Issues: Management Actions (misapplication of policy) and Discrimination (religion); Hearing Date: 07/19/19; Decision Issued: 08/19/19; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 11371; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11371

Hearing Date: July 19, 2019
Decision Issued: August 19, 2019

PROCEDURAL HISTORY

Grievant was a teacher with the Virginia Department of Corrections (the Agency). The Grievant initiated his grievance on October 22, 2018, to challenge the requirement that he must submit to a mandatory full body screening using an electronic body scanning machine before entering the agency's facility. The Grievant has multiple objections to being required to pass through the body scanner. The Grievant alleges that the body scanner is not safe and subjects employees to higher than approved levels of radiation. Along a similar line, the Grievant does not want to be subjected to unnecessary doses of radiation and indicates he has experienced anxiety as a result of this issue. The Grievant has also asserted a religious objection to going through the body scanner because of the image it produces, which reportedly exposes both internal aspects of the individual's body (similar to an x-ray image) and the outlines of external body parts. Lastly, the Grievant expresses concerns about whether the use of the body scanner is appropriate legally and/or whether it violates an employee's privacy. After proceeding through the management resolution steps, the agency head denied the Grievant's request for qualification of his grievance for hearing, and EDR qualified the grievance as raising a sufficient question to qualify for a hearing on the issues of 1) religious discrimination, and 2) misapplication and/or unfair application of policy violating the employee's privacy and/or constitutional rights.

During that time, as a result of his anxiety reportedly resulting from the body scanner issue, the Grievant was on approved disability leave. The Grievant received short-term disability benefits beginning October 8, 2018, following a waiting period from October 1 through October 7. The disability claim has run its course and the Grievant was separated from employment with the agency.

EDR held that if the hearing officer determines that the requirement of the Grievant to go through the body scanner was improper or that the Grievant should have been offered an alternative, and that his absence on disability was the result of this body scanner issue, the

hearing officer will have authority to put the Grievant back in the position in which he should have been prior to the improper application of the body scanner matter. Such an order could include reinstatement and/or back pay, if warranted and appropriate under the circumstances.

On May 16, 2019, EDR appointed the Hearing Officer to hear the grievance. During the pre-hearing conference, the grievance hearing was scheduled for July 19, 2019, the first date available for the parties, on which date the grievance hearing was held, at the Agency's designated location.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's exhibits as numbered, respectively. The parties were permitted to file post-hearing briefs, which were received on August 9, 2019, and made a part of the grievance record. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether the Agency's application of policy discriminated against the Grievant based on religion?
2. Whether the Agency's application of policy violated the Grievant's constitutional rights against unreasonable search?
3. Whether any relief may be granted?

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Grievant. Grievance Procedure Manual* (GPM) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth.

This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy ... "the hearing officer reviews the facts *de novo* ... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

This matter is not a disciplinary grievance, but the principles from *Tatum* governing the hearing officer's authority apply.

The United States Equal Employment Opportunity Commission ("EEOC") has issued its Compliance Manual concerning "Religious Discrimination," clarifying the EEOC's guidance and instructions for investigating and analyzing charges alleging discrimination based on religion in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). The Compliance Manual's discussion of reasonable religious accommodations is particularly instructive, explaining the EEOC's view on when an employer is considered to have notice of an employee's requested religious accommodation, what is considered to be a "reasonable" religious accommodation, and what may be considered an undue hardship for an employer.

The EEOC indicates that the following requirements must exist before an employer is obligated to provide an employee with a religious accommodation:

- An applicant or employee seeking a religious accommodation must inform the employer of both the need for accommodation and that such an accommodation is being requested due to a conflict between religion and work;
- Once an employee has put the employer on notice of an accommodation request, the employee must cooperate with the employer's efforts to determine whether a reasonable accommodation can be granted; and
- The request for an accommodation by an employee must not impose an undue hardship on the employer.

Agency policy requires that an employee's request for a religious accommodation be made "in writing and given to the employee's immediate supervisor." DOC Operating Procedure ("OP") 145.3 § IV(E)(3), *Equal Employment Opportunity*. Grievant's Exh. 40.

OP 445.1, *Employee, Visitor, and Offender Searches*, provides, at § IV(A)(1):

> Searches of persons entering, leaving, or confined in DOC facilities are integral elements to a security and control program. Searches are effective deterrents in preventing the introduction of contraband into facilities, and contribute to the safety and well-being of all persons confined in, working in, or visiting a DOC facility.

