

**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: Laurie Cummings, Esq.

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

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 [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 physical abuse, neglect and abuse (obstruction of reports of reportable incidents).

The substantiated report is properly categorized as a Category 2 act in regard to Allegation 1 and a Category 3 act in regard to Allegation 2.

NOW, THEREFORE, IT IS DETERMINED that the report, Allegation 1, that results in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. The record of these reports shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

NOW, THEREFORE, IT IS ALSO DETERMINED that the record of this report, Allegation 2, 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: January 6, 2017
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:

Elizabeth M. Devane
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street
Brooklyn, NY 11201
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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New York State Justice Center for the Protection
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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for physical abuse, neglect and 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] of physical abuse, neglect and abuse (obstruction of reports of reportable incidents) 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 physical abuse and/or neglect when you struck a service recipient in the neck with a pen, causing a laceration.

These allegations have been SUBSTANTIATED as Category 2 physical abuse and Category 2 physical abuse¹ pursuant to Social Services Law § 493(4)(b).

Allegation 2

It was alleged that on [REDACTED], during the course of an investigation of

¹ The parties agreed that the repeated use of the words physical abuse in Allegation 1 was a clerical error in the Allegation, that the term neglect was intended at this juncture and that the Subject had sufficient notice that the Allegation consisted of both physical abuse and neglect.

a reportable incident that occurred at the [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you intentionally made false and/or inconsistent statements during the investigation of the incident described in Allegation 1 and during your interrogation about that incident.

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], an [REDACTED] [REDACTED], is located at [REDACTED], and is operated by [REDACTED] which is an agency certified by the Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Justice Center Exhibit 7)

5. The [REDACTED] has two floors with an unidentified number of residents. The Service Recipient and his roommate were the only two residents on the first floor. The first floor consisted of a main living area off of which was a kitchen, a bathroom and the bedroom that the Service Recipient and his roommate shared. A door opens off the first floor living area to a hallway that allows egress from the building. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibit 18)

6. At the time of the alleged abuse and neglect, the Subject had been employed by [REDACTED] for approximately five months as a Direct Care Counselor (DCC). The Subject's duties included supervising and assisting service recipients with activities of daily life including meals and hygiene. (Hearing testimony of Justice Center Supervising Investigator [REDACTED] [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 7, 17 and 18)

7. On [REDACTED], the Subject was scheduled to work from 4:00 p.m. to 12:00

██████████ a.m. and was assigned to the first floor of ██████████ and to monitor the Service Recipient. The Subject was a custodian as that term is defined in Social Services Law §488(2). (Hearing testimony of Justice Center Supervising Investigator ██████████; Hearing testimony of the Subject; Justice Center Exhibits 6, 7, 17 and 18)

8. At the time of the alleged physical abuse and neglect, the 59-year-old male Service Recipient was a resident of ██████████. The Service Recipient had diagnoses of schizophrenia and mild intellectual disability. The Service Recipient had a long history of falls and tremors and therefore required close supervision. (Hearing testimony of Justice Center Supervising Investigator ██████████; Hearing testimony of the Subject; Justice Center Exhibits 6, 14, 15, 16 and 18)

9. The Service Recipient also had a history of aggression, including threatening others with knives and forks, making racist slurs and making allegations against staff within his residential program. (Hearing testimony of Justice Center Supervising Investigator ██████████; Hearing testimony of the Subject; Justice Center Exhibits 6, 14, 16 and 18)

10. On the date of the alleged abuse and neglect, the Service Recipient was upset upon returning from his day program and became further agitated when he saw the Subject on duty, as he did not like the Subject. The Assistant House Manager offered to reassign the Subject, however, the Subject declined. (Hearing testimony of Justice Center Supervising Investigator ██████████; Justice Center Exhibits 6 and 18)

11. Around 5:00 p.m. the Assistant House Manager, staff and service recipients were going to a shopping mall. The Service Recipient refused to go along. The Service Recipient was cursing and yelling racial slurs at the Subject. The Assistant House Manager offered to reassign the Subject and have a different staff member remain at the facility with the Service Recipient,

however the Subject declined to be reassigned. When the group left to go shopping, the Service Recipient and the Subject were the only people remaining at [REDACTED]. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 6, 10 and 18)

12. At around 8:00 p.m., the Service Recipient went to the bathroom to take a shower. The Subject had just been in the bathroom. The Service Recipient became agitated as the Subject left some of her belongings in the bathroom and the toilet seat was wet. The Service Recipient went into the living area where the Subject was sitting at a desk filling out the communication log. The Service Recipient began yelling at the Subject and accusing her of urinating on the toilet seat. The Subject explained that she did not urinate on the seat but instead, water must have gotten on the seat when she washed her face. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 6, 7 and 18)

