

**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
AND ORDER
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: Jacqueline M. Seitz, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

██████████

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 Allegation 1 of 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.

Allegation 1 of the substantiated report is properly categorized, as a Category 3 act.

The request of ██████████ that Allegation 2 of the substantiated report dated ██████████, ██████████ be amended and sealed is granted.

NOW, THEREFORE, IT IS DETERMINED that the record of this report regarding Allegation 1 shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

NOW, THEREFORE, IT IS DETERMINED that the record of this report regarding Allegation 2 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: October 28, 2016
Schenectady, New York

A handwritten signature in dark ink, appearing to read "David Molik", is written over a horizontal line.

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**

Adjud. Case #:

[REDACTED]

Before:

Elizabeth M. Devane
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
Eleanor Roosevelt State Office Building
4 Burnett Blvd., 2nd Floor
Poughkeepsie, New York 12601
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
Appearance Waived

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

[REDACTED]

[REDACTED]

[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse. 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 [REDACTED], [REDACTED] of abuse by the Subject.

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

Allegation 1

It was alleged that on or about [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 a reportable incident to the VPCR.

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

Allegation 2

It was alleged that on or about [REDACTED] during the course of an investigation of a reportable incident that occurred at the [REDACTED], located at [REDACTED] while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you withheld material information during your interrogation.

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, located at [REDACTED] is an [REDACTED] operated by the New York State Office for People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibits 5, 6 and 7)

5. At the time of the alleged abuse, the Subject was employed by OPWDD as a Treatment Team Leader (TTL) covering a number of residences including [REDACTED]. The Subject oversaw the operations of [REDACTED], as well as the clinical and direct care staff at [REDACTED] (Hearing testimony of OPWDD Internal Investigator [REDACTED] Hearing testimony of the Subject; Justice Center Exhibits 5, 7 and 11; Subject Exhibit A).

6. At the time of the alleged abuse, five adult male service recipients, including the Service Recipient, resided at [REDACTED], all of whom were non-verbal and all of whom functioned in the mild to profound range of intellectual disability. All of the service recipients, with the exception of one, required 24 hour care. (Justice Center Exhibit 5 and 11; Subject Exhibit A)

7. The Subject was a custodian of the Service Recipient as that term is defined in Social Services Law §488(2), and as a result also a mandated reporter. (Hearing testimony of OPWDD Internal Investigator [REDACTED] Hearing testimony of the Subject; Justice Center Exhibits 5 and 11)

8. On January 4, 2014, at approximately 11:15 a.m., passing motorists saw a service recipient near the end of [REDACTED] driveway. One passerby, W1, was a nurse and recognized that the Service Recipient had developmental disabilities. W1 notified [REDACTED] staff who immediately retrieved the Service Recipient and brought him inside. (Hearing testimony of OPWDD Internal

Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 5, 6, 7 and 8)

9. The Service Recipient eloped because a [REDACTED] staff person had propped open a door to bring in groceries, disabling the alarm. (Hearing testimony of OPWDD Internal Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 5, 6, 7 and 11)

10. [REDACTED] staff did not notify either the Administrator On Duty (AOD), or the Nurse, or the TTL who was filling in for the Subject as the Subject was on vacation, or the Justice Center of the incident. (Hearing testimony of the Subject; Justice Center Exhibits 2, 5 and 8)

11. On [REDACTED] W1 left a message for the Subject to call her. W1 later stated she called as she wanted to make sure the incident was reported. (Hearing testimony of Subject; Justice Center Exhibits 5 and 11)

12. On either [REDACTED] or [REDACTED], an OPWDD employee, who was told of the incident by one of the passersby, told the Subject of the [REDACTED] incident. As a result, the Subject began to investigate the incident. The Subject spoke with W1 and the staff at [REDACTED] (Hearing testimony of OPWDD Internal Investigator [REDACTED] Hearing testimony of the Subject; Justice Center Exhibits 5, 6, 7 and 11; Subject Exhibit A)

13. The Subject reported the [REDACTED] incident to her supervisor and the Quality Assurance Department and, on [REDACTED] [REDACTED] reported a Missing Person incident to the Justice Center. (Hearing testimony of the Subject; Justice Center Exhibits 5, 6, 7)

