

DECISION AND ORDER

JIM UNDERWOOD, Appellant,

v.

DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on March 15, 2016 before Hearing Officer Valerie McNaughton. Appellant was represented by Marcy Ongert, Esq. and David Canter, Esq. Assistant City Attorney Charles Mitchell represented the Agency in the appeal. The Agency called John Romero and Shannon Elwell. Appellant testified on his own behalf, and presented the testimony of James Sanford, Daniel Lusk and Dauphin Maxwell.

I. STATEMENT OF THE APPEAL

Appellant Jim Underwood appealed his thirty-day suspension dated Oct. 28, 2015 based on a June 15, 2014 incident with an inmate and his subsequent incident report. The parties stipulated to all submitted exhibits, which are Agency Exhs. 1 – 17, and Appellant's Exhs. A - E.

II. FINDINGS OF FACT

Appellant has been a Deputy Sheriff with the Denver Sheriff's Department for the past ten years. On June 15, 2014, an inmate named Mohamed Dirshe¹ filed a grievance against Appellant complaining that Appellant had said to his cellmate, "[t]ell your partner Abdul the towelhead to come out." MD considered the remark highly insulting, racially offensive and humiliating.

Officer Underwood requested that I wrap up my stuff to be moved. I complied with the order. As I was getting ready, he opened the door and yelled, "Abdul, let's go." My cellmate walked out and asked Officer Underwood to repeat his request. My cellmate [TB] was told, "Tell your partner Abdul the towelhead to come out." I personal could not believe

¹ In general, inmates are identified by their initials in the interest of privacy. In this case, however, Appellant's use or misuse of the name is part of the reason for the discipline. When necessary to allow for an understanding of the facts and context, the inmate's full name will be used. In other contexts, the initials MD will be used.

what I heard. My cellmate asked if my name was Abdul, and responded "No, my name is Mohamed Dirshe." Everyone present during the lunch chow heard that. I proceeded to ask Officer Underwood that the term "Abdul the towelhead" was offensive and it's clearly a racial remark, and misconduct of unbecoming an officer of the law, it's [devastating] to me as a person. Officer Underwood laughed and replied, "Ok ok, is Mohamed better?" I told Officer Underwood the racial remarks were of no laughing matter and yelled at him and I quote "you piece of shit" 3 times. ... The term 'towelhead' is a reference to what Islamic male[s] wear on their head which is popularly known as a turban. ... I believe Officer Underwood was retaliating to my move from 4C 211 to 4C 216. I believe he feels that he wanted the final say in my transfer which happened late last night by a different officer. He told me he didn't approve of the transfer.

[Exh. 8.]

In his shift log for that day, Appellant stated that the inmate had been moved from his original cell overnight,

for unknown reasons. He transferred in to the POD yesterday and asked to be moved to 216 because that was his friend - I said no. Not that it makes any reason unless there was a problem but one is white and one is black. I will move [MD] to another cell because he doesn't run this POD.

[Exh. 7.]

An hour later, Appellant wrote a report documenting the incident that followed the above log entry. Appellant stated he had ordered MD to move from cell 216, and the inmate refused.

I told him to roll his stuff up 3 times and after 40 minutes I told him I would have the tier porters wrap his stuff up if he did not hurry it up and he called me a piece of shit and he refused to go to his new cell 112 where the age and race was a better match (same race and 5 years difference compared to black and white and 9 years [the age and race of inmate in cell 216]). He decided to say I was a [racist] and I didn't pronounce his name correctly. All in an attempt to run the POD, causing other prisoners to yell and act up (other prisoners started yelling and saying Underwood is a piece of shit). This was an inept attempt by him to get his way. My dealings with him is he will con and do anything to get his way. He told me again, he would not go in to 112 but he did decide to go in to the sally port to go to another POD. No force was used. I contact[ed] classification and floor Sgt. where he was taken away.

[Exh. 6-1.]