13. The Service Recipient left the living area, went to the kitchen, grabbed a fork, and returned to the living area, waving the fork in his hand and threatening and scaring the Subject. The Subject told him to put the fork back in the kitchen. The Service Recipient returned the fork to the kitchen then the Service Recipient returned to the living area where the Subject was still sitting at the desk filling out paperwork. The Service Recipient approached the Subject with nothing in his hands but his fist clenched. However, he did not touch the Subject. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 6, 7, 10 and 18)

14. An altercation occurred within seconds. The Subject punched or pushed the Service Recipient away from her. The Subject had an object in her hand which made contact with the Service Recipient's neck. The Subject went out to the hallway from the first floor area and the

Service Recipient locked the door behind the Subject. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 6, 7 and 18)

15. The Service Recipient noticed he was bleeding and told the Subject, who was on the other side of the locked door. The Subject repeatedly asked the Service Recipient to open the door, to no avail. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 6, 7 and 18)

16. The Service Recipient called 911 for assistance. The Subject made phone calls to the Program Manager, the Assistant Manager and at least one other party. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 6 and 18)

17. Approximately 10 to 15 minutes later, the authorities arrived at the facility. Authorities declined to arrest the Subject. The Service Recipient was taken to a local emergency room where he received one or two sutures for a 0.5 cm laceration on the left side of his neck. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 6, 8, 9, 11, 12, 13 and 18)

18. The Subject told two staff members that she did not know how the Service Recipient received a puncture wound, but that she may have had a pen in her hand at the time of the incident. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Justice Center Exhibits 6 and 18)

19. When Justice Center Supervising Investigator [REDACTED] interrogated the Subject on [REDACTED], regarding the [REDACTED] incident, the Subject denied making any contact with the Service Recipient and denied that she had anything in her hands at the time

of the incident. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Justice Center Exhibits 6 and 18)

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 and neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and neglect that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse and 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 physical abuse of a person in a facility or provider agency is defined by SSL § 488(1)(a) as:

"Physical abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or causing the likelihood of such injury or impairment. Such conduct may include but shall not be limited to: slapping, hitting, kicking, biting, choking, smothering, shoving, dragging, throwing, punching, shaking, burning, cutting or the use of corporal punishment. Physical abuse shall not include reasonable emergency interventions necessary to protect the safety of any person.

The neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h) as:

"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 neglect shall be categorized into categories pursuant to

SSL § 493(4), including Category 2, which is defined as follows:

Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

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 a hearing by a preponderance of the evidence that the Subject committed the act or acts of abuse and 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 neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

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

If the Justice Center did not prove the abuse and neglect 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 of physical abuse and neglect, described as “Allegation 1” and an act of abuse (obstruction of reports of reportable incidents), described as “Allegation 2” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation (Justice Center Exhibits 1-17) as well as an audio recording. (Justice Center Exhibit 18) The investigation underlying the substantiated report was conducted by Justice Center Supervising Investigator [REDACTED] who was the only witness to testify

at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided no other evidence.

Allegation 1 - Physical Abuse

In order to sustain an allegation of physical abuse, the Justice Center must show that the Subject was a custodian who had physical contact with the Service Recipient; that such contact was either intentional or reckless; and that such contact caused either physical injury or serious or protracted impairment of a Service Recipient's physical, mental or emotional condition, or caused the likelihood of such injury or impairment. SSL § 488(16) states that the word "recklessly" has the same meaning as provided in New York Penal Law § 15.05. Under New York Penal Law § 15.05(3), a person acts "recklessly with respect to a result or to a circumstance" when the person is "aware of and consciously disregards a substantial and unjustifiable risk that such result will occur."

The Subject was a custodian as that term is defined in Social Services Law §488(2). The evidence established that at the time of the incident, which occurred quickly, the Subject and the Service Recipient were the only people at the facility, they had an altercation, right after the altercation the Service Recipient locked the Subject out of his living area, the Service Recipient was bleeding, and the Service Recipient called 911. The Service Recipient did not have any history of self-injurious behavior. The Service Recipient was later taken to the emergency room, treated and received stitches for a small laceration on his neck.

The Subject testified that the Service Recipient approached her with the fork in his hand. The Subject placed a chair between them, put her arms up in a blocking manner and backed out of the room away from the Service Recipient. The Subject said she never had any contact with the Service Recipient and had nothing in her hands. The Subject testified that she tried to call 911 but

that call was interrupted. The Subject did call other staff as well as another unidentified party. The Subject further testified that the Service Recipient had a history of making allegations against staff, he did not like the Subject and wanted her out of the residence.

The Subject's testimony in regard to the Service Recipient's history of making accusations against staff, threatening others while holding utensils and abusive conduct toward and dislike of the Subject is credited evidence. However, the remainder of the Subject's testimony is not credited. Soon after the incident, the Subject told both the Program Manager and the Assistant Manager that she had a pen in her hand at the time of the altercation. On the contrary, she later stated to the Investigator and at the hearing that she had nothing in her hands. In addition, the fact that the Subject did not make another attempt to call 911 but spent time speaking with an unnamed party while the situation was unfolding is remiss.

The Service Recipient's statements, one made the day after the incident and the other given to the Investigator a few weeks later, consistently report that the Subject punched and pushed him and stabbed him in the neck. There is some factual dispute as to whether the injury was caused by a key or a pen as alleged, or some other object. In any case, an object, held by the Subject, contacted the Service Recipient's neck during that altercation and punctured his neck.

The Subject acted recklessly by attacking the Service Recipient and doing so with an object in her hand which could injure the Service Recipient. The fact that the Service Recipient was particularly vulnerable to injury due to his history of falls and tremors adds to the Subject's reckless behavior.

As such, the Justice Center has met its burden that the Subject committed physical abuse, in violation of SSL § 488(1)(a).

Allegation 1 - Neglect

In order to sustain an allegation of neglect, the Justice Center must show that the Subject acted, or failed to act, or lacked attention in such a manner that it breached her duty to the Service Recipient. In addition, the Justice Center must show that this breach either resulted in, or was likely to result in either physical injury, or a serious or protracted impairment of the physical, or mental, or emotional condition of the Service Recipient.

As noted above, the Justice Center has shown that the Subject committed physical abuse when the Service Recipient received a puncture wound to his neck during a physical altercation with the Subject. The Subject's actions breached her custodial duty of care to the Service Recipient by engaging the Service Recipient in a physical altercation. The Subject did not assert that there was imminent risk of harm to the Service Recipient. Additionally, the Subject's actions followed no techniques authorized by [REDACTED] or the OPWDD and, therefore, the Subject's conduct was not reasonable. As such, the Justice Center has met its burden of proving that the Subject committed neglect, in violation of SSL § 488(1)(h).

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 physical abuse and neglect alleged. The substantiated report will not be amended or sealed in regard to Allegation 1.

Allegation 2 - Abuse (obstruction of reports of reportable incidents)

The Justice Center has established by a preponderance of the evidence that the Subject intentionally made false or inconsistent statements during her interrogation which impeded the Justice Center's investigation, as set forth in the allegation.

In order to prove abuse (obstruction of reports of reportable incidents) as it is alleged, the Justice Center must prove that the Subject impeded the Justice Center's investigation by

intentionally making a false statement. (SSL §488(1)(f)) 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 Justice Center Supervising Investigator [REDACTED] which was inconsistent with other statements made by the Subject. During her interrogation by the Investigator, the Subject said that she had nothing in her hands and that she had no contact with the Service Recipient. However, the Subject told two staff members that she may have had an object in her hand. The Subject’s intent is inferred from her inconsistent and contradictory statements in regard to a material fact which goes to the crux of the matter.

Justice Center Supervising Investigator [REDACTED] testified that due to the inconsistent statements of the Subject, the investigation took longer and involved more resources than it would have, thereby impeding the investigation.

Accordingly, the Justice Center has established by a preponderance of the evidence that the Subject committed abuse (obstruction of reports of reportable incidents).

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category set forth in the substantiated report. Allegation 1 of the report was substantiated as Category 2 physical abuse and category 2 neglect. To prove Category 2 conduct, the Justice Center must establish that the Subject’s conduct “seriously endanger[ed] the health, safety or welfare of [the] service recipient...” (SSL §493(4)(b)) by committing the act. The Service Recipient was particularly vulnerable due to his long history of falling and tremors. Further, the Service Recipient received a puncture wound to his neck, an area of important arteries with potentially extensive implications, during an altercation with the Subject,

seriously endangering his health, safety or welfare. The Subject was aware that the Service Recipient locked himself in his residence and was told by the Service Recipient he was bleeding, yet the Subject never successfully contacted 911. 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 2 act in regard to Allegation 1.

A substantiated Category 2 finding of physical abuse or neglect will not result in the Subject being placed on the VPCR Staff Exclusion List. A Category 2 act under this paragraph shall be elevated to a Category 1 act when such an act occurs within three years of a previous finding that such custodian engaged in a Category 2 act. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

Additionally, based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that Allegation 2 of the substantiated report, abuse (obstruction of reports of reportable incidents), is properly categorized as a Category 3 act.

Substantiated Category 3 findings will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to SSL § 496 (2). The report will be sealed after five years.

DECISION:

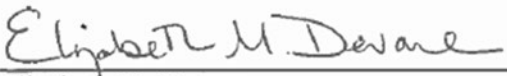
The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed physical abuse, neglect and abuse (obstruction of reports of reportable incidents).

The substantiated report is properly categorized as a Category 2 act in regard to Allegation 1 and a Category 3 act in regard to Allegation 2.

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

DATED: December 7, 2016
Schenectady, New York



Elizabeth M. Devane
Administrative Law Judge