Agency Exh. 4. At § V(A)(5)(a), OP 445.1 states:

> At facilities using full-body security X-ray scanning devices, individuals will be required to submit to an examination by the cell phone detector and the X-ray scanning device unless the individual is pregnant or has a medical condition that precludes the use of the full-body security X-ray screening system.

Further, at § V(C)(7), OP 445.1 states:

> Full-Body Security X-Ray Screening System

a) Full-body security X-ray screening systems shall be maintained and operated in accordance with the manufacturer's recommendations
b) Persons who are pregnant shall not be scanned in the full-body security X-ray screening system. A Warning Notice shall be posted at the entry to the search area and at the entrance to the full-body security X-ray screening system directing pregnant persons to request other search procedures.
c) Only documented, trained staff may operate a full-body security X-ray screening system.
    i. The display must be shielded so that no one other than the scanning system operator can view the scanned images.
    ii. Other than authorized investigators, no one but the scanning system operator may view any scanned image.
    iii. Other than as needed for investigative purposes, the scanning system operator shall not comment on or discuss any scanned image.
    iv. Post orders shall require the scanning system operator to maintain absolute confidentiality.
d) The system shall only be operated at the "Low" setting unless the Facility Unit Head or Administrative Duty Officer (in the Facility Unit Head's absence) approves a higher setting due to the inability to penetrate dense material in a specific scan.

e) If a full-body security X-ray screening system is in use, the search will be conducted in accordance with the operator's instructions.
f) Each employee shall be identified in the scanner system by their employee number. Persons without an employee number shall be identified by their government issued identification card number.
g) The scanner system tracks the radiation exposure using the identification number. If a person reaches the maximum allowable exposure (about 1000 scans within a year), they shall be searched by other methods (i.e., metal detector) until they are again eligible to use the full-body security X-ray screening system.
h) Persons who are pregnant or have medical conditions that preclude use of the full-body security X-ray screening system must provide documentation from a physician.
    i. Documentation for employees, contractors, volunteers, and interns shall be maintained in the facility's Human Resources Office. The Human Resources Office shall provide notice to the scanning system operator of facility staff, volunteers, etc. who are exempt from full-body security X-ray screening.
    ii. Persons who are exempt from full-body security X-ray screening shall be searched by other methods (i.e., metal detector).
    iii. An offender visitor who is pregnant or has a medical condition that precludes use of the full-body security X-ray screening system but did not know that they needed to provide documentation from a physician shall be allowed into visitation one time using alternate search methods.
        a. following *Comment* will be added to VACORIS Visitation Module "Waived X-ray screening on (date) due to undocumented medical condition."
        b. On each subsequent visit, the visitor will be required to present documentation from a physician so that the X-ray scan can be waived for entry to visitation.

The facility warden testified that the Grievant mentioned in an email on April 6, 2017, that he had a religious concern over the planned use of scanners. Again, in an email of August 9, 2017, the Grievant raised religious and moral beliefs. The warded did not inquire further for details. When the Grievant presented a medical note seeking an exception to the scanner, the warded did not grant the Grievant an exemption. The warden testified that he followed the Agency's OP 445.1, *Employee, Visitor, and Offender Searches.* Agency Exh. 4.

The visitation manager testified that she oversaw the implementation of the body scanners. She testified that the scanners had high and low settings; single and dual view. The Agency did not use the higher setting and the Agency's lower, single view setting on the scanners produced images not as detailed as those in the manufacturer's brochures. The scanned images are stored on the machine, out of view, and the images cannot be downloaded by the attending officers. The attending officers are trained and subject to confidentiality. The low, single view setting reveals offending contraband, particularly that which is hidden in body cavities and not found by standard pat down. The Grievant voiced his health and privacy concerns to her, but not a religious objection.

The prior regional principal testified that the Grievant expressed his concerns and objections to him, including health, privacy, and religion. He did not present the Grievant's concerns to Human Resources. The Grievant did not provide detail regarding his religious objection, as he stressed more the privacy and health concerns. The current school principal

testified that the Grievant expressed his full-body scanner objections to her, but not including religion. The Grievant presented medical notes in October 2016 addressing his anxiety and stress over the full-body scanners, and she forwarded to the warden for his consideration. Grievant's Exh. 25, 26.

The regional administrator testified that the Grievant made him well aware of the Grievant's concerns over exposure to radiation and invasion of privacy, but not religion specifically.