14. On [REDACTED] an OPWDD Special Review Committee (Committee) which included the Quality Assurance Coordinator, the Developmental Disabilities Program Specialist 4 (DDPS4), nursing staff, community members and representatives from Mental Hygiene Legal

Services, opened a review of the incident. On [REDACTED] the Committee determined that the incident could be categorized as neglect. Also on [REDACTED], [REDACTED] reported the Committee's findings of neglect to the Justice Center. (Hearing testimony of the Subject; Justice Center Exhibits 2 and 8)

15. The Subject was interrogated on [REDACTED] by OPWDD Investigator [REDACTED] regarding the [REDACTED] incident. OPWDD Internal Investigator [REDACTED] was also present. (Hearing testimony of OPWDD Internal Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibit 11; Subject Exhibit A)

16. Subsequent to the [REDACTED] incident, the Subject provided in-service training to [REDACTED] staff regarding incident reporting, house protocols and supervision requirements. (Hearing testimony of the Subject; Justice Center Exhibits 6, 7 and 11; Subject Exhibit A)

17. The Subject and the [REDACTED] staff had been trained on the Justice Center reporting requirements, as well as recognizing abuse and neglect, prior to the [REDACTED] incident. (Hearing testimony of the Subject; Justice Center Exhibits 5 and 11; Subject Exhibit A)

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 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 of a person in a facility or provider agency is defined by SSL § 488(1)(f), to include:

"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 agency 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.

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

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 the 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 acts of abuse cited in the substantiated report constitute 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

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation as well as an audio CD of the Subject's interrogation. (Justice Center Exhibits 1-11) OPWDD Internal Investigator [REDACTED] who was present at the interrogation of the Subject, was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided a transcript of her interrogation that she prepared. (Subject Exhibit A).

The allegations consist of two theories of obstruction of reports of reportable incidents.

Allegation 1 - Abuse (Failure to report a reportable incident)

The Justice Center has established by a preponderance of the evidence that the Subject committed the act of abuse described as "Allegation 1" in the substantiated report. Specifically, the preponderance of the evidence established that the Subject, while acting as a custodian, committed abuse when she failed to report a reportable incident to the VPCR.

Where a custodian is alleged to have committed obstruction of reports of reportable incidents based on a failure to report a reportable incident upon discovery, under Social Services Law § 488(1)(f), the Justice Center must establish by a preponderance of evidence that the Subject was a custodian and therefore a mandated reporter, and that the Subject failed to report a reportable incident upon discovery. Reportable incidents range from various types of abuse and neglect, to

“significant incidents” which include acts not rising to the level of abuse or neglect. (Social Services Law § 488(1)(a –i))

The uncontroverted evidence in the record establishes that, at the time of the allegations, the Subject was a custodian and, as a result, she was a mandated reporter. (Hearing testimony of OPWDD Internal Investigator [REDACTED], Hearing testimony of Subject) Pursuant to Social Services Law § 491(1), a mandated reporter is required to report allegations of reportable incidents to the VPCR immediately upon discovery. Discovery occurs when the suspected reportable incident is witnessed by the mandated reporter, or when the mandated reporter is provided with reasonable cause to suspect that the vulnerable person has been subjected to a reportable incident.

After the Subject became aware of the [REDACTED] incident, she investigated it and reported her findings to her supervisor. [REDACTED] then reported the incident as a missing person incident to the Justice Center on [REDACTED]. When [REDACTED] made the missing person incident report to the Justice Center, [REDACTED] was aware of the fact that none of the staff on duty at [REDACTED] at the time of the incident had reported the incident to the Justice Center, as required. The Subject acknowledged that she, as well as the staff at [REDACTED], had been trained prior to the incident at [REDACTED] regarding the requirement to report allegations of reportable incidents to the Justice Center.