The inmate grievance was assigned to the Internal Affairs Bureau for investigation, and MD was interviewed on July 9, 2014. He told the investigator that on June 13th he asked Appellant to move him because he was having issues with his older cellmate, who complained MD was too loud. After Appellant refused, MD separately asked two other deputies to move him. The second deputy granted the request during the night. When Appellant came back on shift the next morning, he observed MD in cell 216. After returning from lunch, MD was playing cards with TB, the inmate already in that cell. Appellant knocked on the door and said, "Dirshe, wrap it up." MD told the investigator,

At first I ignored him. I think he's not happy that I've been moved, is my initial thought. Five to ten minutes passed and he comes back. He knocks on the door and say he needs me to wrap it up 'or I'm going to have it wrapped up for you.' ... I get up. ... I take my time because I still have food that I brought in that I was eating.

He pops the door. [TB] walks out. He tells [TB] 'tell Abdul to hurry up.' He knows my name. [TB] knows my name, but asks 'you're not Abdul, are you?' [TB] goes back out and says, 'there's no Abdul in here'. Underwood replied '[t]ell your partner Abdul the towel head to wrap it up.' TB said, 'he's not my partner. We're not gay.' I gather my stuff and go out there. ... He says, 'I need you to hurry up.' I said, '[f]irst of all I'm working on it, and second of all I'm not Abdul.' I'm frustrated. He's just smiling ... He called me Abdul twice. He said it to [TB], then I heard it again as I was walking out. Then he called me Mohamed.

I told him, '[i]t's not funny to call me by a different name that's not mine. ... I don't put a towel on my head, I've been a Christian since 2000. He went down to where his cubic office is. I got really mad. ... At that point, I repeated again and told him, '[m]y name is not Abdul.' I yelled at him. I called him a piece of shit three times. 'I'm not staying here with you using all those racial slurs against me.' ... He called me Abdul twice. ... I did get a lot of support from people; I could hear people cheering ... after I voiced my opinion.

[Exh. 13.]

That same day, the investigator interviewed TB, who said he too assumed Appellant was upset with MD over the cell move. Appellant told MD to pack his stuff. After five minutes, during which MD was eating the rest of his lunch from a cup, Appellant told TB, "[t]ell Abdul to move his stuff, tell your partner to get down here." TB said he has no partner. Appellant replied, '[y]ou know what I'm saying. Tell towelhead to get down here." TB told the interviewer that Appellant had called MD by the name Mohamed the entire day before, and TB did not think it was a mistake. "I thought it was very insensitive to call him Abdul when he knows full well his name is Mohamed. ... The man speaks seven different languages, he's highly intelligent. I mean yeah, we're all in jail, but just because we're in jail doesn't mean we're not people." TB has never heard Appellant use racially disrespectful names at any other time. [Exh. 14.]

Appellant was interviewed on Aug. 8, 2014. He said that on June 14th, MD was admitted to Housing Unit 4C, a maximum security pod. MD asked Appellant if he could be moved from cell 211 to cell 216 "because they were friends." [Exh. 9-21.] Appellant refused, and told him he should file an official request, called a kite, to ask for the transfer. The next morning, Appellant discovered that another deputy had granted his request, and MD was now in cell 216 with TB. Appellant checked with the Classification Unit to see if the move had been approved. When he learned it had not been, he wrote a shift log entry stating he intended to move him into another cell. [Exh. 7.]

Appellant waited until after the lunch break, then went to the cell, opened the door and said, "Mr. Dirshe, roll up your stuff, you're going to be moved." Appellant observed that MD is an African American who is 6'9" and about nine years older than TB, who is white and much shorter than MD. Cell assignments are made by the Classification Unit and housing deputies, with the help of housing alerts which may show gang affiliations and other relevant history. There are no written guidelines for cell assignments, and deputies are expected to follow general guidelines and exercise their discretion based on their knowledge of all the circumstances. [Romero, 9:35 am.] Generally, deputies attempt to match inmates by size, race and age in an effort to avoid safety concerns. Appellant was aware from a housing alert that MD had just been moved from a different pod after testing positive for intoxication, along with three other cellmates. Four days before that, alcohol had been found in their cell. [Exhs. 9-3 to 9-14; D-7, D-8.]