Another teacher testified that she was provided a medical exemption to the full-body scanner, but she agreed to random strip searches. Other staff members testified that entry to the facility through its sally port did not utilize the full-body scanner. Several corrections officers testified that the scanner was used on the low, single view setting, and to change the setting an officer would need permission. Some of the officers had health concerns over too much radiation.

The VDH inspector testified that the testing for radiation exposure from the full-body scanners was within acceptable limits.

The Grievant testified consistently with his grievance stance, questioning the health danger for all employees and visitors to the facilities. He also testified to his understanding that the scanner images strip away clothing, produced naked images of its subjects, reveals genitals, all invading his privacy rights and invading his religious beliefs. He testified to his Christian faith, and associated belief that his wife was the only person who should see him naked. On cross-examination, the Grievant admitted that before he initiated his grievance he did not explain to anyone at the Agency his religious beliefs forming his religious objection to the scanner, but he also asserted that nobody asked. After he initiated his grievance, he detailed his religious beliefs to EDR and, later, to the Agency's advocate through email messages. Agency Exh. 16. In his message to the Agency's advocate, dated June 24, 2019, he stated he was unwilling to return to work at the Agency, rejected the offered alternative job (with probation and parole that the Grievant had earlier applied for) with back pay and restored benefits—a stance the Grievant reasserted during the grievance hearing.

The scanner's manufacturer's business development director testified that there are no ill health effects from scanner use, and that the radiation doses are equivalent to normal everyday exposures. The more detailed images from the company's marketing and training materials only show the higher resolution images and not the results of the lower setting, single image used for the Agency's purposes.

The chief of corrections operation testified that the Agency carefully researched and elected to deploy the body scanner at the Grievant's facility and other locations, based on security need. He testified to the effectiveness of the scanners in the ever challenging task of eliminating contraband entering corrections facilities.

The employee relations manager testified that she conferred with the Grievant in January 2018 specifically about a possible medical accommodation, but the Grievant ended the

discussion abruptly without mentioning his religious objection, and her attempts to re-engage the Grievant went nowhere.

Analysis

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988). As previously stated, the Grievant's burden is to show upon a preponderance of evidence that the agency discriminated against him through misapplication or unfair application of policy.

As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules for Conducting Grievance Hearings* (*Rules*) provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A).

Religion

"If an employer has not been given adequate notice of an employee's religious conflict, then *ipso facto* the religious animus that the statute was designed to prevent cannot have existed." *Cary v. Carmichael*, 908 F. Supp. 1334, 1344 (E.D. Va. 1995) (citations omitted).

While not following the letter of the policy (OP 145.3), the Grievant initially placed the Agency on merely vague, insufficient notice of his religious objection to submitting to the full-body scanner, even well before the full-body scanner system was implemented. The Grievant's religious objection was expressed slightly and overshadowed by his broader health and privacy objections. In his post-hearing written submission, the Grievant stated succinctly:

> Although my exact religious beliefs were not included in text of many of the emails sent, if any of management had asked what those beliefs were specifically at any point [. . .], I would have gladly explained those to them as I testified.

This level of notice does not meet the sufficiency standard of notice of religious conflict.

The Agency has established alternative accommodation exempting at least one group. Based not on science or medicine, the Agency provided a policy exception to submitting to the

scanner for pregnant women and other medical conditions. OP 445.1. However, the chief of corrections operations testified that the pregnancy exception was not based on any scientific basis or medical risk. Because of the Grievant's minimal reference to religion, the Agency initially did not engage the Grievant in any accommodation analysis for his medical concern raised in October 2018. The Grievant's medical evidence establishes an anxiety and stress concern (albeit based on the Grievant's perceived health threat from the full-body scanner), and there is no contra medical evidence. Grievant's Exh. 25, 26. Thus, while the Agency's initial response to the Grievant's medical excuse was lacking, that issue is not qualified for the grievance.

In January 2019, the Agency ultimately issued a Group III Written Notice and termination based on the Grievant's refusal to submit to the scanner. The Agency unilaterally reconsidered the disciplinary termination and ultimately rescinded the discipline, preferring to extend the claimant's short-term disability through March 31, 2019. The Grievant did not request the extension of the short-term disability. At one time, however, following the rescinded Group III disciplinary termination in January 2019, the Agency offered the Grievant an alternative job that would not have required his submission to the scanner. The Grievant, however, refused to engage in a discussion of or consideration of this alternative job (a job the Grievant had actually applied for during the course of this dispute). The Grievant has unequivocally stated his refusal to return to work for the Agency under any circumstances.