The Subject argued that [REDACTED] she did not report it as neglect because as she did not believe at the time that neglect had occurred. However, this argument does not address the allegation of the Subject’s failure to report the [REDACTED] staff’s failure to report the incident. [REDACTED] not only was the Subject required to report the incident itself, but she was also required to report the failure of the [REDACTED] staff on duty at the time of the incident to report the incident to the Justice Center. The

Subject was a custodian, was aware of the Justice Center reporting requirements and was aware of staff's training and subsequent failure to report the reportable [REDACTED] incident to the Justice Center. The failure of staff to report the incident to the VPCR is in itself abuse. The Subject's failure to report the staff's failure to report the [REDACTED] incident to the VPCR is also abuse.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the abuse alleged. Allegation 1 of the substantiated report will not be amended or sealed.

Allegation 2 - Abuse (Intentionally withholding material information)

The Justice Center has not established by a preponderance of the evidence that the Subject intentionally withheld material evidence, as set forth in the allegation.

In order to prove the abuse alleged in Allegation 2, the Justice Center must establish that the Subject intentionally withheld material information during the Justice Center's investigation, and that the Subject's doing so impeded the investigation.

Social Services Law § 488(16) defines "intentionally" as having the same meaning as provided in New York Penal Law § 15.05. Under New York Penal Law § 15.05(1), a person acts "intentionally" with respect to a result or conduct when a person has a "... conscious objective ..." to cause a result or engage in such conduct.

This allegation revolves around the Subject's interrogation by OPWDD Investigator [REDACTED] on [REDACTED]. The Investigator categorized the Subject's responses during the interrogation as evasive and nondescript, and she determined that the Subject was attempting to protect staff from being punished. Based on those conclusions, the Investigator recommended a substantiated finding of abuse by the Subject for intentionally withholding material information. (Justice Center Exhibit 5; Hearing testimony of OPWDD Internal Investigator [REDACTED])

The Subject testified that she did not withhold any information, that she shared all information with her supervisors immediately upon learning of the incident, and that she continued to do so throughout the investigation.

While Investigator [REDACTED] characterized the Subject's answers during the interrogation as evasive, she did not identify what information the Subject allegedly withheld. Internal Investigator [REDACTED] testified that during the interrogation, instead of supplying yes or no answers, the Subject provided explanations as to why the staff's actions did not constitute neglect. (Hearing testimony of OPWDD Internal Investigator [REDACTED]) During the interrogation, the Subject and Investigator [REDACTED] went back and forth numerous times discussing what constitutes abuse and neglect and whether the staff committed abuse or neglect. The Subject stated that based on her knowledge at the time, she did not believe the staff's actions to constitute neglect. The Subject testified that she was not being evasive during the interrogation and explained that she could not answer some of the questions with simply a yes or no answer as she wanted to explain her answers and put them into context. During the interrogation and at the hearing, the Subject was very descriptive in her answers and expounded on details. Therefore, it is concluded that this is her manner of speech, not an attempt at evasion. (Justice Center Exhibits 5 and 11; Hearing testimony of the Subject)

During the hearing, when Internal Investigator [REDACTED] was asked to specify the material information that the Subject withheld, he responded that it was not a determination that he had made and testified "what that material information is, I can't say." (Hearing testimony of OPWDD Internal Investigator [REDACTED])

There is no evidence in the record that the Subject intentionally withheld evidence. There is no evidence in the record that, even if the Subject did intentionally withhold information, the

investigation was impeded in any way by the Subject's responses in the interrogation.

The weight of evidence in the record and hearing testimony do not support a finding that the Subject intentionally withheld material information during her interrogation. She appears to have been forthcoming with the information she had at the time. Further, there is no evidence in the record that any action by the Subject impeded the investigation.

Accordingly, the Justice Center has not established by a preponderance of the evidence that the Subject intentionally withheld material evidence, as set forth in the allegation.

Although Allegation 1 of the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that Allegation 1 of the substantiated report is properly categorized as a Category 3 act.

DECISION:

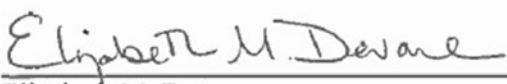
The request of [REDACTED] that Allegation 1 of the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

Allegation 1 of the substantiated report is properly categorized, as a Category 3 act.

The request of [REDACTED] that Allegation 2 of the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is granted.

This decision is recommended by Elizabeth M. Devane, Administrative Hearings Unit.

DATED: October 7, 2016
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge