts"); Ware v. Billington, 344 F. Supp. 2d 63, 71 n.1 (D.D.C. 2004)(rejecting plaintiff's argument that alleged adverse employment actions should be considered in their totality; "This is not the law . . . for analyzing a discrimination claim based on disparate treatment . . . . Rather, each alleged adverse action must be analyzed to determine if it constitutes an objectively tangible harm")(internal quotation marks omitted).

C. Reduction of Supervisory Responsibilities

1. Timeliness

28. At the outset, it is necessary to address Respondent's contention that Petitioner is time-barred from pursuing the claim that the reduction in his supervisory duties constituted an adverse employment action. Specifically, Respondent argues that contrary to the requirements of section 760.11(1), Petitioner's complaint was filed with FCHR on June 24, 2010, more than 365 days after the re-organization of the public works department and modification of Petitioner's duties, which occurred on June 22, 2009, and was communicated to Petitioner on that date (and in greater detail on the following day). See § 760.11(1), Flat. Stat. ("Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation"); Fla. Admin. Code R. 60Y-5.001(3) ("providing that "the date of filing shall be the

date of actual receipt of the complaint by the Clerk or other agent of [FCHR]").

29. As there is no dispute that Petitioner's complaint was filed with FCHR on June 24, 2010, more than 365 days after Petitioner was informed of the reorganization, the claim is untimely, see St. Petersburg Motor Club v. Cook, 567 So. 2d 488, 489 (Fla. 2d DCA 1990)("The period for filing a complaint [with FCHR], therefore, commenced at the time the decision was made and communicated to the appellee regardless of the fact that the effect of such decision . . . did not occur until later"), unless the limitations period was tolled by operation of section 95.051, Florida Statutes. Greene v. Seminole Elec. Coop., Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997)(holding that the limitations period for the filing of a discrimination complaint with FCHR can be equitably tolled, but only based on the acts or circumstances enumerated in section 95.051).

30. Section 95.051 provides, in relevant part, as follows:

> § 95.051. When limitations tolled
>
> (1) The running of the time under any statute of limitations except ss. 95.281, 95.35, and 95.36 is tolled by:
>
> (a) Absence from the state of the person to be sued.
>
> (b) Use by the person to be sued of a false name that is unknown to the person entitled

> to sue so that process cannot be served on the person to be sued.
>
> (c) Concealment in the state of the person to be sued so that process cannot be served on him or her.
>
> (d) The adjudicated incapacity, before the cause of action accrued, of the person entitled to sue. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action.
>
> (e) Voluntary payments by the alleged father of the child in paternity actions during the time of the payments.
>
> (f) The payment of any part of the principal or interest of any obligation or liability founded on a written instrument.
>
> (g) The pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action.
>
> (h) The period of an intervening bankruptcy tolls the expiration period of a tax certificate. . . .
>
> (i) The minority or previously adjudicated incapacity of the person entitled to sue during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to the minor or incapacitated person, or is adjudicated to be incapacitated to sue. . . .

31. As none of the circumstances enumerated in section 95.051(1) are applicable in this proceeding, Petitioner's allegation regarding the diminishment of his supervisory responsibilities is untimely.

32. Even if Petitioner's claim regarding the reorganization of Public Works had been timely filed, he is still not entitled to relief because his claim is without merit, for the alternative——and independently dispositive——reasons set forth below.

2. Merits

33. Section 760.10, Florida Statutes, provides, in relevant part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

34. Complainants alleging unlawful discrimination may prove their case using direct evidence of discriminatory intent. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "only the most blatant remarks, whose intent could be nothing other than to discriminate," satisfy this definition. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir.

1999)(internal quotations omitted). Often, such evidence is unavailable, and in this case, Petitioner presented none.

35. As an alternative to relying exclusively upon direct evidence, the law permits complainants to profit from an inference of discriminatory intent, if they can adduce sufficient circumstantial evidence of discriminatory animus, such as proof that the charged party treated persons outside of the protected class (who were otherwise similarly situated) more favorably than the complainant was treated. Such circumstantial evidence, when presented, constitutes a prima facie case.

36. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court articulated a scheme for analyzing employment discrimination claims where, as here, the complainant relies upon circumstantial evidence of discriminatory intent. Pursuant to this analysis, Petitioner has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination, which requires proof that he (1) is a member of a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action; and (4) was treated less favorably than other similarly situated employees. Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1264 (11th Cir. 2010); Ramsey v. Henderson, 286 F.3d 264, 268 (5th Cir. 2002).

37. Failure to establish a prima facie case of discrimination ends the inquiry. Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996). If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. Alvarez, 610 F.3d at 1264. This intermediate burden of production, not persuasion, is "exceedingly light." Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 516-518 (1993); Alvarez, 610 F.3d at 1264. Despite these shifts in the burden of production, "the ultimate burden of persuasion remains on the plaintiff to show that the defendant intentionally discriminated against her." Alvarez, 610 F.3d at 1264; Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1088 (11th Cir. 2004).

38. It is undisputed that Petitioner, an African-American, is a member of a protected class. As such, Petitioner satisfied the first prong of a prima facie case of employment discrimination.

39. The second prong of the test has also been satisfied, as sufficient evidence was presented from which the undersigned

can conclude that Petitioner possessed the basic skills necessary for the performance of the job. See Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001)(holding that a plaintiff "need only make the minimal showing that she possesses the basic skills necessary for performance of [the] job" to satisfy the requirement that the plaintiff was qualified for the position)(internal citations and quotations omitted).

40. Turning to the third prong, the undersigned must determine if the diminishment of Petitioner's supervisory responsibilities constitutes an adverse employment action. Although an adverse action need not be an ultimate employment decision——e.g., termination, failure to hire, or demotion——it must meet a threshold level of substantiality. Grimsley v. Marshalls of MA, Inc., 284 Fed. Appx. 604, 608 (11th Cir. 2008). While evidence of direct economic consequences is not always required, "to prove adverse employment action under Title VII's anti-discrimination clause, an employee must show a serious and material change in the terms, conditions, or privileges of employment." Id. at 608. Petitioner's "subjective perception of the seriousness of the change is not controlling; rather this issue is viewed objectively from the perspective of a reasonable person under the circumstances." Id.

41. A useful and persuasive application of the "serious and material change in the terms, conditions, or privileges of

employment" standard is provided by Byrne v. Alabama Alcoholic Beverage Control Board, 635 F. Supp. 2d 1281 (M.D. Ala. 2009). In Byrne, the plaintiff alleged, inter alia, that the complete removal of her supervisory responsibilities——allegedly due to her gender——constituted an adverse employment action. In rejecting the plaintiff's argument and entering summary judgment for the employer, the court found it significant that no modification of pay or benefits accompanied the reduction of duties:

> An "indispensable element" of Ms. Byrne's prima facie case on her Title VII gender discrimination claim alleging disparate treatment is proof of an "adverse employment action." Davis v. Town of Lake Park, 245 F.3d 1232, 1246 (11th Cir. 2001).
>
> * * *
>
> On the facts presented, the removal of Ms. Byrne's supervisory responsibilities and the shift of her post-reorganization duties to those more clerical are not the type of serious and material changes contemplated by Davis. See Davis, 245 F.3d at 1232 (noting that changes in job duties generally do not constitute an adverse employment action) . . . . As observed in Davis, "[A]pplying the adverse action requirement carefully is especially important when the plaintiff's claim is predicated on his disagreement with his employer's reassignment of job tasks." 245 F.3d at 1244. Such claims "strike at the very heart of an employer's business judgment and expertise," and, in particular, with regard to public entities, their responsibility of "balanc[ing] limited personnel resources with the wide variety of critically important and challenging tasks

> expected of them by the public." Id. Here, it is undisputed that no economic harm accompanied these changes in Ms. Byrne's job tasks, and the court finds that Ms. Byrne has not presented an "unusual" set of circumstances. Id. at 1245; see also id. (citing as an example of an "unusual instance[]" McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1077-78 (11th Cir. 1996), in which the court held that the jury should have been permitted to consider as a basis for the plaintiff's discrimination claim that he was stripped of his supervisory duties in the newspaper's camera department and assigned to clean toilets as a janitor).

Id. at 1292-93 (emphasis added); Chavez v. Dakkota Integrated Sys., LLC, 2011 U.S. Dist. LEXIS 58382 (W.D. Ky. May 27, 2011) ("Plaintiff has also argued that he suffered an adverse employment action by and through the removal of her supervisory duties . . . and the issuance of a low annual evaluation. It is clear from the record that these actions do not constitute adverse employment actions because they did not materially affect or alter Plaintiff's employment. At the time these actions were taken, Plaintiff did not suffer any reduced benefits or incur any direct economic harm.").

42. Turning to the facts of the instant case, it is true, as Petitioner asserts, that his supervisory responsibilities were decreased significantly pursuant to the June 2009 reorganization. However, as Petitioner remains at the same level in the hierarchy of Public Works——a superintendent——and

continues to enjoy the same pay and benefits, the undersigned concludes that the reduction of Petitioner's supervisory duties does not constitute an adverse employment action. See Byrne, 635 F. Supp. 2d at 1292-93. As such, Petitioner's prima facie case fails.

43. Even assuming, arguendo, that Petitioner could establish a prima facie case, Respondent has proffered a legitimate, non-discriminatory reason for the action——to improve efficiency within the public works department——that Petitioner has failed to refute as a mere pretext for discrimination. See Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)(holding that a plaintiff must show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence").

D. Performance Evaluations

44. Turning to the issue of performance evaluations, only Petitioner's March 24, 2010, evaluation occurred within 365 days of the date he filed his complaint with FCHR. See § 760.11(1), Flat. Stat. ("Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation"). Accordingly, Petitioner's evaluations from 2000 through 2009, which were not timely

challenged, will not be examined as possible adverse employment actions.

45. With respect to the March 24, 2010, evaluation, Petitioner's claim fails for the simple reason that Mr. McCaughan rated him "very effective"——the second highest ranking (out of five possibilities), which cannot be construed as anything but positive. See Watson v. Potter, 35 Fed. Appx. 261, 264 (7th Cir. 2002)(rejecting contention that rating performance as "very good" rather than "outstanding" constituted an adverse action; "Moreover, [plaintiff] did not refute [defendant's] position that a 'very good' rating is indeed a positive performance rating"). For this reason alone, Petitioner is unable to demonstrate that the evaluation constitutes an adverse employment action.

46. Even assuming, arguendo, that the March 2010 evaluation can be characterized as negative, Petitioner's claim nevertheless fails due to the absence of any evidence that he suffered a "connected tangible injury, such as a loss in benefits, ineligibility for promotional opportunities, or . . . formal discipline." Anderson v. UPS, 248 Fed. Appx. 97, 100 (11th Cir. 2007); Douglas v. Preston, 559 F.3d 549, 552 (D.C. Cir. 2009)(observing that a performance evaluation only constitutes an adverse employment action where it adversely affects the employee's salary or chances for advancement).

47. For these reasons, Petitioner cannot establish a prima facie case of discrimination based upon the March 24, 2010, evaluation.

E. Refusal to Communicate

48. Petitioner next alleges, as an additional adverse employment action, that "all the directors became distant . . . and refused to communicate" with him subsequent to the June 2009 reorganization.

49. As detailed in the findings of fact above, the credible evidence demonstrates that only one City employee—— Helen Gray, the city engineer——refused to communicate directly with Petitioner after the restructuring. Such a grievance, which is nothing more than a common workplace slight, falls woefully short of an adverse employment action. See Harmon v. Home Depot USA, Inc., 130 Fed. Appx. 902, 904 (9th Cir. 2005)("Ostracism, however, is not an adverse employment action"); Williams v. City of Kansas City, Mo., 223 F.3d 749, 754 (8th Cir. 2000)(holding that defendant's "silent treatment of [plaintiff] is at most ostracism, which does not rise to the level of an actionable adverse employment action"); Roberts v. Segal Co., 125 F. Supp. 2d 545, 549 (D.D.C. 2000)("The fact that plaintiff believes she was getting the cold shoulder from her co-workers does not constitute . . . an adverse personnel action"). Petitioner is therefore unable to establish a prima

facie case of discrimination based upon an alleged failure to communicate by his co-workers.

F. Filling of Positions

50. Petitioner's final allegation of discrimination is that Respondent prohibited him from filling vacant positions within his department from 2007 through 2010.

51. First, as Respondent correctly notes, Petitioner's claim is untimely to the extent that he wishes to challenge acts that occurred more than 365 days before June 24, 2010, the date Petitioner filed his discrimination complaint with FCHR. See § 760.11(1), Fla. Stat. Accordingly, Petitioner's challenge must be confined to any limitation on the filling of positions that occurred on or after June 24, 2009. See id.

52. While it is true, as Petitioner alleges, that he was prohibited from filling non-essential positions throughout 2009 and 2010, he fails to acknowledge that this limitation was imposed pursuant to a hiring freeze that applied to all departments within the City of Pompano Beach. As there is no evidence whatsoever that Petitioner was treated differently than any other department head or supervisor, he is unable to establish a prima facie case of discrimination. See Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1264 (11th Cir. 2010)(holding that that to establish a prima facie case of discrimination, a complainant must demonstrate, inter alia, that

he or she was treated differently than other similarly situated employees).

G. Unpleaded Discrete Acts of Discrimination

53. In his Proposed Recommended Order, Petitioner identifies three other discrete acts that he alleges constitute unlawful discrimination: (1) the denial of clerical assistance; (2) Mr. Smith's levying of "false allegations" against him during the investigation by The Craig Group; and (3) Mr. Smith's "failure" to provide him "the same deference" as afforded to Mr. Herman.

54. As none of these claims were included in Petitioner's June 24, 2010, discrimination complaint, they must be rejected. See Batcher v. City of High Springs, FCHR Case No. 2011-358 (Fla. FCHR Dec. 7, 2011). Further, and as discussed below, even assuming that Petitioner's unpleaded claims can be properly considered on the merits, none rises to the level of an adverse employment action.

55. Beginning with the issue of clerical support, there was no credible evidence that Petitioner was denied the assistance he needed to perform his job functions. Instead, the record evidence demonstrates that after the June 2009 reorganization, Petitioner began to receive support from the clerical pool as a whole (as opposed to the previous system, where Petitioner was assigned a particular member of the

clerical staff). While the new arrangement was undoubtedly not to Petitioner's liking, and arguably less convenient, Respondent's restricting of the clerical staff does not rise to the level of an adverse employment action. See Halloway v. Milwaukee Cnty., 180 F.3d 820, 826 (7th Cir. 1999)(holding that plaintiff failed to establish an adverse employment action from the alleged failure to provide adequate support staff where the alleged failure was no "more disruptive than a mere inconvenience").

56. As to the claim of false allegations, even assuming, arguendo, that Mr. Smith provided untruthful information regarding Petitioner to The Craig Group during its investigation, there is no evidence that Petitioner experienced a significant change in his employment as a result Mr. Smith's conduct. Indeed, Petitioner's principal complaint in this proceeding——the partial removal of his supervisory responsibilities——occurred prior to the Craig Group's investigation. As such, Mr. Smith's allegations against Petitioner, even if untrue, do not rise to the level of an adverse employment action. See Benningfield v. City of Houston, 157 F.3d 369, 376 (5th Cir. 1998)("[Plaintiff] alleges that she was falsely accused of attempting to sabotage the fingerprint identification system. Assuming that these allegations are true, mere accusations, without more, are not adverse employment

actions"); Zhang v. Rolls-Royce, Seaworthy Sys., Inc., 2012 U.S. Dist. LEXIS 933 (E.D. Va. Jan. 5, 2012)(concluding that employer's supposed false allegations against plaintiff, which resulted in no changes in the terms or conditions of plaintiff's employment, did not constitute an adverse employment action); see also Mitchom v. Bi-State Dev. Agency, 43 Fed. Appx. 958, 958-59 (7th Cir. 2002)(holding that plaintiff, who suffered no significant change in his employment status, did not sustain an adverse employment action where employer refused to purge a "false accusation" from plaintiff's employment record).

57. Finally, Petitioner's contention that Mr. Smith scrutinized him for certain behavior (e.g., treating subordinates poorly), yet defended William Herman in the wake of similar misconduct, even if true, does not constitute an adverse employment action. See McKinnon v. Gonzales, 642 F. Supp. 2d 410, 426 (D.N.J. 2009)(stressing that allegations of "micromanaging" and "increased scrutiny" do not constitute materially adverse employment actions).[9/]

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order.

Further, it is RECOMMENDED that the final order dismiss the Petition for Relief.

DONE AND ENTERED this 25th day of January, 2012, in Tallahassee, Leon County, Florida.

Edward T. Bauer
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2012.

ENDNOTES

[1/] In its Proposed Recommended Order and witness list, Respondent spells Ms. Newbold's given name "Kristie," as opposed to the spelling contained in the final hearing Transcript, "Christy." As it is unclear which is correct, the undersigned has deferred to the Transcript.

[2/] Portions of the conclusions of law section of Petitioner's Proposed Recommended Order, as well as paragraphs 34 through 37 of this Recommended Order, borrow heavily from the undersigned's earlier order in King v. Department of Corrections, Case No. 10-4818 (Fla. DOAH July 22, 2011).

[3/] Mr. Ketchum, Mr. McRay, and Mr. Tench also lodged complaints regarding Petitioner with Ms. Phyllis Korab, who began her employment with the City in 2005. Ms. Korab, who presently serves as an Assistant City Manager, acted as the Interim Public Works Director from April 2006 through September 2006 and as the

Interim City Manager from May 2007 through July 2007 (and again from June 2009 through December 2009).

[4/] Notwithstanding the hiring freeze, on October 29, 2008, Mr. McCaughan authorized Petitioner to fill three vacant positions.

[5/] Ms. Craig's opinion regarding the merits of Petitioner's allegations of discrimination are of no moment in this proceeding, and therefore will not be discussed.

[6/] Petitioner also received an overall rating of "very effective" in his 2011 evaluation.

[7/] Even assuming that Petitioner alleged the existence of a hostile work environment, none of the supposed wrongs enumerated in the complaint——a reduction of supervisory duties, one or more negative evaluations, a refusal to communicate by certain directors, and a freeze on new hires——can be properly brought under a hostile environment claim, which centers on acts of discriminatory ridicule, intimidation, and/or insult. See McCann v. Tillman, 526 F.3d 1370, 1379 (11th Cir. 2008)("As the district court properly found, the remainder of McCann's allegations concern patterns of discrimination practiced against black employees, which constitute discrete acts that must be challenged as separate statutory discrimination and retaliation claims. These cannot be brought under a hostile environment claim that centers on discriminatory intimidation, ridicule, and insult")(internal quotations omitted); Patterson v. Johnson, 391 F. Supp. 2d 140, 146 (D.D.C. 2005)(holding that plaintiff could not "sweep[] [his allegations of discrete acts of discrimination] under the rubric of a hostile work environment claim"); Ware v. Billington, 344 F. Supp. 2d 63, 71 n.1 (D.D.C. 2004)(noting that plaintiff's litany of alleged adverse employment actions could not be pleaded correctly under a hostile work environment theory); see also Holmes-Martin v. Sebelius, 693 F. Supp. 2d 141, 165 (D.D.C. 2010)(concluding that plaintiff's claims that her job responsibilities were reduced, that she was publicly criticized, excluded from meetings, received unrealistic deadlines, and received unwarranted criticism in her performance evaluations were not sufficiently severe or pervasive to support a hostile work environment claim); Pearsall v. Holder, 610 F. Supp. 2d 87, 98-99 (D.D.C. 2009)(dismissing hostile work environment claim where plaintiff alleged the assignment of an inferior office, the denial of training, exclusion from meetings, and the underutilization of his skills and experience).

[8/] Petitioner could have easily alleged retaliation in his compliant with FCHR by checking the box next to "Retaliation," which is pre-printed on the form.

[9/] Although not pleaded in his discrimination complaint or addressed in the conclusions of law portion of his Proposed Recommended Order, Petitioner offered extensive testimony concerning the City's relocation of his office, an act that Petitioner suggests was discriminatory. It is well-settled, however, that an office change——even to an undesirable setting——does not constitute an adverse employment action. See Reiter v. Metro. Trans. Authority of N.Y., 224 F.R.D. 157, 169 (S.D.N.Y. 2004)(noting that loss of desirable office space does not, by itself, constitute an adverse employment action); Obi v. Anne Arundel Cnty., 142 F. Supp. 2d 655, 674 (D. Md. 2001)(finding that new office assignment, which caused plaintiff to feel cramped and inconvenienced, did not constitute an adverse employment action).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.