I find that the Agency, however clumsily, returned to the medical accommodation issue to cure its prior denial to consider medical accommodation (that would, coincidentally, also satisfy a religious objection). The Agency's policy establishes that an accommodation exemption to submission to the full-body scanner is not unduly burdensome. In January 2018, the Agency, tried to invoke a medical/disability accommodation discussion with the Grievant, in accord with OP 445.1. The Agency did not articulate much to defend its prior lack of consideration and response to the Grievant's medical notes in October 2018, but the Agency appears to have tried to remedy its process to give more consideration for a possible medical exemption to the full-body scanner. The Grievant, however, withdrew from the accommodation analysis, and the Agency closed the inquiry. At that time, the Grievant failed to explain that he was, instead, raising or relying on his religious request for accommodation. Ironically, a medical exemption from the full-body scanner would have satisfied the Grievant's religious objection, even without an explicit religion exemption. With the Grievant's withdrawal from engagement generally with the Agency, it was reasonable for the Agency to consider the objection or request for accommodation, however couched, to be moot. The Grievant elected not to pursue long-term disability following the expiration of short-term disability on March 31, 2019, and the Agency classified the Grievant as resigned beginning April 1, 2019.

After the Grievant ultimately filed his grievance, the Agency proffered the alternate position in the probation and parole division, which job would not require the Grievant to submit to the full-body scanner. The Grievant flatly refused to consider the Agency's offer, which may appropriately be considered a proffered accommodation by the Agency. The Grievant's withdrawal from the engagement left the proffered accommodation untested for reasonableness under any analysis. As the Agency has pointed out, the proffered accommodation need not be the ideal one for the employee in order to be reasonable.

The relief that would be available to the Grievant if he prevailed is reinstatement and the potential restoration of benefits including back pay. Because the Grievant has unequivocally refused returning to work for the Agency, without such reinstatement, there is no relief I may provide to the Grievant.

Privacy

Given my decision, because the Grievant has rejected actual return to work with the Agency, it is not necessary to address the claimant's privacy challenge to the use of the scanner. "[F]aithful adherence to the doctrine of judicial restraint warrants [the] decision of cases on the best and narrowest grounds available." *Ferguson v. Stokes*, 287 Va. 446, 455, 756 S.E.2d 455, 460 (2014) (McClanahan, J. concurring) (citing *McGhee v. Commonwealth*, 280 Va. 620, 626 n.4, 701 S.E.2d 58, 61 n.4 (2010) (quoting *Air Courier Conference v. Am. Postal Workers' Union*, 498 U.S. 517, 531, 111 S. Ct. 913 (1991) (Stevens, J., concurring)). Since the Grievant will not return to work with the Agency, and his job loss is attributable to the Grievant's actions and elections, the privacy objection is rendered moot.

Nevertheless, I will address privacy as qualified by EDR. Grievant alleges that the scanner requirement violates the Fourth Amendment's prohibition "against unreasonable searches and seizures." U.S. Const. amend. IV. Unless an exemption has been granted or the individual has reached the annual exposure limit, all employees go through the scanner each time they enter through the facility's front entry. This requirement applies to all non-exempt employees without regard to whether they are suspected of wrongdoing.

The Agency recognizes that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Nonetheless, "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable.'" *Chandler v. Miller*, 520 U.S. 305, 323 (1997). The screening of Agency employees using the scanner is properly characterized as an "administrative search," as its aim is not to gather evidence for law enforcement purposes, but rather to prevent the introduction of contraband into Agency facilities. *Cf. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (finding the screening of passengers in the nation's airports to be an administrative search "because the primary goal is not to determine whether any passenger has committed a crime but rather to protect the public from a terrorist attack"). "An administrative search does not require individualized suspicion." *Id.* (citing *Edmond*, 531 U.S. at 41, 47–48). "Instead, whether an administrative search is 'unreasonable' within the condemnation of the Fourth Amendment 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* (quoting *United States v. Knights*, 534 U.S. 112, 118–19 (2001)).

