STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Denise Cheney Charging Party	)))	
v.	)	HRC Charge NoPA12-0015
	))	
VT Dept. of Corrections Responding Party	))	

FINAL DETERMINATION

Pursuant to 9 V.S.A. 4554, the Vermont Human Rights Commission enters the following Order:

1. The following vote was taken on a motion to find that there are **reasonable grounds** to believe that the Vermont Department of Corrections, the Respondent, illegally discriminated against Denise Cheney, the Charging Party, in violation of Vermont's Fair Housing and Public Accommodations Act on the grounds of religion.

Mary Marzec-Gerrior, Chair	For ✓	Against __	Absent __	Recused __
Nathan Besio	For ✓	Against __	Absent __	Recused __
Mary Brodsky	For __	Against __	Absent ✓	Recused __
Mercedes Mack	For ✓	Against __	Absent __	Recused __
Donald Vickers	For __	Against ✓	Absent __	Recused __

Entry: ✓ Reasonable Grounds __ Motion failed

Dated at Montpelier, Vermont, this 23rd day of August, 2011.

BY: HUMAN RIGHTS COMMISSION

Mary Marzec-Gerrior, Chair

Nathan Besio

Mary Brodsky

Mercedes Mack

Donald Vickers

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INVESTIGATIVE REPORT
PA12-0015

CHARGING PARTY: Denise Cheney

RESPONDING PARTY: Vermont Department of Corrections

CHARGE: Public accommodations/religion

SUMMARY OF CHARGE: On December 14, 2011, Denise Cheney filed a charge of discrimination alleging that the Vermont Department of Corrections (DOC) discriminated against her because of her religion. Specifically, on October 22, 2011, an officer at the Chittenden Regional Correctional Facility (CRCF) cut sacred beads out of Ms. Cheney's hair against her will. Ms. Cheney, who is Abenaki, wears sacred beads that have been blessed by elders as part of her religion. DOC staff told her that the beads had to be removed because they had sharp edges. Ms. Cheney maintains that the edges of her beads are not sharp; moreover, while incarcerated at CRCF, Ms. Cheney observed other inmates wearing crosses with sharp edges.

SUMMARY OF RESPONSE: On December 30, 2011, the Vermont Department of Corrections (DOC) filed a response to the charge denying that it discriminated against Ms. Cheney because of her religion. Specifically, the DOC stated that some of Ms. Cheney's beads had sharp edges, had the potential for being used for self-harm, and were not permitted in the Alpha Unit (maximum security) at CRCF. Moreover, the DOC stated that in accordance with DOC directive 380.01 on religious observance in facilities, Christian inmates are allowed to wear crosses no longer than 1.5 inches and that such crosses were not sharper than Ms. Cheney's sacred beads.

PRELIMINARY RECOMMENDATION: This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are **reasonable grounds** to believe that the Vermont Department of Corrections discriminated against Denise Cheney because of her religion in violation of 9 V.S.A. §4502(a) of the Vermont Fair Housing and Public Accommodation Act.

SUMMARY OF INVESTIGATION:

Interviews:
John Cannon, 5/30/12
Denise Cheney, 3/19/12
Frank Chilcote, 5/30/12
Briana Clark, 5/30/12
Tom DiSalvo, 5/30/12
Rebecca Hall, 5/30/12
Greg Hill, 5/30/12
David Turner, 5/30/12

Documents:
Charge of Discrimination, 12/14/11
Response to Charge, 12/30/11
Response to request for information from Respondent, 3/19/12, 5/3/12, 5/24/12, 6/4/12

Elements of prima facie case:

1. She is a member of a protected class (religion) and she engaged in religious exercise based on sincerely held beliefs;
2. She suffered an adverse action through the implementation of one or more prison regulations;
3. The adverse action imposed a substantial burden on her religious exercise;
4. While the regulation was implemented on behalf of one or more compelling state interests, it was not done so in the least restrictive means possible.

I. Facts

A. Background

1. **Denise Cheney** is a member of the Koasek Abenaki Traditional Band of the Sovereign Abenaki Nation and lives in Lyndonville, Vermont.[1] On October 21, 2011, she was incarcerated at the Chittenden Regional Correctional Facility for two weeks until November 9, 2011. When Ms.

[1] Ms. Cheney carries a Koasek Abenaki Citizen ID card with her at all times.

Cheney arrived at CRCF, she had sacred beads in her hair (see appendix for photos). All the beads were blessed by an Abenaki elder and therefore considered sacred. None of the beads exceeded 1.5 inches in length or width. Ms. Cheney has had the beads in her hair for over 10 years.

2. At the time of the incident, **David Turner** was the superintendent at Chittenden Regional Correctional Facility (CRCF); he no longer works at CRCF. **John Cannon** is a shift supervisor at CRCF. **Frank Chilcote** was a correctional officer at CRCF; he no longer works for the department. **Briana Clark** and **Greg Hill** are correctional officers at CRCF.[2] **Tom DiSalvo** and **Rebecca Hall** are contract nursing staff at CRCF.

B. The circumstances

3. **Ms. Cheney:** When Ms. Cheney arrived at the CRCF on October 21, 2011, she was processed in the booking area where paperwork was filled out. At the time, neither of the booking officers said anything to her, asked any questions about, or did an inventory of the beads in her hair.[3] Neither officer mentioned the DOC directive on religious observances in facilities or offered her a religious accommodation request form.

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[2] Heather Morris was another correctional officer on duty at the time of the incident. She no longer works for the DOC and could not be reached for an interview. She did, however, fill out a facility report form about the incident (see below).

[3] Ms. Cheney said that during two previous brief periods of incarceration, once at Northwest Correctional Facility in Swanton and once at the St. Johnsbury facility, no officer ever took an inventory of her sacred beads or told her that the sacred beads needed to be removed from her hair.

4. **Mr. Hill:** When Ms. Cheney arrived at CRCF, she was taken into the strip room and a female officer conducted a strip search of Ms. Cheney and placed her in inmate clothing.[4] According to Mr. Hill, during the strip search, Ms. Cheney's beads should have been removed as all jewelry is supposed to be taken off. Mr. Hill did not know why the beads were not removed from Ms. Cheney's hair by the officer who conducted the strip search. After the strip search, when Mr. Hill asked her about the beads, Ms. Cheney told him that they were religious beads. Consequently Mr. Hill did not think anything of the situation since the female officer had left the beads in Ms. Cheney's hair.

5. **Ms. Cheney:** Ms. Cheney was initially placed in the Alpha Unit at CRCF. According to Ms. Cheney, all incoming inmates are placed temporarily in the Alpha Unit. In addition, other inmates are placed in the Alpha Unit for longer periods of time when they are high on drugs or need closer supervision to prevent self-harming behaviors; Ms. Cheney was neither high on drugs nor in danger of self-harm. Within a few days, Ms. Cheney was transferred to the Foxtrot Unit.

[4] Mr. Hill stated that the normal procedure for processing incoming inmates is to conduct a strip search, complete a body mark form, an INS form, and medical forms. Once the inmate is processed, she is initially placed in the Alpha Unit (maximum security) until a bed opens up elsewhere in the facility.