MD asked why he was going to be moved. Appellant responded by telling him to hurry up, and walked back to his desk, leaving the cell door open. When MD continued to delay, Appellant became more insistent. "Abdul. Wrap up your stuff or I'll have the tier porters wrap it up." Appellant told the investigator that it was unintentional, and he may have called him Abdul instead of Mohamed because he didn't have his correct name in front of him when he was trying to get MD to pack up. [Exh. 9-17, 9-24.] TB asked MD if his name was Abdul. MD said no. TB stepped out of the cell and said, "[t]here's no Abdul here." Appellant repeated, "Abdul! Wrap it up or I'll have it wrapped up for you." MD "exploded", telling Appellant that is not his name, adding, "[t]hat's racist. You're a piece of shit." He repeated that phrase angrily, and soon other inmates were shouting, "Underwood's a piece of shit", and demanding to get released for their free time. MD left the housing unit, stating he would not be in the same place with Appellant. MD was met at the pod door by Appellant's supervisor Daniel Lusk, who observed MD was "miffed". [Lusk, 2:02 pm.] Lusk reported that MD told him "the building officer was racist", and asked for a grievance form. [Exh. 6-2.]

Appellant charged MD with two offenses in custody: refusing an order and disrupting the pod. The internal Conduct Adjustment Board found MD not guilty of the first offense, but guilty of the second. [Exhs. 1-13; D-2.] That same day, the watch commander reviewed the staff reports stemming from this incident, and found that appropriate action was taken by the officers involved. [Exh. D-6.]

Over a year after the incident, Appellant was served with a pre-disciplinary letter charging him with violation of six Career Service Rules² and nine departmental rules based on asserted racial harassment and inaccurate reporting. At the pre-disciplinary meeting, Appellant submitted a four-page written statement, and spoke at length in answer to the allegations and oral questioning. Appellant said he called MD Abdul by mistake, and generally calls inmates by their last name. When he first approached the cell to move MD, he said, "Dirshe, wrap up your stuff." Because MD was not complying, Appellant decided to try to get his attention by using his first name. The delay was holding up release of the other inmates for their regularly scheduled free time, and they began to complain. Appellant said, "Abdul, come on, let's go", and told him that if he didn't gather his things, Appellant would have the tier porters do it for him. When TB said there was no Abdul there, Appellant thinks he said, "Abdul – the tall one". Appellant denied calling MD a "towelhead". "I think I said 'the tall one'". When asked to clarify, Appellant said, "I think I said, 'Abdul, the tall one' – is what I think." The disciplinary letter added in a footnote that MD's booking slip shows MD is 6'9" tall. [Exh. 1-8.] After MD yelled at him, the other inmates started yelling too. [Exh. 3-12.] Sheriff Diggins asked Appellant if he knows anyone named Abdul. Appellant said his tailor when he lived in Thailand twenty-three years ago is named Abdul, and they have stayed in touch. [Exh. E-20.]

He apologized for not taking the Internal Affairs investigation seriously, explaining that he thought MD was angry because he was told to move, or that Appellant had mispronounced his name. He said he did not further comment on MD's accusation of racism in his report because he had not said anything racist, and did not believe mistaking his name could have led to the allegation. He denied laughing at MD to humiliate him after MD called him a racist. "I may have laughed at some point because I have a habit of laughing as an attempt to [defuse] tension", an "involuntary reaction" that he admits could have been misconstrued. [Exh. 3-3.]

The decision-maker, Civilian Review Administrator Shannon Elwell, found that Appellant "used a racial epithet – 'Abdul' – multiple times when referring to an inmate whose name was not Abdul, whose name he knew was not Abdul, and with the intent of discriminating against, harassing, and intimidating the inmate based on his perceived racial background. Deputy Underwood then laughed at the inmate's reaction." [Exh. 1-16.] Elwell also found that Appellant failed to submit a complete report in that he excluded any reference to calling MD Abdul, "making it appear ... that [MD] was responsible for the unrest in the housing unit." [Exh. 1-22.] He "lacked candor in his explanation for making the comment", and was "less than forthcoming in describing his reasoning for and state of mind in calling inmate MD 'Abdul'". [Exh. 1-21.] Elwell believed that Appellant was angry with MD for being demanding, especially in getting another deputy to move him to the cell of his friend.

² Since this appeal was filed, the Career Service Rules have been revised. Because the previous version of the rules were in effect at the time discipline was assessed, that version controls the outcome in this appeal.

In aggravation, she found that his comments “constituted actual and demonstrable prejudice to the Department, in that at least two, if not more, inmates observed a Denver deputy sheriff using a racial epithet to refer to an inmate in his care.” [Exh. 1-19.] She also found that he had failed to understand the seriousness of the matter and had not taken responsibility for his conduct. [Exh. 1-21.] When balanced with the mitigating factors of no previous discipline and positive performance evaluations, Elwell found the conduct merited the presumptive penalties in all sustained rule violations. She therefore imposed two thirty-day suspensions and one two-day suspension, all to run concurrently. [Exh. 1-23.]

At hearing, Elwell testified that she did not find Appellant had used the word “towelhead”. She found instead that his use of the wrong first name, Abdul, was a racial epithet when considered in the totality of the circumstances. Elwell found the misconduct caused actual and serious impact on the city by virtue of MD’s grievance and his act in leading other inmates in a chorus against Appellant. [Elwell, 11:30 am.]

III. ANALYSIS

The Agency divided its findings on the rule violations into three categories: racial harassment, conduct prejudicial, and inaccurate reporting.

1. Racial harassment

The Agency’s finding in support of the racial harassment allegation is that Appellant called an inmate Abdul, knowing his name was Mohamed, with the intent to discriminate against him based on his race, then laughed at him. [Exh. 1-16.] The Agency determined that Appellant used the wrong first name as a racial epithet, which is prohibited by the rules cited in the disciplinary letter. The decision-maker believed that Appellant knew MD’s real first name, and that Abdul is a commonly understood racial epithet, similar to calling a Mexican-American Juan or Pablo. Elwell stated that her understanding of the term is also based on a conversation with a Muslim friend who told her she was called Abdul after the Sept. 11th bombing of the World Trade Center in New York, and considered that a disparaging statement. After issuing the disciplinary letter, Elwell googled “Abdul”, and testified that she found it was listed as a racially derogatory name for someone of Muslim descent. Appellant’s attorney stated during the Elwell cross-examination that she too had googled “Abdul”, but found no such meaning.

Judicial notice of even a common word usage via an internet search should be preceded by authentication of the website from which the usage is taken in order to provide a basis for a finding that the source is sufficiently reliable. David J. Dansky, *The Google Knows Many Things: Judicial Notice in the Internet Era*, 39 Colo. Law. 19, 24 (Nov. 2010). Prior to deciding whether the results of an internet search of a specific name is such a reliable source, it must be determined whether the offered interpretation of fact is the type that can be subject to judicial notice.

Well-established Colorado law prohibits a court from taking judicial notice of “facts on the very issue the parties are litigating”. Municipal Subdistrict, Northern Colorado Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701, 711 (Colo. en banc 1999); citing Hughes v. Jones, 3 P.2d 1074, 1076 (1931). The essential factual issue in this appeal is whether Appellant’s use of Abdul to address the inmate was a mistake or intended as a racial insult. That issue requires a finding about Appellant’s intent at the time he used the name. Neither Google, the Oxford English Dictionary, nor the Urban Dictionary can provide any relevant information on that question. It is therefore not a proper subject for judicial notice.

The Agency argues that Appellant’s denial of discriminatory intent is not credible because he gave different explanations at various times. During his IAB interview, Appellant said he called him Abdul because that’s what he thought his name was. At another point, Appellant said he mispronounced his name. At the pre-disciplinary meeting, Appellant said he misspoke, just as he sometimes does with his children’s names. When asked if he knew MD’s name was Mohamed, Appellant said he did know that. Elwell found that those statements are in direct conflict. She believed that Appellant could not both know that MD’s first name was Mohamed and think that his name was Abdul. She reasoned that if he was lying about this, it was to cover up his racist intent.

However, Appellant consistently explained that he called MD Abdul, “thinking in the moment that Abdul was his first name.” [Exh. 1-4; see also Exh. 9-17; Appellant, 3:08.] He referred to it variously as a mistake, “an innocent blunder”, and the product of momentarily forgetting MD’s real first name. [Exh. 3.] At hearing, Elwell quoted Appellant as having said, “I just picked a name” when asked if calling him Abdul was a racist statement. [Elwell, 11:42 am.] When asked twice at the pre-disciplinary meeting whether he “picked a name”, Appellant demurred, explaining instead that it was a mistake. “I said Abdul instead of Mohamed.” [Exh. 4-30.]

Appellant was first questioned about his use of the name Abdul two months after the event. At first, he did not remember calling MD Abdul, and thought MD exploded in anger because he mispronounced his last name, Dirshe. He then stated that he may have called him Abdul because he didn’t have his name in front of him, “and I was just looking at him, I just ---hurry it up ... I’ve mispronounced my kids’ names. I’ve called them the wrong names when they need to hurry it up and do something.” [Exh. 9-17.] He was then asked whether he thinks calling the inmate Abdul was racist. Appellant answered, “you could probably find that name in any race around the world ... so I don’t think it’s any kind of race: there’s white, black, red, whatever, that are named Mohamed or named Abdul.” On its face, the answer does not indicate that he selected the name Abdul because MD looked Muslim, but states only that he does not think the name Abdul indicates any specific race or color.

Appellant became more articulate in his written response to the pre-disciplinary letter: “I believe I called Mr. Dirshe “Abdul”, thinking in the moment that Abdul was his first name.” Appellant later regretted not apologizing for using the wrong name, but by then MD was “very mad”, and repeatedly called Appellant “a piece of shit”. Appellant responded, “[t]hat’s one shit”, “that’s two shit”, “that’s three shit”. When other inmates

starting calling out, "Underwood's a piece of shit", Appellant decided he had better move MD out of the pod to avoid further problems. [Exh. 6-1.] "If I could go back in time and explain to him that I meant no harm by calling him the wrong first name, I would." [Exh. 3-2, 3-3.]

Based on a thorough review of all of Appellant's statements over the twenty-month life of this incident, I find no inherent inconsistency in his statements. Appellant had known MD for little more than one day, where he was one of about 60 other inmates. He believes he knew MD's name, although he may have mispronounced the last name when he first asked him to move. After waiting about 40 minutes for MD to comply with his order, Appellant decided to try to get his attention by switching from his last name to his first name. In that moment of impatience, Appellant momentarily forgot the name Mohamed and called him Abdul. After being told by MD that his name was Mohamed, Appellant corrected himself and called him Mohamed.

Tier Porter Dauphin Maxwell testified that he met Appellant while incarcerated, and was present during the event. He confirmed that "everyone called [MD] the tall kid or the tall guy" because of his unusual height. He observed that Appellant looked irritated after MD ignored his order to get his things together, and raised his voice to make sure MD could hear him. Maxwell testified that Appellant is known to be firm but fair in his interactions with inmates. [Maxwell, 4:40.] Appellant recalled that when TB said there was no Abdul there, he thought they were playing games with him. In an effort to identify the inmate by physical description, he said, "Abdul, the tall one." When MD exploded in anger, saying, "[m]y name is not Abdul, you piece of shit, it's Mohamed Dirshe," Appellant said, "Okay, okay, Mohamed, then."

Once he understood he was being charged with making racially charged statements, Appellant offered the names of four sergeants and a captain to vouch for his lack of racial bias. [Exh. 1-7.] The Agency did not contact those persons. [Elwell, 11:28 am.] At hearing, Appellant presented the testimony of his supervisor for the past year, Sgt. James Sanford, who testified he would be shocked if he heard Appellant had said anything racist. Sanford described Appellant as "an awesome officer" who takes care of business. He has never heard of any complaints of discrimination against Appellant. Sanford testified that he has been faced with the same situation as Appellant faced on June 15th, and he would do almost the same thing: he would move the prisoner first, then call Classification. He confirmed that Appellant sometimes laughs in tense situations. "I would consider it more of a nervous tic at times." [Sanford, 12:08 pm.] He added that Appellant has always taken his job very seriously.

Sgt. Daniel Lusk, Appellant's supervisor at the time of this incident, testified that he had "never ever detected ... that Underwood as a human being or an officer holds any type of bias, malice, or prejudice against any group." While not a friend of Appellant's outside of work, Lusk has worked with Appellant when they were both deputies and as his supervisor. Lusk is impressed with Appellant's attitudes about the value of travel and "seeing how different cultures live" based on his military service in Thailand and his daughter's attendance at an international school there. Lusk stated that he often assigns Appellant to a special management unit, which requires the exercise of discretion and respect for inmates based on issues such as protective

custody, child abuse, or mental health status. "My experience with Underwood is he is an individual with a calming effect." [Lusk, 2:13 pm.]

Several years of performance reviews indicate Appellant "shows no discrimination, bias or favoritism", and "works well to manage inmates without unnecessary confrontation." His evaluations have been either successful or exceeds expectations, including its ratings about his compliance with the Agency's non-discrimination policies. [Exh. C.]

The initial allegation made by the prisoner was that Appellant called MD "Abdul the towelhead", which MD believed was an insulting reference to a Muslim turban. That allegations was included in the pre-disciplinary letter, and was the subject of many questions during the pre-disciplinary meeting. The Agency ultimately found that Appellant's use of "towelhead" was not established. It determined instead that he called MD Abdul with the intent to discriminate against him. There is no evidence as to whether MD would have considered Appellant's use of Abdul alone as a racial slur, if he had not believed Appellant had added the words, 'thetowelhead.'

Appellant has responsibility for management of about sixty inmates a day, and readily acknowledges he does not always remember their names. Because this very situation happens often to him, he incorporates an explanation into his speeches to inmates. He regularly tells them, "I know you're stressed out. If I mispronounce your name, it's not to make it more stressful." [Exh. 1-8.] Appellant's testimony on this issue was credible. His tendency to mix up names of even those he knows well when hurried or under stress adequately explains his use of the wrong name during this incident. His supervisors corroborated his statements that "it is not in my nature to make statements of [this] type. [Exh. 3-4.] While Appellant's recall of the event was not perfect two months thereafter, he had no reason to think of the incident until that time. His supervisor considered it a "non-event", and approved of his handling of the matter. [Lusk, 1:58 pm; Exh. 6-2.] The only eye-witness other than Appellant was the tier porter, who did not view Appellant's actions or words as biased. After a jail disciplinary hearing held the following day, at which time MD had the opportunity to explain any provocation for his conduct, the inmate was found guilty of disrupting operation of the pod. The Agency ultimately found that the most damning statements of the two cellmates could not be proven.

The Agency also found that Appellant "laughed at the inmate's reaction" to his use of a racial epithet. [Exh. 1-16.] MD's grievance immediately after the incident stated Appellant laughed at him. During his interview three weeks later, MD said Appellant was "just smiling." Appellant admits he has a habit of laughing at inappropriate times to defuse tension, and said he could understand "how that could have been misconstrued by [MD], but I did not mean to humiliate him." [Exh. 3-3.] That habit is well known to Appellant's supervisor, who described it as "a nervous tic." At hearing, Appellant apologized for involuntary laughter during his questioning. [Appellant, 3:05 pm.]

Appellant testified credibly and consistently that he made a simple mistake in calling the inmate the wrong name. The Agency's finding that his statements have

been inconsistent was not supported by a careful review of those statements. The underlying allegation of racism was based on the inmate's perception that Appellant had called him "Abdul the towelhead." When that allegation was found to be unproven, the Agency found that the word Abdul itself was a racial epithet. Appellant offered persuasive testimony that a racially harassing comment is out of character for him, which was reinforced by his supervisors and positive statements about his lack of bias in his performance reviews. I find the Agency did not prove by a preponderance of the evidence that Appellant called the inmate Abdul with any discriminatory intent, or that he laughed at him thereafter to mock or humiliate him. As a result, there is no factual basis for any of the asserted rule violations under the first category, racial harassment.

2. Conduct Prejudicial

The Agency next concluded that Appellant had engaged in conduct prejudicial to its operation, reputation or integrity of the City or Agency. In support, it found that Appellant's use of the name Abdul had caused MD anger and humiliation, as a result of which MD "led the other inmates in a chorus [of] 'Underwood's a piece of shit'". [Elwell, 11:30 am.]

Departmental regulation RR-300.11.6 "was intended to encompass conduct that might otherwise appear to be minor, yet result in serious consequences or potential consequences." In re Redacted, CSB 31-12A, 3 (10/3/13). I have found that Appellant did not make a racially charged comment, or laugh at him for the purpose of humiliating him. Appellant's unintentional error in calling a new inmate by the wrong name does not establish the type of conduct targeted by this rule.

Moreover, the Agency did not prove by a preponderance of the evidence that the inmate's name-calling was in any respect caused solely by Appellant's use of the name Abdul. MD's outburst was caused by his belief that Appellant had called him "Abdul the towelhead", a charge that was ultimately rejected by the Agency. The most credible reason for inmate unrest was that inmates were upset with Appellant because MD's drawn-out move was delaying their release from lockdown by as much as forty minutes. Some shouted, and some echoed MD's words to Appellant by saying, "Underwood's a piece of shit." There is no evidence that the inmates believed Appellant had uttered a racial insult to MD. I do not attribute MD's anger and the resulting inmate reaction to the only conduct proven against Appellant, his use of the wrong name.

Because Appellant engaged in no misconduct, and made a single inadvertent error in MD's name with no discriminatory motive, the Agency failed to prove that Appellant engaged in conduct prejudicial to the City or Agency, in violation of the rules listed in the second category of the disciplinary letter.

3. Inaccurate Reporting

Finally, the Agency charged Appellant with inaccurate reporting based on his failure to state in his OIC staff report that he had called the inmate Abdul. [Elwell, 10:24

am; Exh. 6.] Appellant prepared this statement just after the incident, and before MD filed his grievance. His report stated that he told MD if he did not move his stuff, he would have a tier porter move it for him. MD responded by repeatedly calling him a piece of shit. "He decided to say I was a [racist] and I didn't pronounce his name correctly." Appellant later said he did not include his use of the wrong first name because it was not the issue in the report as he saw it at the time, which was the inmate's reaction to his order to move and mispronunciation of his last name. The grievance had not been filed at the time the report was issued, and Appellant was unaware of its allegations until his own interview two months later. I do not find that under these circumstances his failure to include the name Abdul rendered the report inaccurate or incomplete. His mistaken use of an incorrect name was not the kind of information needed to present a full picture of the incident, based on all the facts then known to him. "The fact that a report could have been more complete, contained more facts, or may even have been proven to be wrong in part does not mean as a matter of law he was being deceptive or that he intentionally omitted facts." In re Lewis, 51-14A, 5-6 (CSB 11/9/15). Therefore, the Agency failed to prove that Appellant's report was inaccurate or incomplete in violation of the cited rules.

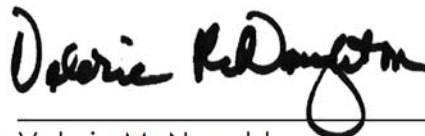
4. Penalty Determination

Since the Agency did not prove Appellant violated any of the rules listed in the disciplinary letter, its penalty determination based on those violation findings is moot.

Order

Based on the above findings of fact and law, it is hereby determined that the Agency's disciplinary action dated Oct. 28, 2015 is reversed.

DONE this 29th day of April, 2016.



Valerie McNaughton
Career Service Hearing Officer