

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AFTER HEARING**

Adjud. Case #:

[REDACTED]

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Christopher Mirabella, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Nicole Murphy, Esq.
Fine, Olin & Anderman, LLP
39 Broadway
Suite 1910
New York, New York 10006

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The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

ORDERED: The request of ██████████ that the substantiated report dated ██████████
██████████, ██████████: received and dated ██████████
██████████ be amended and sealed is granted. The Subject has not been shown
by a preponderance of the evidence to have committed abuse and/or
neglect.

NOW THEREFORE IT IS DETERMINED that the record of this report
shall be amended and sealed by the Vulnerable Persons' Central Register,
pursuant to SSL § 493(3)(d).

This decision is ordered by David Molik, Director of the Administrative
Hearings Unit, who has been designated by the Executive Director to
make such decisions.

DATED: Schenectady, New York
December 14, 2015



David Molik
Administrative Hearings Unit

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjudication Case #:

[REDACTED]

Before:

Sharon Golish Blum
Administrative Law Judge

Held at:

Adam Clayton Powell Jr. State Office Building
163 West 125th Street
New York, New York 10027
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
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By: Christopher Mirabella, Esq.

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39 Broadway
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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or neglect. The Subject requested that the VPCR amend the report to reflect that the Subject is not a subject of the substantiated report. The VPCR did not do so, and a hearing was then scheduled in accordance with the requirements of Social Services Law (SSL) § 494 and Part 700 of 14 NYCRR.

FINDINGS OF FACT

An opportunity to be heard having been afforded the parties and evidence having been considered, it is hereby found:

1. The VPCR contains a "substantiated" report dated [REDACTED], [REDACTED] [REDACTED] received and dated [REDACTED] of abuse and/or neglect by the Subject of a Service Recipient.

2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Offense 2¹

It was alleged that on [REDACTED], at the [REDACTED] [REDACTED], located at [REDACTED] [REDACTED], while acting as custodian, you committed neglect by failing to obtain a medical evaluation and/or medical care for [REDACTED] when he stated that his arm was injured.

This allegation of neglect has been SUBSTANTIATED as a Category 3 offense pursuant to Social Services Law § 493

3. An Administrative Review was conducted and as a result the substantiated report was retained.

¹ There was initially an allegation against the Subject of physical abuse under SSL § 488(1)(a) that was unsubstantiated.

_____, is a secure residential _____

regular shift [REDACTED] in the facility's [REDACTED] Wing of Building [REDACTED]. At the time,

age and had been a resident of the facility since 1994. The Service Recipient is a person with

(DA2) [REDACTED], who was a mid-level supervisor, was doing rounds in the facility's [REDACTED] Wing

of Building [REDACTED]. At that time, the Service Recipient had just come out of the shower and he stated

that “a tall black man broke my arm.” DA2 [REDACTED] was surprised by the disclosure

because she had been on duty the entire shift and had heard no prior complaints from the Service

Recipient or any remotely related concerns from other staff members. (Justice Center Exhibits 4

and 11)

8. DA2 [REDACTED] then inquired of the Direct Support Assistant in Training (DSAT) [REDACTED], who was nearby, if he knew what the Service Recipient was talking about. DSAT [REDACTED] stated that he witnessed an incident that had occurred the previous evening in the living area, between the Service Recipient and the Subject. (Justice Center Exhibits 4, 11 and 21)

9. DA2 [REDACTED] thereafter examined the Service Recipient's arm, sought appropriate medical attention for the Service Recipient, completed an OPWDD Reportable Incidents and Notable Occurrences Reporting Form 147 and made the appropriate notifications. (Justice Center Exhibits 4, 5 and 21)

10. The Service Recipient was taken to [REDACTED] Medical Center later that day and it was subsequently determined that the Service Recipient's arm was uninjured. (Justice Center Exhibit 12)

11. On [REDACTED] at 6:35 p.m., DSAT [REDACTED] prepared a Statement of Employee, in which he reported that on [REDACTED] at 7:30 p.m., it was snack time for the service recipients and that he had been sitting in the office outside of the living area. DSAT [REDACTED] reported that he saw the Service Recipient coming out of the dining area into the living area with a snack in his hand. DSAT [REDACTED] further reported that he then heard the Service Recipient say to the Subject, "you broke my arm" and that the Subject told the Service Recipient to "shut up." DSAT [REDACTED] reported that he "went to ask [the Service Recipient] if he was feeling any pain..." because he would have taken him to the nurse, but that the Service Recipient stated that he was fine. DSAT [REDACTED] further reported that he failed to report the incident at the time because he was not comfortable reporting the matter to the supervisor on duty and because he was a trainee and did not know to whom he

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should have reported the incident. (Justice Center Exhibit 10)

12. On ██████████, DSAT ██████████ was interviewed by Justice Center Investigator ██████████ and Justice Center Supervising Investigator ██████████. In that interview, DSAT ██████████ reiterated that he saw the Service Recipient exit the dining area and say to the Subject, “you broke my arm.” (Justice Center Exhibit 21)

13. During his interview with the Justice Center investigators, DSAT ██████████ stated that during the incident, two other female staff members had been present. DSAT ██████████ stated that these two staff members approached the Service Recipient and were talking to him, asking him if he was okay or not, and that the Service Recipient told them that he was okay. DSAT ██████████ also added that the two staff members had the Service Recipient sit down. (Justice Center Exhibit 21)

14. On ██████████ at 7:30 p.m., the time that DSAT ██████████ stated the incident occurred, the Subject was assisting his assigned 1:1 service recipient with his shower. The Subject and his assigned service recipient did not go to the dining area for a snack until approximately 8:30 p.m. (Hearing testimony of the Subject)

15. On ██████████, Justice Center Investigator ██████████ interviewed the Service Recipient regarding the incident and he reported that a “tall black guy” broke his elbow but he was unable to provide any further details. (Justice Center Exhibit 21)

16. On ██████████, there were three staff members working during the afternoon shift of the facility’s █ Wing of Building █, who could have been described as tall African-American men, including the Subject and DSAT ██████████. (Hearing testimony of the Subject)

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the act or acts giving rise to the substantiated report.
- Whether the substantiated allegation constitutes abuse and/or neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse and/or neglect in a facility or provider agency. (SSL § 492(3)(c) and 493(1) and (3)) Pursuant to SSL § 493(3), the Justice Center determined that the initial report of abuse and/or neglect presently under review was substantiated. A “substantiated report” means a report “wherein a determination has been made as a result of an investigation that there is a preponderance of the evidence that the alleged act or acts of abuse or neglect occurred...” (Title 14 NYCRR 700.3(f))

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1), to include:

(h) "Neglect," which shall mean any action, inaction or lack of attention that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient. Neglect shall include, but is not limited to: (i) failure to provide proper supervision, including a lack of proper supervision that results in conduct between persons receiving services that would constitute abuse as described in paragraphs (a) through (g) of this subdivision if committed by a custodian; (ii) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with the rules or regulations promulgated by the state agency operating, certifying or supervising the facility or provider agency, provided that the facility or provider agency has reasonable access to the provision of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or (iii) failure to provide access to educational

instruction, by a custodian with a duty to ensure that an individual receives access to such instruction in accordance with the provisions of part one of article sixty-five of the education law and/or the individual's individualized education program.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 3, which is defined as follows:

(c) Category three is abuse or neglect by custodians that is not otherwise described in categories one and two. Reports that result in a category three finding shall be sealed after five years.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject(s) committed the act or acts of abuse and/or neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of abuse and/or neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

If the Justice Center proves the alleged abuse and/or neglect, the report will not be amended and sealed. Pursuant to SSL § 493(4) and Title 14 NYCRR 700.10(d), it must then be determined whether the act of abuse and/or neglect cited in the substantiated report constitutes the category of abuse and/or neglect as set forth in the substantiated report.

If the Justice Center did not prove the abuse and/or neglect by a preponderance of evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has not established by a preponderance of the evidence that the Subject failed to obtain medical care for the Service Recipient when the Service Recipient stated that his arm was injured, as alleged in Offense 2 of the substantiated report. Specifically, the evidence did not show that the Subject committed an act of neglect under SSL § 488(1)(h) as it was not established that the Subject was aware of the allegation of injury to the Service

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Recipient's arm at the relevant time.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-22) The investigation underlying the substantiated report was conducted by Justice Center Investigators ██████████, ██████████ and Justice Center Supervising Investigator ██████████. Justice Center Investigator ██████████ prepared the Investigative Report (Justice Center Exhibit 4) and testified at the hearing on behalf of the Justice Center.

The Subject testified at the hearing on his own behalf and provided no other evidence.

The issue in this case is the question of fact as to whether, on ██████████ at approximately 7:30 p.m., the Service Recipient stated to the Subject words like or similar to, "you broke my arm," as they exited the dining area. At the hearing, the Subject through his counsel, conceded that had the Justice Center proven by a preponderance of the evidence that the Service Recipient had said words like "you broke my arm" to the Subject, then the Subject's duty to obtain medical assistance for the Service Recipient would have been triggered, which is the duty that the Justice Center alleged that the Subject breached.

The Subject consistently denied during the investigation and during hearing testimony that the Service Recipient made the statement or any similar statement to him as alleged.

The allegation of neglect first arose when, on ██████████, the Service Recipient came out of the shower and stated to DA2 ██████████, that a "tall black man" broke his arm. DA2 ██████████ turned immediately to DSAT ██████████, (a tall African-American man), who was nearby, and asked him if he knew anything about it. DSAT ██████████, who was still in training, disclosed, at that point, only that he had seen an incident between the Subject and the Service Recipient the previous evening during snack time. (Justice Center

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Exhibits 5 and 11)

DA2 ██████████ then directed DSAT ██████████ to prepare a written Statement of Employee. (Justice Center Exhibit 10) In his report, DSAT ██████████ stated that on ██████████ at 7:30 p.m., he saw the Service Recipient coming out of the dining area into the living area with a snack in his hand, that he heard the Service Recipient say to the Subject, “you broke my arm” and that the Subject told the Service Recipient to “shut up.” DSAT ██████████ Statement of Employee indicates that DSAT ██████████ approached the Service Recipient and asked him if he was feeling any pain, to which the Service Recipient responded that he was fine. In the Statement of Employee, DSAT ██████████ also wrote that had the Service Recipient been in pain, he would have taken the Service Recipient to the nurse. DSAT ██████████ Statement of Employee further indicates that he had not reported the incident at the time to the supervisor on duty because he was not comfortable reporting to anyone other than DA2 ██████████ and that, as a trainee, he did not know to whom he should have reported it. (Justice Center Exhibit 10)

Interestingly, even though DSAT ██████████ had had the opportunity to report the alleged incident to the only person he felt comfortable with, DA2 ██████████, he did not do so prior to the Service Recipient’s ██████████ statement. His allegation against the Subject was made only after he was forced to respond to DA2 ██████████ questions, subsequent to the Service Recipient’s disclosure. This fact is particularly revealing in light of DSAT ██████████ ██████████ repeated statements that he would have reported the incident to DA2 ██████████ at the time that it occurred, had she been on duty.

On ██████████ DSAT ██████████ was interviewed by Justice Center Investigator ██████████ and Justice Center Supervising Investigator ██████████. While

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reiterating the allegation that he witnessed the Service Recipient confront and accuse the Subject of breaking his arm, DSAT ██████████ description of the incident during his interview by the Justice Center investigators was significantly different from the account that he provided in the Statement of Employee. (Justice Center Exhibits 21 and 10)

In his interview with the Justice Center investigators, DSAT ██████████ stated that during the incident, two other female staff members had been present. DSAT ██████████ stated that at the time, these other staff members approached the Service Recipient and were talking to him, asking him if he was okay or not and that the Service Recipient told them that he was okay. DSAT ██████████ also added that the two staff members had the Service Recipient sit down. When asked whether it was at that time that he spoke to the Service Recipient, DSAT ██████████ answered no, that he had not gotten up from where he was sitting to go over to him, but that he had gone to the Service Recipient's room at some unspecified point later on in the evening. (Justice Center Exhibit 21)

In his interview with the Justice Center investigators, DSAT ██████████ stated that he knew that he was supposed to report all incidents to the supervisor on duty but that he had not done so at the time because he assumed that the other staff members, who he had claimed were present and were looking after the Service Recipient, would do so. He also attributed his failure to report the alleged incident to the fact that he did not feel comfortable communicating with any supervisor other than DA2 ██████████. Lastly, DSAT ██████████ explained his failure to report the alleged incident by claiming unfamiliarity with reporting protocols, even though he admitted that he was recently trained and knew of his duty to report all incidents. (Justice Center Exhibit 21)

In his interview with the Justice Center investigators, DSAT ██████████ stated

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that the Subject responded to the Service Recipient's complaint by saying "be quiet." The Justice Center investigators questioned DSAT ██████████ closely about the discrepancy between his Statement of Employee and his interview statements regarding how the Subject had responded to the Service Recipient's accusation. At first, DSAT ██████████ said that the Subject told the Service Recipient to be quiet, then he answered that he did not know and then he revised his account saying that the Subject had told the Service Recipient to "shut up." (Justice Center Exhibit 21)

On ██████████, the Subject was interviewed by Justice Center Investigator ██████████ and Justice Center Supervising Investigator ██████████. Because he had not been advised of the nature of the allegation and had no access to the Daily Assignment Sheet (Justice Center Exhibit 7) during the interview, the Subject was only able to provide general answers about facility procedures and assignment responsibilities. The Subject's responses during the interview by the Justice Center investigators were consistent with his hearing testimony. During the interview, the Subject denied knowledge of any incident having occurred on ██████████, with respect to the Service Recipient. The Subject was able to discuss the Service Recipient's issues and told the Justice Center investigators that the Service Recipient is not problematic, that he is a medium to high functioning individual, that he is independent and that the Service Recipient never needs restraints as he responds well to redirection.

The Subject's hearing testimony was that he had been employed at the facility as a DSA for 12 years. The Subject further testified that on ██████████, he was assigned as a 1:1 for another service recipient and that at 7:30 p.m. on that date (the time that the incident allegedly occurred), the Subject was not in the dining or living areas but, instead, was in the process of assisting his assigned service recipient with his evening shower. The Subject explained that his

assigned service recipient's shower is scheduled for earlier than the other service recipients' showers because of his assigned service recipient's behaviors. The Subject testified that after his assigned service recipient finished showering at approximately 8:00 p.m., he and his assigned service recipient went to the back of the common room for his assigned service recipient's evening medication. The Subject testified that, thereafter, he and his assigned service recipient went to the dining area for his assigned service recipient to have a snack. Finally, the Subject testified that he specifically remembered that, at that point in time, the female staff member had handed him the snack and he needed to find a spoon for his assigned service recipient to eat it with. (Hearing testimony of the Subject)

All of the Subject's answers during the recorded interrogation and his hearing testimony were given in a clear, forthright and credible manner. The Subject's hearing testimony was significantly more detailed than his statements given during the Justice Center interrogation because he had the benefit of knowing what his shift assignment was for [REDACTED].

The most compelling evidence to corroborate the Subject's testimony are the statements of the two staff members who were on duty at the time that the alleged incident occurred. DSAT [REDACTED] stated in his interview with the Justice Center investigators that two female staff members were present in the living area when the Service Recipient came through the doors from the dining area and accused the Subject of breaking his arm. DSAT [REDACTED] stated further that these two staff members began talking to the Service Recipient, asking him if he was okay and getting him to sit down. The implication is that they, too, must have heard the Service Recipient accuse the Subject of breaking his arm. It was confirmed by Justice Center Investigator [REDACTED] that the two female staff members to whom DSAT [REDACTED] had referred were DSA [REDACTED] and DSA [REDACTED]. These two staff

members were interviewed by Justice Center Investigator [REDACTED] and they each stated that they were not aware of any injury having been sustained by the Service Recipient on [REDACTED] [REDACTED] and that they were not aware of the allegation against the Subject. One reasonable conclusion that can be drawn from this is that DSAT [REDACTED] fabricated the allegation against the Subject in his Statement of Employee and subsequently invented the other staff members' involvement to help explain why he did not respond appropriately to the alleged incident at the time.

DSAT [REDACTED] statements are not credited evidence. The inconsistencies between his two accounts of the alleged incident are remarkable. DSAT [REDACTED] Statement of Employee makes no mention of the two female staff members being present and it implies that DSAT [REDACTED] had immediately approached the Service Recipient after the incident to ascertain whether he was injured. Lastly, because DSAT [REDACTED] did not testify, the pivotal evidence regarding his allegation could not be properly tested through cross examination, a scrutiny made all the more necessary due to his aforementioned inconsistencies.

The fact that the Service Recipient stated to DA2 [REDACTED] on [REDACTED], that a "tall black man" had broken his arm, is not in and of itself, corroborative evidence against the Subject regarding the allegation of neglect. In fact, the primary relevance that the statement has to the allegation of neglect is that it was the catalyst to DSAT [REDACTED] sudden disclosure of the alleged incident.

In any case, it seems that despite the inconsistency of DSAT [REDACTED] statements regarding the alleged incident, and his obvious motive to fabricate, the Justice Center investigation into what, if anything, had happened to the Service Recipient's arm was based

entirely on the statements of DSAT [REDACTED]. DSAT [REDACTED] was the one and only person who alleged that the incident occurred and no other evidence was provided regarding the possibility that an incident from which Service Recipient's complaint arose might have occurred at a different time.

In the final analysis, based on all of the evidence, it is concluded that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged in the substantiated report. It was not established that the Service Recipient had, during the material time, stated to the Subject that the Subject had broken or injured his arm and therefore, the Subject cannot be found to have committed an act of neglect for failing to obtain a medical evaluation and/or medical care for the Service Recipient.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] received and dated [REDACTED] be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse and/or neglect.

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

DATED: November 25, 2015
Plainview, New York


Sharon Golish Blum, Esq.
Administrative Law Judge