6. On the second night of her incarceration, on October 22, 2011, Officer Chilcote came to Ms. Cheney's cell to take her to see medical staff.[5] When Officer Chilcote arrived at Ms. Cheney's cell and saw the sacred beads in her hair, he immediately said she could not have them. When she explained that they were sacred beads and part of her religion and she was therefore allowed to have them, Officer Chilcote said he needed to speak with his supervisor and left to do so. A few minutes later Officer Chilcote returned with Shift Supervisor John Cannon. Ms. Cheney again explained to Mr. Cannon that the beads were sacred and a part of her religion. Mr. Cannon said that this information was not in her paperwork and when Ms. Cheney said the contrary, Mr. Cannon went to look at Ms. Cheney's paperwork. Mr. Cannon found Ms. Cheney's Abenaki identification information in her paperwork but nothing about her beads. Mr. Cannon then told Ms. Cheney they would have to cut the beads out of her hair because the beads were sharp and could be used for self-harm.[6] Ms. Cheney said that beads were not sharp and that she would never use them as weapons on herself or others.[7] Nonetheless, Mr. Cannon, Mr. Chilcote, and two

[5] Ms. Cheney has COPD (chronic obstructive pulmonary disease) and at times has difficulty breathing. That evening she asked to see medical personnel because of breathing difficulties.

[6] Ms. Cheney said that at no time did any DOC staff ask her if she was thinking of engaging in self-harming behaviors nor did she indicate that she would do so. She said she was aware that there was another inmate in the Alpha Unit who was on 24-hour watch for self-harming behaviors but Ms. Cheney had no contact with that inmate. Officer Hill, Officer Chilcote, Supervisor Cannon, Officer Clark, and Mr. DiSalvo all also stated that Ms. Cheney did not give any indication that she would engage in self-harming or violent behavior.

[7] Upon close inspection during her interview, this investigation did not observe any sharp edges on Ms. Cheney's beads. Please see attached photographs.

additional female officers handcuffed Ms. Cheney and took her to the medical office where Mr. Cannon cut the beads out of Ms. Cheney's hair.

7. During this process, Ms. Cheney was crying hysterically and asking them not to cut the beads out of her hair; she said she was devastated when they did so against her wishes. Ms. Cheney asked the officers to not throw away her beads; they told her they would hold her beads. At no time did any officer explain the religious practices policy to her or offer her the option of requesting a religious accommodation for her the beads in her hair.[8]

8. **Mr. Chilcote:** As Officer Chilcote was completing his rounds through the Alpha Unit on October 21, 2011, he noticed color strands hanging in Ms. Cheney's hair. He initially thought it was rope but upon closer inspection, he saw that Ms. Cheney had "metal trinkets" in her hair. When Officer Chilcote asked Ms. Cheney where she got the metal items in her hair, she became defensive and said she was allowed to have them. Officer Chilcote picked up some of the trinkets and said they were "razor sharp" but Ms. Cheney insisted that she was allowed to have them in her possession. Officer Chilcote closed her cell and called Supervisor Cannon to assess the situation.[9]

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[8] Neither Officer Chilcote, Officer Clark, Ms. Hall, nor Mr. DiSalvo recalled any mention of the religious practices policy or the religious accommodations request process during the conversations with Ms. Cheney that evening. Ms. Hall and Mr. DiSalvo are nurses who were on duty at the health center and present when the beads were cut our of Ms. Cheney's hair.
[9] Officer Chilcote said that generally inmates are allowed to have a small cross or wedding band. Other jewelry, such as engagement rings and studs, are not permitted.

9. When Supervisor Cannon arrived, he asked Ms. Cheney, "Where did you get these? They let you through booking with these?" Ms. Cheney said that she was allowed to have them because she is Indian. Supervisor Cannon said he would look into the matter, he left, and returned about 15 minutes later with two female officers. When Supervisor Cannon asked Ms. Cheney if she could remove the beads from her hair, she said she could not because they were woven into her hair. Supervisor Cannon and the two female officers then removed Ms. Cheney from the Alpha Unit and Officer Chilcote returned to his rounds. About 30 minutes later, Ms. Cheney returned; she was crying and the strands of beads were gone from her hair.

10. **Mr. Cannon:** Officer Chilcote called Mr. Cannon and said he was concerned about an inmate who had items (pointed, sharp metal objects) that were inappropriate and dangerous. Officer Chilcote asked Supervisor Cannon to come down and take a look at the items in Ms. Cheney's hair.

11. When Supervisor Cannon arrived at Ms. Cheney's cell and examined the beads in her hair, he agreed with Officer Chilcote that the items were prohibited under the directive regarding items that are prohibited in maximum security.[10] Supervisor Cannon told Ms. Cheney that she would have to hand over the items in her hair and repeatedly offered Ms. Cheney the opportunity to voluntarily remove the beads from her hair but she refused to do so. Ms. Cheney told Supervisor Cannon that the items had

religious significance and that she needed to keep them. Supervisor Cannon told her that they would take care of the items and give her a receipt for the items. He also told her that if the items were really something of religious significance, she could make a request to have them returned to her.

12. When the beads were cut out of Ms. Cheney's hair, she was very demonstrative and vocal, insisting they could not take the religious items from her, but she did not resist when the items were cut from her hair.

13. **Ms. Clark:** Officer Clark and Officer Morris (another female officer) were called down to Ms. Cheney's cell because the situation involved a personal matter. Officers Clark and Morris accompanied Ms. Cheney and Supervisor Cannon to the health center. Ms. Cheney was offered the option of voluntarily removing the beads but declined to do so. Ms. Cheney said the beads were blessed and that she needed them to eat so she could bless her food. Officer Clark then assisted while Officer Morris cut the beads out of Ms. Cheney's hair. Ms. Cheney was very upset and crying but did not resist.

14. **Mr. DiSalvo, Ms. Hall:** After bringing Ms. Cheney to the health center, Mr. DiSalvo and Ms. Hall said the officers tried to explain to Ms. Cheney why she could not keep the beads in her hair (security risk) and offered her the opportunity to remove the beads herself. Ms. Cheney was very upset and crying and refused to remove the beads. She told the officers

[10] The Alpha Unit is considered the "maximum security" unit at CRCF. According to Supervisor Cannon, inmates in the Alpha Unit are not even allowed to have shoe laces or any item that might be used to hang one's self.

that the items in her hair were Native American prayer beads and blessed by tribal elders. Supervisor Cannon apologized to Ms. Cheney and the officers proceeded to cut the items out of her hair.

15. **Ms. Cheney:** A few days later, Ms. Cheney wrote a letter to Superintendent Turner about this matter; Mr. Turner wrote a response within a few days.[11] Within 24 hours of writing that letter, Supervisor Cannon came back to Ms. Cheney's cell and showed her that they still had her beads and told her that they would hold them until she was released. Ms. Cheney also filed a grievance against Officer Chilcote (see below for text).

16. Ms. Cheney nearly stopped eating after the sacred beads were removed from her hair. When DOC staff expressed concern about this, Ms. Cheney told them that she could not bless her food (which she does with her sacred beads) so she ate very little food.[12]

17. While incarcerated at CRCF, Ms. Cheney said she observed other female inmates wearing Christian crosses. Ms. Cheney said the points on those crosses were a lot sharper than the edges of her beads.

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[11] Neither Ms. Cheney nor the Department could produce a copy of the written correspondence between Ms. Cheney and Mr. Turner.
[12] Officer Chilcote said Ms. Cheney did not eat for several days after the beads were removed from her hair but that she eventually started eating again.

C. Additional information

DOC reports, forms, grievances, and responses related to the incident:

18. When Ms. Cheney was taken into custody (for parole violation) on October 21, 2011, her file included several Inmate Religious Preference Designation Forms that she had completed on multiple occasions in 2010. On the form, Ms. Cheney indicated that the religion she practices (and would practice while incarcerated) is Native American.

19. Officer Morris' facility report form, dated October 22, 2011, stated the following:

> At approximately 2222 hrs on 22 October 2011, this officer and COI Clark were advised of I/M [inmate] Cheney, Denise having religious hair beads with sharp objects on [sic] it that was [sic] attached to her hair. CFSS Cannon, COI Clark and this officer escorted Cheney down to medical so the beads could be removed. CFSS Cannon explained to Cheney that she was not allowed to have it in her hair in Alpha. This officer then cut the beads out of her hair as advised by CFSS Cannon.

20. Supervisor Cannon's incident report, dated October 23, 2011, stated the following:

> At 2153 Officer Chilcote called me from A Unit. He said an inmate had jewelry attached to her hair that was obviously contraband. He said it appeared to have razor blades attached to it.
>
> I went to A Unit and looked at Inmate Denise Cheney. A beaded chain was attached to her hair. It went down past her shoulders. At one point it split into five separate sections. They appeared to have metal studs in them. The first strand began with metal dolphins followed by metal skulls. A metal decoration was located where the five strands began which had a small sharp point. Each strand ended with a piece of metal. Two of these decorations had sharp points. A third was in the shape of

wings which could be easily sharpened. This jewelry piece had obvious negative potential as a tool for self harm.

Inmate Cheney was adamant that it not be removed. She pointed out that it was attached to her hair and we would have to cut her hair to obtain it. She was placed in hand cuffs and walked to the Health Center. It was apparent that her hair was attached to the item. A small amount of hair was cut and it was removed. Cheney wept but did not interfere with our actions.

Inmate Cheney had been in A Unit since 0141 hours.

The discovery by Officer Chilcote was given more seriousness by the on going self harm in that Unit. Inmate [X] has been on constant observation since the 18th. On the day this item was confiscated [Inmate X] had made numerous threats of self harm and she was placed in the Restraint Chair.

21. On October 28, 2011, Ms. Cheney filed a grievance that stated the following:

I had filed a grievance on CO2 Gilcotte [sic] on the 24 [sic] on Sat night the 22nd of Oct. Officer Gilcotte [sic] came on duty in Alpha Unit and I had sacred beads in my hair that was [sic] put in by my elders and blessed. CO2 Gilcotte [sic] took it upon himself with his supervisor and cut them out of my hair. By doing this to me has [sic] taken a big part of me away. This not [sic] only my cultur [sic] of [sic] also my religion and to me once again White man has taken away from a Native American and I am registered Abinaki. [sic]

I want my beads back in my possession and I want these [sic] CO to write me and read to me why they would they do this [sic] to take something that is so sacred to me away. Everyone else here is allowed there [sic] cross or what there [sic] belief are [sic] but I'm not allowed.

I want my beads back.

22. On November 4, 2011, Superintendent Turner wrote a response to Ms. Cheney's grievance that stated the following:

Reviewed inmate file and religious directive. Also looked at beads.

Religious beads are allowed per directive. However, there are several issues with these beads:

1. The beads contain metal objects that are not beads but more symbols. These metal objects are a security risk as they could be used as a weapon or to aid in an escape.
2. There was no documentation or support on a theological basis for [illegible word] the practice of an inmate's documented religion.
3. Certain beads may not be worn or displayed.

I recommend that the bead [sic] be stored and returned when the inmate leaves. The officers acted appropriately. The inmate could also fill out a [sic] inmate religious accommodations request form to see if the beads could be approved that way.[13]

23. **Mr. Turner:** When a grievance cannot be resolved informally between an inmate and officer or shift supervisor, the inmate has the option of filling a formal grievance which is subsequently investigated. While Superintendent Turner did not normally investigate grievances he chose to investigate this situation.

24. Mr. Turner examined the beads after they were removed from Ms. Cheney's hair. His assessment was that the items were a potential risk for self-harm or harm to someone else because of the pieces of metal. He also said the metal pieces could be used as a handcuff key.

25. **Mr. Cannon:** Mr. Cannon said that before Ms. Cheney's arrival, he had never had an inmate with religious items in his/her hair.[14] He stated that the DOC policy is specific about what inmates can and cannot have in their possession. If an item is prohibited, an inmate can fill out a request

[13] Ms. Cheney was released from CRCF on November 9, 2011 but she never received this response from superintendent Turner.
[14] Neither had Officer Chilcote, Officer Clark, Officer Hill, nor Superintendent Turner.

form to ask for permission to keep the item; Mr. Cannon said that some things have been approved in the past.

26. Mr. Cannon said that he told Ms. Cheney about this procedure for requesting approval to keep her beads; however, Mr. Cannon said that even if she had filled out the form, he would have had to take the beads out of her hair because of the policy about what items are prohibited in maximum security (the Alpha Unit).[15]

27. According to Mr. Cannon, generally officers make the decisions regarding the possession of religious items; a supervisor is called only when an inmate refuses to hand over an item. In Ms. Cheney's case, Mr. Cannon said that she should never have been allowed to keep the beads in her hair[16] because of three DOC directives: the religious items directive (the beads were not on the list of permitted items), the self-harm directive (the beads and string in Ms. Cheney's hair could have been used for self-harm), and the security directive (metal items, including zippers, are not allowed in

[15] Generally, inmates are in the Alpha Unit because of threats of self-harm and behavioral problems and staff therefore assumes that there is a potential for self-harm. According to Supervisor Cannon, even if an inmate is in the Alpha Unit because she is new and is not suicidal, she still is not permitted to keep any items in her possession that might be used for self-harm; however, those items may be returned to the inmate once she returns to a general population unit in the facility. Mr. Cannon assumed that Ms. Cheney was in the Alpha Unit because she was new; neither he nor any of the other officers and staff interviewed for this investigation were aware of any behavioral problems with Ms. Cheney.

[16] After removing the beads from Ms. Cheney's hair, Mr. Cannon asked Officer Hill why he allowed Ms. Cheney to be processed without removing the beads from her hair. Officer Hill told Mr. Cannon that he thought the beads were acceptable because they were religious items.

maximum security and Ms. Cheney's metal beads were therefore considered contraband and had to be removed).

Relevant DOC policies in Appendix A

II. Analysis

The Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §4502(a) provides:

> (a) An owner or operator of a place of public accommodations or an agent or employee of such owner or operator shall not, because of . . . . creed . . . . of any person, refuse, withhold from or deny to that person any of the accommodations, advantages, facilities and privileges of the place of public accommodation.

Ms. Cheney alleged that the Vermont Department of Corrections discriminated against her because of her religion. Specifically, on October 22, 2011, an officer at the Chittenden Regional Correctional Facility (CRCF) cut sacred beads out of Ms. Cheney's hair against her will. Ms. Cheney, who is Abenaki, wears sacred beads in her hair that have been blessed by elders as part of her religion. DOC staff told her that the beads had to be removed because they had sharp edges. Ms. Cheney maintains that the edges of her beads are not sharp; moreover, while incarcerated at CRCF, Ms. Cheney observed other inmates wearing crosses with sharp edges.

A. Legal background and the prima facie case

Almost the entire history of case law involving claims by inmates of religious discrimination against corrections facilities is based on

constitutional and federal statutory violation claims, namely, violations of the First Amendment Free Exercise Clause and Establishment Clause, the Fourteenth Amendment Equal Protection Clause, and various federal statutes, including the Religious Freedom and Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Since the *Sherbert v. Verner* case of 1963,[17] in which the U.S. Supreme Court established a strict scrutiny standard with regard to free exercise claims (when a government regulation imposes a substantial burden on sincerely held religious beliefs, the regulation is unconstitutional unless it furthers a "compelling state interest" in the "least restrictive means" possible), Congress and the U.S. Supreme Court have engaged in a back-and-forth wrestle over the proper standards to utilize in free exercise cases. In 1987, the U.S. Supreme Court lowered the standard in its *Turner v. Safley*[18] decision (reaffirmed in *O'Lone v. Shabazz*, 484 U.S. 342 (1987)) from a strict scrutiny standard to a reasonableness standard.[19] The Court established a four-pronged "reasonableness test" which allowed regulations that impinged on inmates' constitutional rights if the regulation could be shown to be reasonably related to a "legitimate penological interest."

In response to the *Turner* and *O'Lone* decisions, Congress passed the Religious Freedom and Restoration Act (RFRA) in 1993 to restore the strict

[17] 374 U.S. 398 (1963), reaffirmed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[18] 482 U.S. 78 (1987).

scrutiny standard for free exercise claims set out in the *Sherbert* and *Wisconsin* cases. In turn, the Court declared RFRA unconstitutional in its *City of Boerne v. Flores* decision in 1997.[20] Subsequently, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000 to once again restore the strict scrutiny standard (compelling state interest/least restrictive means) for a very narrow set of applicable contexts (land use and institutionalized persons). While the constitutionality of RLUIPA has been challenged many times since 2000, it has thus far survived these challenges.

With respect to recent free exercise claims brought by inmates under the RLUIPA, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the U.S. Supreme Court affirmed that under RLUIPA, prisoner constitutional rights must be balanced with the needs and interests of a penal institution. Specifically, section 3 of RLUIPA "provides that '[n]o [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,' unless the government shows that the burden furthers 'a compelling governmental interest' and does so by 'the least restrictive means.' The Act defines 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Id.*, at 2118. While the Court did not explicitly reject the

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[19] The reasonableness standard, also known as the deferential standard, basically requires lower federal courts to afford deference to the rationale of prison officials in imposing restrictions on religious freedoms.
[20] 521 U.S. 507 (1997).

reasonableness test from its *Turner* decision or minimize the importance of according deference to the experience and expertise of prison officials, it did affirm the Congressional intent and validity of restoring the "compelling interest/least restrictive means" standard in RLUIPA (and previously established in the *Sherbert* and *Wisconsin* decisions). Thus, when a prisoner brings a claim of religious discrimination under RLUIPA, the respondent (corrections institution) must show that its policy does not impose a substantial burden on the prisoner's exercise of religion, unless that burden is justified by "a compelling governmental interest" (e.g., security or safety within a corrections facility) and the burden is imposed by the "least restrictive means" (e.g., other less onerous alternatives do not exist). In other words, the four questions to consider in a RLUIPA-based analysis are:

- Was there "religious exercise" based on sincerely held beliefs?
- Did the prison regulation impose a "substantial burden" on that religious exercise?
- Did the government/prison have a "compelling state interest" in regulating the religious exercise?
- Even if there is a compelling state interest, was the regulation the "least restrictive means" for furthering that compelling interest?

There is no case law involving claims of religious discrimination in Vermont based on the Vermont state statute prohibiting discrimination in places of public accommodation, so this analysis turns to the federal court analyses in general, and Second Circuit court analyses in particular, on religious discrimination cases for guidance. Because the Human Rights Commission's jurisdiction is limited to claims brought under a state statute,

namely, the Fair Housing and Public Accommodations Act, and does not reach claims brought under the Vermont Constitution, this investigation will rely on case law involving federal statutory claims for guidance (i.e., under RLUIPA) rather than case law involving constitutional claims (i.e., based on the First Amendment Free Exercise and Establishment Clauses). The two most recent Vermont cases heard in federal courts on claims of religious discrimination are not particularly helpful as one (*Bock v. Gold*, 2008 WL 3454890 (D.Vt.)) focuses primarily on the question of what constitutes "appropriate relief" under RLUIPA and the other (*McMichael v. Pallito*, 2011 WL 012173 (D.Vt.)) involves a First Amendment (constitutional) claim. However, in *Salahuddin v. Goord*, 467 F.3d 263 (2006), the Second Circuit Court of Appeals provides helpful guidance in that the court makes a clear distinction between the analyses of free exercise claims brought by a plaintiff under a First Amendment right (constitutional claim) and those brought under RLUIPA (statutory claim). In reviewing the constitutional claim raised by a plaintiff, the court relies on the "reasonableness" standard from the *Turner* decision; for a statutory claim, the court relies on RLUIPA's "compelling state interest/least restrictive means" standard. This analysis will utilize the latter standard.

Using the four questions listed above to set a framework for an RLUIPA-based analysis, in order to establish a prima facie case of religious discrimination Ms. Cheney must show the following:

1. She is a member of a protected class (religion) and she engaged in religious exercise based on sincerely held beliefs;
2. She suffered an adverse action through the implementation of one or more prison regulations;
3. The adverse action imposed a substantial burden on her religious exercise;
4. While the regulation was implemented on behalf of one or more compelling state interests, it was not done so in the least restrictive means possible.

Did Ms. Cheney engage in "religious exercise" based on sincerely held beliefs?

Ms. Cheney's religion was clearly noted on multiple DOC Inmate Religious Preference Designation Forms in her file. She also carries a Koasek Abenaki Citizen ID card with her at all times which verifies her Native American ancestry. This documentation, as well as Ms. Cheney's testimony about the elder's blessing of her beads and her practice of blessing her food with the sacred beads in her hair, all clearly indicates that her religious practice is based on sincerely held beliefs.

Under RLUIPA, "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). This is a very broad definition of "religious exercise" and Ms. Cheney's practice of blessing her food before meals clearly meets this statutory definition. However, in his response to Ms. Cheney's October 28, 2011 grievance, Superintendent Turner stated that "there was no documentation or support on a theological basis for the practice of [Ms. Cheney's] documented religion." This statement seems to imply that because he had no documentation or knowledge of the theological basis for

Ms. Cheney's practice of blessing her food with the sacred beads, Superintendent Turner did not believe that her "religious exercise" was valid, thereby further justifying the removal of the beads. Superintendent Turner does not explain how he came to this conclusion about Ms. Cheney's practices nor does he offer any evidence to support his conclusion.[21] In fact, as in most religious traditions around the world, it is common for Native Americans to bless their food and say a prayer before meals.[22] How that is accomplished varies from tribe to tribe; in Ms. Cheney's case, her beads, which were blessed by her elders, were used to bless her food (first element).

Did Ms. Cheney suffer an adverse action as the result of the implementation of one or more prison regulations?

Relying on the DOC directives regarding contraband in maximum security units, Supervisor Cannon made the decision to cut the sacred beads out of Ms. Cheney's hair. This permanent and very personal action clearly constituted an adverse action for Ms. Cheney; she no longer had access to her sacred beads which she used to bless her food on a daily basis (second element). Moreover, the spiritual importance of the sacred beads was evident in the level of emotional distress expressed by Ms. Cheney when the beads were removed.

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[21] Superintendent Turner also wrote "[c]ertain beads may not be worn or displayed" with no information or evidence to support this conclusion.

[22] This statement is based on this investigator's personal experience with Cherokee, Pueblo, and Lakota traditional practice.

Did the DOC regulation and actions impose a "substantial burden" on that religious exercise?

Section 4 of RLUIPA clearly specifies that a "plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion." 42 U.S.C. 2000cc-2(b). However, what constitutes a "substantial burden" is not clearly defined in RLUIPA nor has it been clearly defined by the U.S. Supreme Court (in cases specifically involving free exercise claims brought by prison inmates) or the Second Circuit. In his article "Defining Substantial Burden Under the Religious Land Use and Institutionalized Persons Act: The Third Circuit's Successful Clarification,"[23] Michael Distefano reviews the various current Circuit Court and U.S. Supreme Court definitions of substantial burden.[24] While none of the U.S. Supreme Court definitions are exactly on point and applicable (i.e., do not involve cases of <u>inmate</u> free exercise claims) and the Circuit Court definitions vary considerably, Mr. Distefano concludes that the Third Circuit

[23] 35 NENGJCCC 277 (2009).

[24] Mr. Distefano reviews definitions from the 1st, 3rd, 4th, 5th, 8th, and 9th Circuit Court cases (all involving free exercise claims made by inmates) as well as definitions in five key U.S. Supreme Court cases (none of which were cases involving free exercise claims made by inmates).

provides the best definition of substantial burden[25] and quotes the court as follows:

> 'For the purpose of RLUIPA, a substantial burden exists where: 1) a follower is forced to choose between the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.' *Washington v. Klem*, 497 F.3d 272, 280.

Assuming this definition is acceptable to the Commission (and because there is no clear definition in use by the Second Circuit), this investigation believes the evidence in this case indicates that the DOC's actions imposed a substantial burden on Ms. Cheney's religious practice. Ms. Cheney uses the beads in her hair to bless her food. Without the beads, Ms. Cheney was unable to bless her food before meals while she was housed at CRCF. Subsequently, for several days after the beads were removed from her hair, she ate very little food. Eventually, however, she started eating again out of sheer necessity. Without her sacred beads, Ms. Cheney was forced to "substantially modify [her] behavior and to violate [her] beliefs" (third element).

[25] In his analysis of the various Circuit Court definitions, Mr. Distefano focused on four issues: "(1) whether the court considered appropriate sources in articulating a definition of 'substantial burden'; (2) whether the definition was in accordance with RLUIPA's statutory language and legislative history; (3) whether the definition impacted the outcome of the case; and (4) whether the definition's pros outweigh its cons." 35 NENGJCCC 277, 297 (2009).

Did the DOC have a "compelling state interest" in regulating Ms. Cheney's religious exercise?

Clearly, the DOC has a compelling interest to both ensure security and safety at its facilities. DOC officers must make daily, at times immediate, decisions based on a need to maintain security and safety. As Supervisor Cannon explained, concerns about security and safety are generally related to an inmate's capacity for self harm, harm to others, or escape. Moreover, Supervisor Cannon stated the Alpha Unit (where Ms. Cheney was initially housed) had more stringent restrictions due to heightened concerns about security and safety because it was the maximum security unit.

Even if there was a compelling state interest, was the DOC regulation the "least restrictive means" for furthering that compelling interest?

This is the pivotal question in this analysis. In its *Cutter* decision, the U.S. Supreme Court stated that

> We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests. . . We have no cause to believe RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a "compelling governmental interest" standard, "[c]ontext matters" in the application of that standard. Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. They anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." (citations omitted) *Cutter v. Wilkinson,* 544 U.S. 709, 722

Nonetheless, "defendants [must] do more to justify the imposition of a substantial burden on religious exercise [rather] than rely on speculation or unjustified fears."[26] In passing RLUIPA, Congress recognized that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements."[27]

Section 6 of RLUIPA "requires defendants to demonstrate that practices that impose substantial burdens on inmates' religious exercise are the least restrictive means of furthering a compelling interest *under the facts of the particular case*"[28] (emphasis added). Thus, the burden now shifts to the DOC to show that its actions were the least restrictive means of furthering its interests of safety and security at CRCF.

Ultimately, the question that needs to be answered is this: Even with the compelling state interests of safety and security, was this action (removing the beads from Ms. Cheney's hair) the "least restrictive means" for furthering the interests of security and safety? In other words, could the DOC have accommodated Ms. Cheney's religious practice through some

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[26] Brief for the United States as Amicus Curiae, at 9, *Thunderhorse v. Pierce*, cert. denied, 131 S.Ct. 896 (2011) (No. 09-1353).
[27] *Joint Statement*, 146 Cong. Rec. at 16,699 (quoted in Brief for the United States as Amicus Curiae, at 9, *Thunderhorse v. Pierce*, cert. denied, 131 S.Ct. 896 (2011) (No. 09-1353))
[28] Brief for the United States as Amicus Curiae, at 7, *Thunderhorse v. Pierce*, cert. denied, 131 S.Ct. 896 (2011) (No. 09-1353).

alternative means without significantly compromising prison security and safety? The context is not simple and requires close review.

The DOC policy on religious observances allows inmates to possess certain religious items and, if necessary, to request religious accommodations to maintain items that do not appear on the list of approved items. In this case, Ms. Cheney apparently was never offered the opportunity to request a religious accommodation for her sacred beads; she was only offered the contrary option of voluntarily removing the beads from her hair. Supervisor Cannon said that he told Ms. Cheney about the religious accommodation policy. In contrast, Ms. Cheney said she was never told about this policy and none of the other officers involved could confirm that Mr. Cannon discussed the policy with Ms. Cheney. Because she refused to take the beads out herself, they were forcibly removed from her hair.

Theoretically, had Ms. Cheney been in a general population unit, it is quite possible that she would have been able to submit a request for religious accommodation without first having to relinquish her beads. In fact, Superintendent Turner said in his response to her October 28, 2011 grievance that Ms. Cheney could fill out a "religious accommodations request form to see if the beads could be approved that way."[29] In addition, given that Ms. Cheney had in fact retained the beads in her hair on two other brief periods of incarceration at the St. Johnsbury facility and the Northwest State

[29] This statement, of course, was made after the fact.

Correctional Facility in Swanton, it would not have an irrational expectation on her part that she would have also been able to keep the beads in her hair while housed at CRCF (with or without a religious accommodation request).

Moreover, because Ms. Cheney was put into the maximum security unit for no reason other than being a new inmate (as opposed to being put in the unit for the usual reasons of misconduct or threats of self-harm), she was forced to comply with the maximum security unit directive which, according to the DOC, does not allow inmates to possess <u>any</u> religious items.[30] Under normal circumstances, these restrictions would be understandable in light of the purpose of, and the heightened security and safety concerns that exist in, the Alpha Unit. However, the practice of placing all new inmates in the Alpha Unit creates a *de facto* and perhaps unacceptable restriction on the religious practices of any new inmate who may have a religious item in her possession, an item which, in the general population, could well be permitted under the religious observances policy. In this context, and having no realistic opportunity to make a religious accommodation request,[31] Ms. Cheney was placed in an impossible situation of unavoidably being stripped of her right to practice her religion. Given this

[30] It should be noted that the restrictive housing policy makes no mention of allowed or prohibited religious items.

[31] Even if she had done so, Mr. Cannon said that because of the maximum security unit directive, he would have had to remove the beads anyway, before her request could even be reviewed for approval or denial.

result, the DOC practice of placing all new inmates in the Alpha Unit becomes questionable.

The DOC relied on its maximum security (restrictive housing) directive to justify its actions; as stated above, the policy contains no mention of allowable or prohibited religious items in restrictive housing. In contrast, the religious observances policy states that for inmates in restrictive housing (i.e., maximum security), "allowable inmate religious property ***may*** be limited on an individual basis if it is proven to be a security risk or provides an inmate with the means to injure themselves" (emphasis added). Thus, there appears to be a contradiction between the written policies and in the facility's actual practice regarding what is or is not permitted in the Alpha Unit.

The DOC also relied on Officer Chilcote's inaccurate description of Ms. Cheney's beads as "razor blades" and Supervisor Cannon's description of Ms. Cheney's beads as "decorations" with "sharp points" with "obvious negative potential as a tool for self harm" as further justification for its actions. These appear to be exactly the kinds of "speculation, exaggerated fears, or post-hoc rationalizations" Congress intended RLUIPA to address. If the assumptions of the DOC staff in this case were to serve as the basis for decisions about similar religious items, these kinds of cursory conclusions about the potential security and safety risks could be drawn about <u>any</u> of the religious items regularly approved for inmate possession – metal, wood, or

plastic crosses, medallions, symbols, stars, and crescents – and would necessitate the denial of all religious items, even in the general population units.

In addition, DOC staff members seem to unfairly attribute the actual threats of self harm of another inmate in the Alpha Unit to Ms. Cheney; Supervisor Cannon wrote in his incident report:

> The discovery by Officer Chilcote was given more seriousness by the on going self harm in that Unit. Inmate [X] has been on constant observation since the 18th. On the day this item was confiscated [Inmate X] had made numerous threats of self harm and she was placed in the Restraint Chair.

What inmate X's state of being had to do with Ms. Cheney's actual or potential behavior is unclear. Ms. Cheney stated that she gave no indications that she would engage in self-harming behaviors or violent behaviors; all the officers confirmed this reality. Ms. Cheney was not placed in the Alpha Unit for either of these behavioral reasons so the assumptions made about what she might do with the beads in her hair appear completely unfounded.

Finally, Ms. Cheney was housed at CRCF for a parole violation. This meant that her time at CRCF would be brief (two weeks) and her time in the Alpha Unit would be even briefer. Given the fact that the religious observances policy states that inmates may be allowed to have religious items while in restrictive housing, provided that the items are proven to not pose a safety or security risk, and that the restrictive housing policy expressly prohibits general population inmates (like Ms. Cheney) from being

routinely housed in restrictive housing and establishes that restrictive housing is specifically designated for inmates on administrative or disciplinary segregation, the Department appears to have acted in contradiction to its written policies. While this investigation does not wish to dictate how the DOC should run its facilities, it does seriously question the practice and consequences of placing all new inmates in the Alpha Unit specifically because of the particular impact this practice has on an inmate's religious exercise. Because new inmates are in the Alpha Unit only for brief periods of time (several days) and are not housed there for administrative or disciplinary segregation, allowing them to retain religious items until they can be approved or denied (with or without a religious accommodation request) and before they are moved into the general population does not appear to be unreasonable or an undue burden (financially, in terms of staff time, in terms of safety and security concerns) for the facility. The unfortunate consequence of the current practice, when combined with all the other information listed above, appears to result in a failure to provide the "least restrictive means" for furthering its compelling interests of safety and security and an unacceptable, substantial burden on Ms. Cheney's religious exercise (fourth element).

PRELIMINARY RECOMMENDATION: This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are **reasonable grounds** to believe that the Vermont Department of Corrections discriminated against Denise Cheney because of her religion in violation of 9 V.S.A. §4502(a) of the Vermont Fair Housing and Public Accommodation Act.

Tracey Tsugawa, Investigator

Robert Appel, Executive Director

8/1/12
Date

Appendix A

DOC Directive 380.01 Religious Observances – Facilities states in part the following:

b. Inmate Religious Property Items

i. Only items listed on the *Religious Personal Property Matrix (Attachment 2)* may be possessed by an inmate. These items are subject to considerations of safety and security. Some items for unique reasons may be prohibited. Once approved, all religious property authorized for an inmate becomes part of an inmate's personal property . . .

* * * * *

ii. Items not listed on the *Religious Personal Property Matrix (Attachment 2)* may be requested by inmates by completing an *Inmate Religious Accommodation Request Form (Attachment 3).* The Superintendent, in consultation with the Facilities Executive, will approve or deny the request.

* * * * *

c. Religious Medallions and Symbols

i. Approved religious medallions and symbols pertaining to an inmate's designated faith may be worn about the neck on a jewelry-type chain. Each inmate will be permitted only one (1) religious medallion. Chain lengths, medallions, and symbols may not exceed the sized specified in the *Religious Personal Property Matrix (Attachment 2)* or as noted below.

ii. All medallions must be listed on the inmate's personal property inventory.

* * * * *

iv. Medallions may be made of metal, wood, cloth, or plastic and maybe round in shape or in the shape of the appropriate religious symbol such as a cross, star, or crescent.

* * * * *

vi. Medallions may be no longer than 1.5 inches or 1 inch in diameter.

d. Religious Articles

* * * * *

iii. Religious Beads – Generally, dhikr, mala, or rosary beads may be possessed in one's hands, but not worn or displayed.

- An inmate may be permitted to possess and wear other religious beads, (excluding dhikr, mala, or rosary beads), which can be documented and supported on a theological

basis for use in the practice of an inmate's documented religion.

f. Inmate in Restrictive Housing

* * * * *

iii. Allowable inmate religious property may be limited on an individual basis if it is proven to be a security risk or provides an inmate with the means to injure themselves.

DOC Interim Procedure 408 on Contraband Classification and Disposition states in part the following:

Contraband: Anything not authorized to be in an inmate's possession; used in an unauthorized or prohibited manner, altered in any way; or in excess of allowable limits.

* * * * *

1. Contraband Classification – The classification of contraband categories are as follows:
a. Illegal drugs or non-prescribed pharmaceuticals
b. Drug paraphernalia
c. Weapons or any item which may be used as a weapon
d. Money
e. Tobacco
f. Appliances (e.g., radios, fans, cell phones, etc.)
g. Wearing apparel (items not approved or altered for unauthorized use)
h. Miscellaneous property
i. Alcohol
j. Tools or items that may be used to aid an escape

DOC Procedure 408.00.01 Contraband Classification and Distribution states in part the following:

Scope:
There are a wide variety of items that are considered contraband in a correctional facility. It is a responsibility of officers to be aware of what is considered contraband, and make continual efforts to prevent contraband from entering the facility and removing such contraband as is in the facility.

Definitions:

- Contraband is anything in the possession of an inmate contrary to the rules and regulations of the facility. Anything that is not on the allowed property list is, by definition, contraband. Contraband will also cover allowed items that are received through unauthorized channels.
- Possession is meant to include anything on the inmate's person, in his/her clothing, his/her living unit and any place where there is reasonable grounds to believe it is in the inmate's custody and control.

* * * * *

3. Contraband: Contraband will include, but not be limited to, the following:

* * * * *

1.26 Any item that can potentially be used as a weapon or which an officer finds questionable.

* * * * *

1.44 Any article of clothing or jewelry containing spikes

* * * * *

DOC Directive 410.06 Restrictive Housing Status, Conditions of Confinement states in part the following:

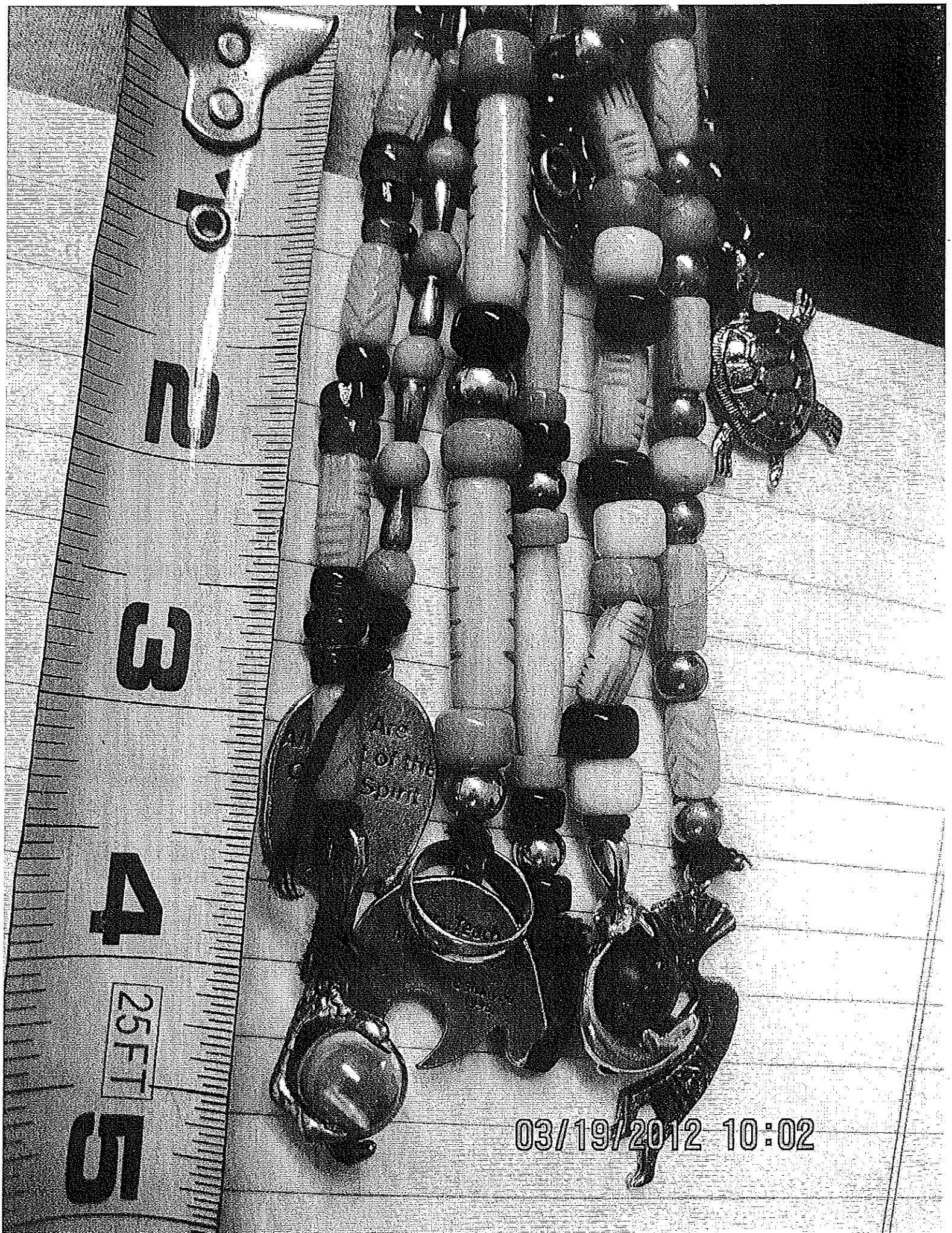
1. Establishment of Restrictive Housing Units
   a. Restrictive housing units shall be established in all facilities for the placement of inmates on Administrative Segregation and Disciplinary Segregation status . . .

* * * * *

2. Restrictive Housing Unit Placement
   a. Placement in a restrictive housing unit shall be limited to those inmates assigned to segregation status according to the provision of administrative directives *Placement on Administration [sic] Segregation #410.03, Protective Custody #410.05,* and *Facility Rules & Inmate Discipline #410.01*.

* * * * *

   b. While recognizing the challenge of managing unpredictable numbers of inmates at any given time, general population inmates may **not** routinely be housed in restrictive housing units.



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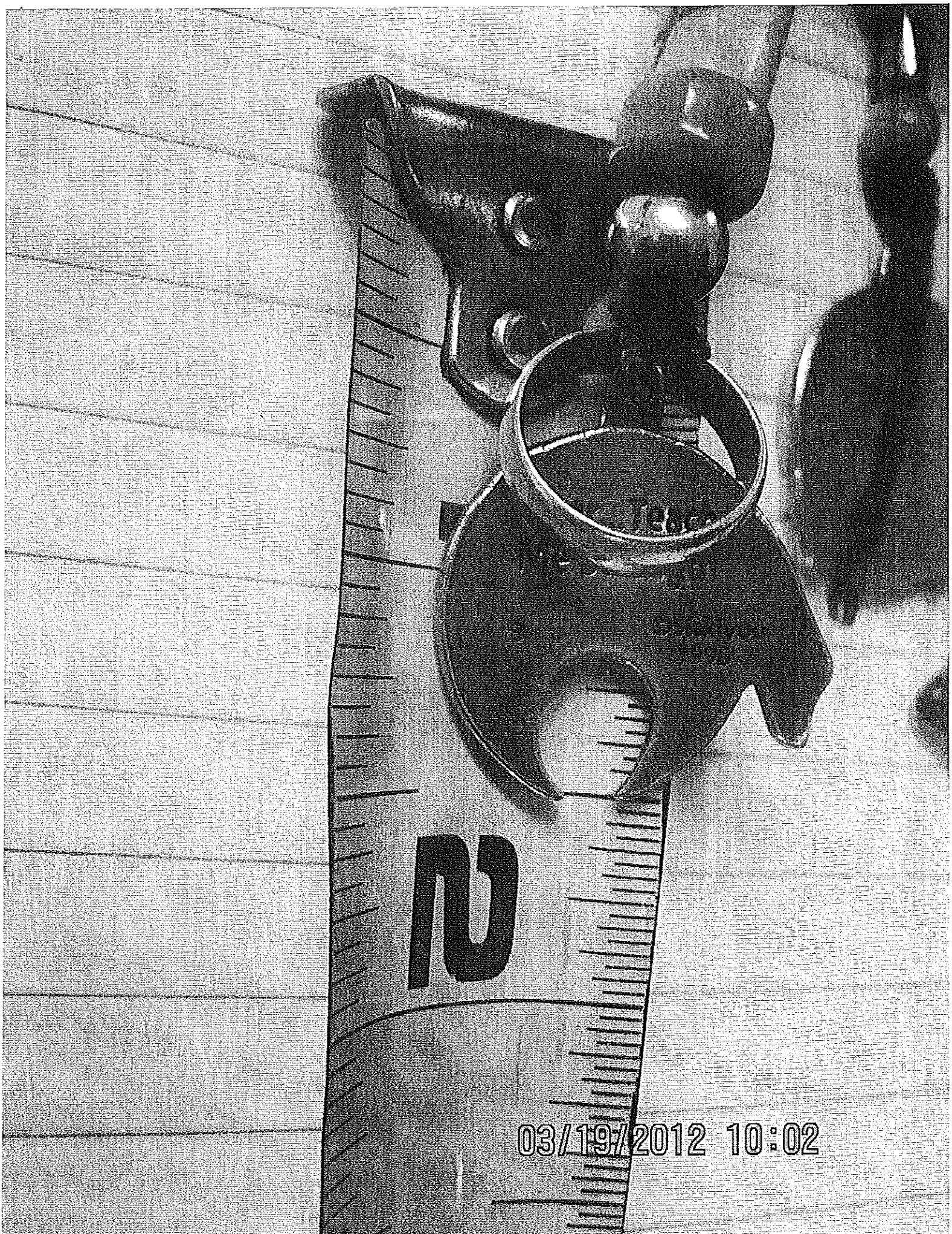
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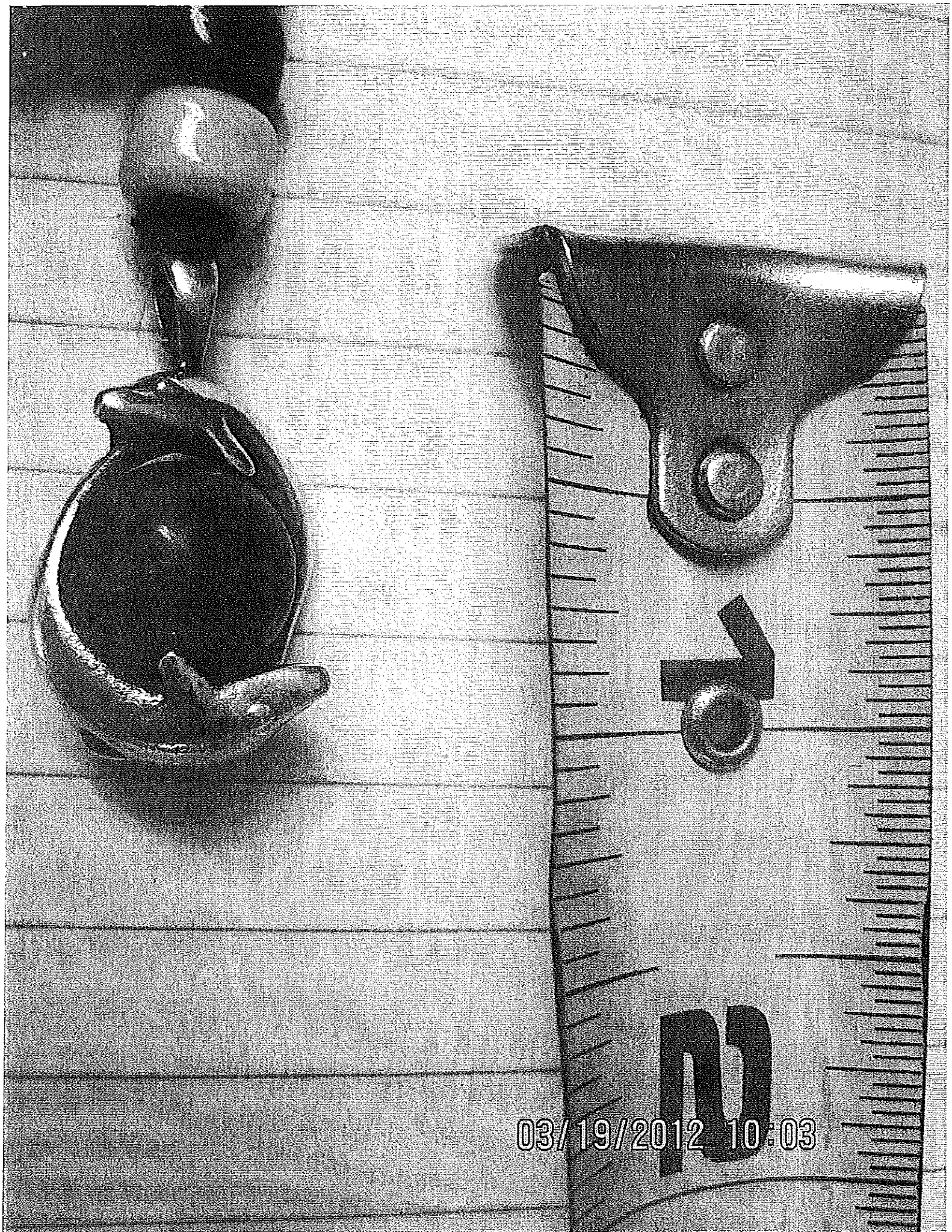
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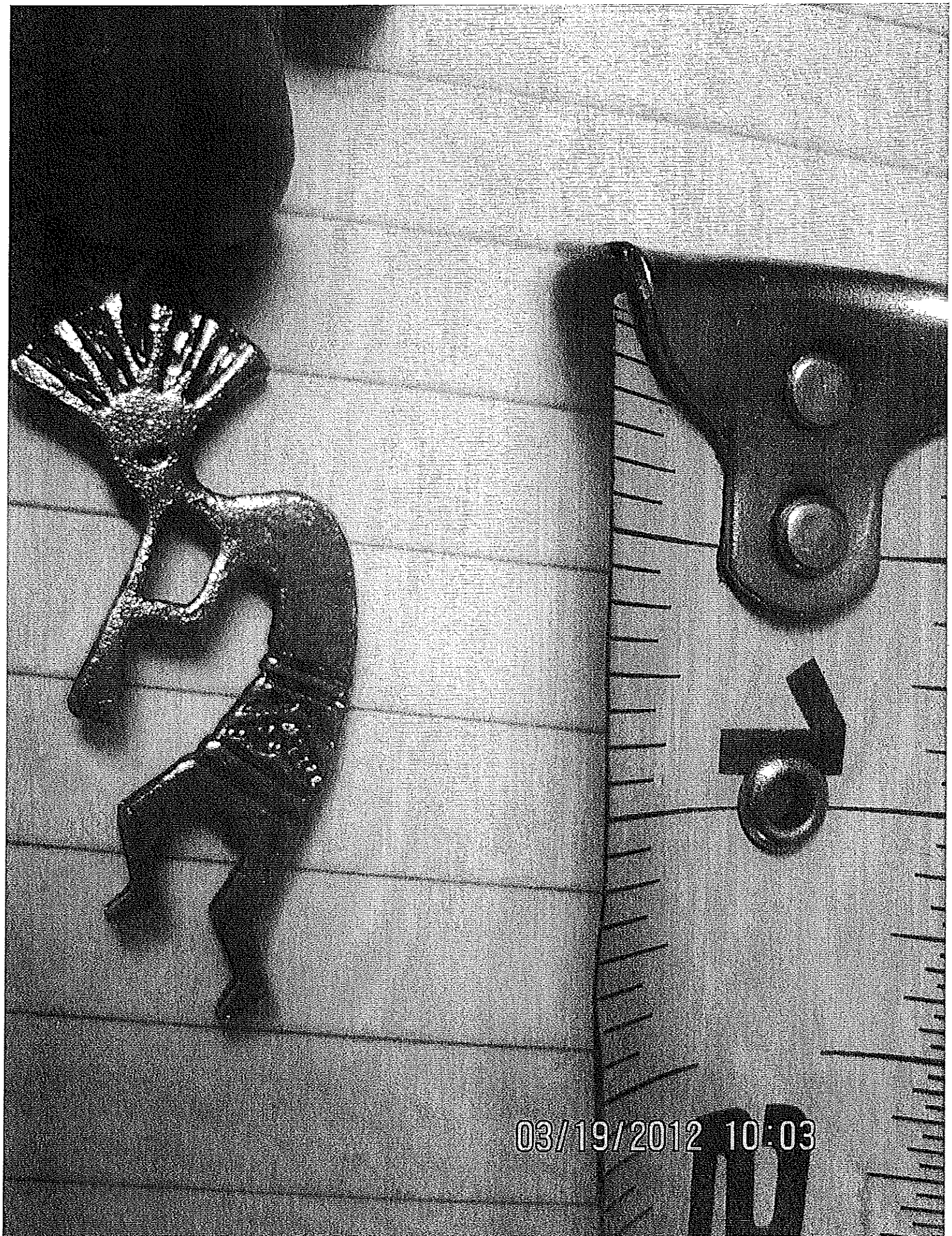
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