Searches conducted using the scanner are minimally intrusive, particularly in light of the diminished expectation of privacy held by employees of a correctional institution, *see Braun v. Maynard*, 652 F.3d 557, 561 (4th Cir. 2011). Despite Grievant's assertion otherwise, the

images produced by the scanner are not like nude photographs. The subject's facial features and external anatomy cannot be seen. Genitalia are not visible, particularly when images are taken on the low, single-view setting (as policy requires for screening of employees), both because the setting is too low to produce a detailed image and because the scan is taken from the subject's back. *See* Agency's Exh. 15, at 227–29; Exh. 17; *see also supra* note 5.

In some ways, the scanner is less intrusive than these other, alternative search methods. For instance, unlike with a pat-down or frisk search, which also may reveal a person's medical device, the scanner screening does not involve any physical touching of the person being searched. The scanner is also less intrusive than a strip or cavity search, which would require the subjects actually to remove clothing and expose bodies (rather than a digital rendering of the insides of their bodies) in the full view of other employees.

The Agency has also taken a number of steps to protect employee privacy with regard to their scanned images. The monitor used by scanner operators is placed so as to shield images from the view of passersby. Agency's Exh. 15, at 212, 225–26. Operators are required by policy to maintain strict confidentiality, *see* OP 445.1 § V(C)(7)(c), Agency's Exh. 18, and are subject to discipline for privacy violations.

Finally, while exposure to radiation emitted by the scanner may be a factor relevant to the intrusiveness of the search, *see* Qualification Ruling, at 7, the evidence in this case shows that the amount of radiation employees are actually exposed to is minimal. Per the manufacturer's specifications, a person going through the scanner on the low, single-view setting is exposed to 0.25 microsieverts (µSv) of radiation per scan. Agency's Exh. 11, at 202. The scanner tracks each employee's cumulative exposure and will not allow the employee to be scanned once he has exceeded 250 µSv, (the equivalent dose of 1,000 scans on the low, single-view setting) over a twelve-month period.

Somewhat troublesome is that measurements taken by the Virginia Department of Health ("VDH") conflict with the manufacturer's specifications. During an inspection on October 26, 2018, VDH inspectors measured the radiation output on the low, single-view setting at 95 µrem (0.95 µSv). Grievant's Exh. 49. The Agency has been unable to determine a reason for this discrepancy, and it does not concede that VDH's measurement is more accurate than the manufacturer's specifications. Nonetheless, even accepting the VDH measurement as the outer bound of the scanner's radiation output, the health effect from this level of exposure is negligible.

Both Virginia and federal regulations provide that a single source should expose individual members of the public to a cumulative dose of no more than 100 mrem (1 mSv) in a year. *See* 10 C.F.R. § 20.1301 (Nuclear Regulatory Commission); 12 Va. Admin. Code § 5-481- 720 (VDH). At the per-scan levels measured by VDH inspectors, an individual who is scanned 1,000 times at the setting applicable to employees would receive a cumulative dose of 95 mrem (0.95 mSv), falling inside of this limit.

The Grievant has failed to prove that his job duties would actually require him to undergo 1,000 scans in a year. Even under the assumption that he would be scanned this many

times, he has also failed to prove that this level of exposure has any appreciable impact on human health. In fact, the evidence instead proves that the dose limits set by regulation fall well within safe levels. In her testimony at the hearing, the VDH inspector and witness for Grievant, put these regulatory limits in perspective. For example, the dose from a single chest X-ray is 10 mrem (0.1 mSv), equivalent to more than 100 scans. The average annual level of exposure from natural background sources is 300 mrem (3 mSv), more than three times the maximum dose from the scanner. The annual limit for workers in radiation-related occupations—individuals no less susceptible to the adverse health consequences of radiation than Grievant—is 5,000 mrem (50 mSv), more than fifty times the maximum amount Grievant could ever be exposed to from the scanner in a single year. *See* 10 C.F.R. § 20.1201(a)(1); 12 Va. Admin. Code § 5-481-640(A)(1). These figures show that the scanner does not cause any noticeable health effects. Cumulatively, the radiation dose from the scanner falls well short of what an individual may be passively exposed to from natural sources, let alone the levels permitted for radiation workers. Based on the evidence presented, on a per-scan basis, the scanner's impact on the subject's health and safety is essentially nonexistent. In either case, because the potential for harm is so low, the exposure to radiation does not make the search any more intrusive.

In contrast to the minimal intrusiveness of the search here, the Agency's interest in using the scanner to intercept contraband is compelling. There can be no question that prison officials have a substantial interest in limiting the flow of contraband into correctional facilities. *See Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Here, the evidence has shown that this interest is particularly acute within the Agency's corrections facilities, where drugs and other items smuggled into facilities pose a significant threat to the well-being of staff and inmates. As Agency chief of corrections operation testified, the Grievant's facility was among several facilities that experienced high levels of contraband incidents, which then-existing security measures were inadequate to prevent. Agency officials considered several ways of addressing this problem, and ultimately determined that the scanner would be the method that could be most effective in screening for contraband while also minimizing the intrusion into the privacy of employees and visitors.

These concerns let the Agency to elect to use the full-body scanners, and such policy prerogative is beyond a hearing officer's reach to change or negate. Because the Agency has determined that the scanner is an effective response to a vital security need, and because it is no more intrusive than is necessary to meet that need, the requirement for employees to be scanned upon entry into the facility is permissible under the Fourth Amendment.

As already discussed above, the Grievant's refusal to engage in accommodation dialogue is the direct cause of his separation from employment. It was essentially the Grievant's election to cease accommodation dialogue. As argued by the Agency, having been the first to walk away from a potential compromise, the Grievant cannot reasonably argue that the Agency bears full responsibility for his resignation. Perhaps more importantly, the Grievant has not proven that his religious or privacy-related objections were the driving force behind his decision to resign. Rather, the record shows that the predominant basis for the Grievant's refusal to go through the scanner was his fear of adverse health effects. Throughout his communications with Agency management and in this grievance process, the Grievant's concerns about his privacy and especially about his religious beliefs have been secondary to his claims that the scanner was

unsafe. An instructive example of this is the doctor's note, dated October 3, 2018, which Grievant presented to management in an attempt to obtain an exemption from the scanner requirement. Grievant's Exh. 25. In this note, the physician states that the Grievant is "concerned by the information he has obtained indicating that the amount of daily radiation exposure is excessive by national standards" and that "[h]is anxiety and stress over this new policy and screening procedure has been exacerbated by his family history which includes multiple types of cancers." *Id.* Nowhere in this note does Grievant's physician attribute his stress and anxiety to his concerns about his privacy or his religious beliefs. *See id.* The record suggests that these same psychological symptoms formed the basis of Grievant's claim for short-term disability benefits. *See* Grievant's Exh. 20 (letter from disability benefits administrator requesting that Grievant be exempted from scanner requirement "[d]ue to environmentally induced anxiety and psychosomatic symptoms").

Based on the evidence, the exposure to radiation emitted by the scanner is not a condition that is so objectively intolerable that a reasonable person would be driven to resign. Furthermore, even if the Agency has been found to have acted wrongly as to Grievant's claims for religious discrimination or privacy violation, it would make little sense to hold it liable for his resignation on these grounds if he in fact resigned for an entirely different reason. Because the issues that have qualified for grievance here were not the primary drivers behind his decision to leave employment with the Agency, Grievant cannot prevail in his claims.

Summary and Conclusion

The Agency's application of policy did not discriminate against the Grievant based on religion. The Agency's application of policy did not violate the Grievant's constitutional rights against unreasonable search. Regardless, no relief could be granted because of the Grievant's unilateral and unequivocal refusal to return to work for the Agency.

Job loss is a harsh result in this situation, but the Grievant bears responsibility for the failure to confront the Agency's response to both a medical exemption and, ultimately, a religious exemption. I find that the Grievant failed properly to raise his religious objection. The Grievant focused on safety and privacy objections, and asserted a medical exemption, leaving his religious claim at the bottom of his expressed objections. As discussed above, the privacy objection fails to overcome the Agency's demonstrated need. Regardless, because the Grievant withdrew from any engagement with the Agency regarding his quest for medical accommodation and exemption, and because the relief I could provide is limited to reinstatement to his former position, the Grievant's unequivocal rejection of reinstatement renders such a useless act, and the law does not require a useless or futile act. Even if reinstatement were ordered, the unique circumstances present here weigh against an award of back pay. The Grievant was on short-term disability when the Agency tried to engage him regarding a possible medical exemption to the full-body scanner. The Grievant's withdrawal from any engagement with the Agency for accommodation, even if a medical exemption, or accommodation otherwise with an alternate position, renders back pay inappropriate even if reinstatement were justified and feasible.

DECISION

For the reasons stated herein, I deny the grievance seeking reinstatement, benefits and related relief.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer