

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

In the Matter of the Appeal of

████████████████████

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

████████████████

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: Thomas C. Parisi, Esq.

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████████████████████

By: Nicole A. 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 ██████████ ██████████ ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (obstruction of reports of reportable incidents).

The substantiated report is properly categorized as a Category 3 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

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: October 3, 2016
Schenectady, New York



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

████████████████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

████████████████

Before:

Louis P. Renzi
Administrative Law Judge

Held at:

Adam Clayton Powell State Office Building
163 West 125th Street
New York, New York 10027
On: ██████████████████

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse (obstruction of reports of reportable incidents). 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] of abuse by the Subject of a Service Recipient.
2. The Justice Center substantiated the report against the Subject. The Justice Center

concluded that:

Allegation 1

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED] while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to report that you observed another staff argue loudly with a service recipient and that the staff member shoved the service recipient.

This allegation has been SUBSTANTIATED as Category 3 abuse (obstruction of reports of reportable incidents), pursuant to Social Services Law § 493(4)(c).

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

4. The facility, [REDACTED] located at [REDACTED] [REDACTED], is a psychiatric hospital and is operated by the NYS Office of Mental Health

[REDACTED] (OMH), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse, the Subject was employed by OMH as a Secure Care Treatment Aide I (SCTA I). He had been employed in this capacity by the facility for fifteen years. His total tenure with the facility was twenty-eight years. The incident took place on [REDACTED]¹ on ward [REDACTED] which is a pre-discharge ward housing approximately twenty-five (25) adult patients, both male and female. (Hearing testimony of Subject)

6. At the time of the alleged abuse, the Service Recipient was an adult male; there is no evidence in this record as to how long he had been a patient at the time of the incident. His exact diagnosis is unclear from the record, but it is fair to assume that, as a result of his placement, the Service Recipient has an emotional and/or mental disability. (Hearing testimony of OMH Risk Manager [REDACTED])

7. At the time of the alleged abuse, a loud verbal altercation took place between the Service Recipient and SCTA Staff "A" in a hallway of the [REDACTED] ward. The altercation evolved into a physical incident with Staff "A" and the Service Recipient pushing and shoving each other. The incident continued for approximately fifteen to twenty minutes. (Hearing testimony of Subject; Hearing testimony of OMH Risk Manager [REDACTED]; Justice Center Exhibits 5, 6, 8; Subject Exhibit B)

8. The altercation was witnessed by the Subject and several service recipients, who were gathered in a nearby part of the unit when the incident began and responded to the loud yelling by emerging into the hallway to see what was taking place. (Hearing testimony of Subject;

¹ [REDACTED] was the Sunday of a holiday weekend.

Hearing testimony of OMH Risk Manager [REDACTED]; Justice Center Exhibits 5, 6, 8; Subject Exhibit B)

9. OMH policy #3400 LD entitled “Incident Reporting and Investigation” was in effect at the time of the alleged abuse. (Subject Exhibit A) Page 1, paragraph number 5 of the policy was revised after the creation of the NYS Justice Center and the policy was re-issued on December 3, 2013. The remainder of the policy pre-dates the incident here. (Hearing testimony of OMH Risk Manager [REDACTED]) On its face, the policy is inconsistent with Social Services Law §§ 488, 491 and the Justice Center “Code of Conduct For Custodians of People With Special Needs (Code of Conduct). (Justice Center Exhibits 18, 20) At the time of the incident, the policy did not require direct care staff to notify the Justice Center upon discovery of a reportable incident. The pre-revision sections of the policy specify that a staff member identifying an incident is to (1) provide necessary assistance to ensure the health and safety of the service recipient, (2) immediately notify the psychiatrist, Medical Specialist and the ward nurse and (3) prepare a Form 147 incident report. (Subject Exhibit A, p.9-10) The credible evidence further proves that during off-hours, the staff member is required to report incidents to his/her supervisor, who in this case was the ward nurse, and to immediately prepare an incident report. (Hearing testimony of OMH Risk Manager [REDACTED])

10. The Subject received and signed the signature page of the Code of Conduct on August 20, 2013. He also signed an acknowledgment of receipt of the “New York Justice Center Notice to Mandated Reporters” on August 20, 2013. (Hearing testimony of Subject; Justice Center Exhibits 17, 18)

11. The Subject did not assist the Service Recipient, notify the nurse on duty at the time of the incident, submit a completed Form 147 incident report or call the VPCR to report the

altercation he had witnessed. Instead, he advised Staff "A" to report the incident to the nurse himself. (Hearing testimony of Subject; Hearing testimony of OMH Risk Manager [REDACTED])

[REDACTED] Subject Exhibit B)

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 allegations constitute abuse.
- Pursuant to Social Services Law § 493(4), the category of abuse 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 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)(f) to include:

(f) "Obstruction of reports of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state Justice Center regulations, policies or

procedures; or, for a mandated reporter who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.

Social Services Law §§ 491(1)(a) and (b) require in relevant part that:

(a) Mandated reporters shall report allegations of reportable incidents to the vulnerable persons' central register...and in accordance with the requirements set forth therein.

(b) Allegations of reportable incidents shall be reported immediately to the vulnerable persons' central register upon discovery. For purposes of this article, "discovery" occurs when the mandated reporter witnesses a suspected reportable incident or when another person, including the vulnerable person, comes before the mandated reporter in the mandated reporter's professional or official capacity and provides the mandated reporter with reasonable cause to suspect that the vulnerable person has been subjected to a reportable incident.

A "reportable incident" is defined by SSL § 488(1) as:

[C]onduct that a mandated reporter is required to report to the vulnerable persons' central register.

Such conduct is further defined by SSL §§ 488(1)(a-i) and includes specific types of abuse and neglect, along with a "significant incident", which is defined in relevant part by SSL § 488(1)(i) as:

...an incident, other than an incident of abuse or neglect, that because of its severity or the sensitivity of the situation may result in, or has the reasonably foreseeable potential to result in, harm to the health, safety or welfare of a person receiving services...

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4)(c), 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 committed the act or acts of abuse alleged in the substantiated report that

is the subject of the proceeding, and that such act or acts constitute the category of abuse as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse, 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 cited in the substantiated report constitutes the category of abuse as set forth in the substantiated report.

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

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 1” in the substantiated report. Specifically, the evidence establishes that the Subject was a custodian, and therefore a mandated reporter, who was on duty and witnessed deliberate abuse of the Service Recipient by another staff member (Staff “A”), and failed to report the incident to the Vulnerable Persons’ Central Register (VPCR) upon discovery, all in violation of Social Services Law (SSL) sections 488(1)(f) and 491(1)(a) and (b).

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-20) The investigation underlying the substantiated report was conducted by the Office of Mental Health (OMH) Risk Manager [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and provided two exhibits which were admitted into evidence. (Subject Exhibits A, B) The Subject provided no other evidence.

Here, the threshold for reporting an incident to the VPCR is triggered when a mandated reporter witnesses a suspected reportable incident. There is no issue here as to whether the Subject

was a custodian and mandated reporter, or whether the incident witnessed by the Subject was reportable. He admitted both during his hearing testimony. Pursuant to SSL § 488(1)(f) and SSL §§ 491(1)(a) and (b), it is concluded that the Subject had a duty to immediately report the incident to the VPCR.

A preponderance of the evidence proves that there was a verbal and physical altercation (the incident) between Staff “A” and the Service Recipient, and that the altercation was witnessed by the Subject. (Hearing testimony of Subject; Hearing testimony of OMH Risk Manager [REDACTED]; Justice Center Exhibits 5, 6, 8, 9, 10; Subject Exhibit B)

The Subject, when being interrogated, initially attempted to downplay the seriousness of the incident he witnessed, claiming that Staff “A” had remained calm throughout. Eventually, the Subject admitted that he witnessed a verbal altercation that became physical when the Service Recipient shoved Staff “A” off balance, with Staff “A” retaliating by shoving the Service Recipient “one time”. (Justice Center Exhibit 5; Subject Exhibit B)

During his hearing testimony, the Subject further described the incident as a back-and-forth shoving match between Staff “A” and the Service Recipient which took place in the hallway and went on for some “fifteen or twenty minutes”, attracting the attention of numerous other service recipients on the unit. (Hearing testimony of Subject) He also admitted that what he witnessed was a reportable incident, as noted above, which was corroborated by another service recipient who approached the unit Psychologist two days later, on [REDACTED], reported the incident and stated that he became fearful when he saw Staff “A” again on the ward. (Justice Center Exhibits 6, 8) The Subject further admitted that he should have reported the incident to the ward nurse and prepared a written form [REDACTED] 147” report as required by OMH policy. Finally, the Subject admitted that he should have called the VPCR. (Hearing testimony of Subject; Justice

Center Exhibits 17, 18; Subject Exhibit A, p.10)

In his defense the Subject referred to the OMH reporting policy (Subject Exhibit A) which required him to assist the Service Recipient, then report the incident only to the ward nurse, and not to the Justice Center. Nevertheless, the record indicates that the Subject failed to do any of these things; instead, he advised Staff "A" to report the incident himself, and took no further action. (Hearing testimony of Subject; Justice Center Exhibit 5; Subject Exhibits A, B)

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed abuse (obstruction of reports of reportable incidents), as alleged. The substantiated report will not be amended or sealed.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse (obstruction of reports of reportable incidents) set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 3 act.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (obstruction of reports of reportable incidents).

The substantiated report is properly categorized as a Category 3 act.

This decision is recommended by Louis P. Renzi, Administrative Hearings
Unit.

DATED: September 16, 2016
Schenectady, New York



Louis P. Renzi, ALJ