

**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: Robert DeCataldo, Esq.

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By: William T. Burke, Esq.
O'Neil & Burke, LLP
135 North Water Street
Poughkeepsie, New York 12601

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 psychological abuse and neglect.

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: February 23, 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:

Louis P. Renzi
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
4 Burnett Boulevard
Poughkeepsie, New York, 12601
On: ██████████

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
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135 North Water Street
Poughkeepsie, New York 12601

JURISDICTION

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

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

Allegation 2¹

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian, you committed psychological abuse and/or neglect when you engaged in a verbal altercation with a service recipient, and threatened to take away her morning cigarette privilege.

This allegation has been SUBSTANTIATED as Category 3 psychological abuse and Category 3 neglect 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 [REDACTED] division of the NYS

¹ Allegation 1 was unsubstantiated.

Office for People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged psychological abuse and neglect, the Subject was a Direct Support Assistant (DSA) and had been working in that capacity for the facility for 11 years. The Subject worked the [REDACTED] shift at the [REDACTED] with DSA [REDACTED]. (Hearing Testimony of Subject; Justice Center Exhibit 6)

6. At the time of the alleged psychological abuse and neglect, the female Service Recipient was 60 years of age, and had been diagnosed with mild mental retardation and chronic schizophrenia. The Service Recipient required bed checks every hour while in bed to ensure her safety and wellbeing. (Justice Center Exhibit 17)

7. At approximately 12:15 a.m. on the day of the alleged psychological abuse and/or neglect, the Subject went into the Service Recipient's bedroom to get her up to go to the bathroom and found that the Service Recipient had wet her bed. The Subject told the Service Recipient to get up, go take a shower and to change the bed linens. The Service Recipient initially refused to do so. A loud verbal argument between them then took place, during which the Subject threatened to withhold the Service Recipient's morning cigarette privilege. At approximately 1:30 a.m. the Service Recipient took a shower and removed the wet sheets. (Justice Center Exhibits 6, 9, 12 and 15)

8. On the day of the alleged psychological abuse and neglect, during a meeting with her psychologist, the Service Recipient reported that the Subject had told her that she would not get her morning cigarette if she did not get up and change her bed. The clinical assessment noted, among other things, that the Service Recipient exhibited fear of the Subject. (Justice Center Exhibit 9)

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

(c) "Psychological abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by verbal or non-verbal conduct, a substantial diminution of a service recipient's emotional, social or behavioral development or condition, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor, or causing the likelihood of such diminution. Such conduct may include but shall not be limited to intimidation, threats, the display of a weapon or other object that could reasonably be perceived by a service recipient as a means for infliction of pain or injury, in a manner that constitutes a threat of physical pain or injury, taunts, derogatory comments or ridicule.

(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 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 acts of abuse and neglect cited in the substantiated report constitute the category of abuse and neglect as set forth in the substantiated report.

If the Justice Center did not prove the abuse or 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 the acts, 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- 21) The investigation underlying the substantiated report was initially conducted by [REDACTED] Developmental Assistant 3, [REDACTED]. [REDACTED] Investigator [REDACTED] thereafter reviewed the investigation and was the only witness who testified at the hearing on behalf of the Justice Center.

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

Allegation of Psychological Abuse

In order to sustain an allegation of psychological abuse, the Justice Center must show that the Subject was acting as a custodian, and engaged in conduct that was either reckless or intentional, and caused a substantial diminution of a service recipient’s emotional, social, or behavioral development or condition as supported by an assessment performed by certain professionals, including but not limited to a psychologist, or causing the likelihood of such diminution. (SSL § 488(1)(c))

At the time of the alleged psychological abuse, the Subject was working as a DSA and was a custodian as that term is defined in Social Services Law § 488(2). During a meeting with her psychologist on the day of the alleged psychological abuse, the Service Recipient reported that the Subject had told her that she would not get her morning cigarette if she did not get up and change her bed. (Justice Center Exhibit 9) DSA [REDACTED] reported hearing the Subject and the Service Recipient arguing and reported overhearing the Subject tell the Service Recipient that if she did not get up and shower and change her sheets she wouldn’t get her cigarette in the morning. DSA [REDACTED] further reported telling the Subject that this was inappropriate conduct on the Subject’s part. (Justice Center Exhibit 15) The Service Recipient again repeated the allegation against the

Subject in a subsequent session with her psychologist in [REDACTED]. During that session, she corroborated the statement of DSA [REDACTED] by reporting that the other staff on duty (DSA [REDACTED]) informed the Subject that the Subject was not allowed to tell the Service Recipient that she would not get her cigarette. (Justice Center Exhibits 6, 9 and 15)

Senior Licensed Practical Nurse [REDACTED] (Sr. LPN [REDACTED]) reported that the Service Recipient told her that the Subject told the Service Recipient that if she did not get up that she would not get her cigarette. Sr. LPN [REDACTED] reported that she counseled the Subject that it was inappropriate to tell any individual something will be taken away if they do not comply with a request. Sr. LPN [REDACTED] also reported that the Subject said that she totally understood and that it would not happen again. (Justice Center Exhibit 16) The Subject testified that she told the Service Recipient that if she did not get up and change her sheets, she would not have time for her morning cigarette. The subject denied being argumentative or threatening. The Subject's testimony is not credited based upon all of the evidence in the record.

SSL § 488(16) indicates that the word "intentionally" has 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 to conduct described by a statute defining an offense" when the person's "conscious objective is to cause such result or to engage in such conduct."

After the Subject discovered that the Service Recipient had stripped her bed, she told DSA [REDACTED]: "You see, she must have thought about having that cigarette in the morning." After DSA [REDACTED] informed the Subject that she could not say that to the Service Recipient, the Subject replied "I know. I just said that to get her up." (Justice Center Exhibit 15) Clearly, the Subject's threat to the Service Recipient of withholding her morning cigarette if she did not get up, shower and change her sheets was intentional within the meaning of New York Penal Law § 15.05(1).

██████████

The psychologist concluded that the Service Recipient was impacted and negatively affected by the Subject, who intimidated the Service Recipient and threatened to withhold her cigarette. The Service Recipient told her psychologist that she hoped that the Subject did not return to the ██████. (Justice Center Exhibit 9) DSA ██████ reported that the Service Recipient felt very threatened and afraid of the Subject. (Justice Center Exhibit 15)

The Subject argued that there was not a substantial diminution of the Service Recipient's emotional, social or behavioral development or condition because the psychologist's statement only noted that the Service Recipient was upset. The Subject's argument is inaccurate and not convincing. The evaluation by the clinician also included an observation of genuine intimidation and fear on the part of the Service Recipient, caused by the conduct of the Subject. (Justice Center Exhibit 9) Thus, it is concluded that the Service Recipient did suffer a substantial diminution of her emotional condition as a result of the Subject's conduct on this occasion.

Accordingly, the Justice Center has proved by a preponderance of the evidence that the Subject committed psychological abuse when the Subject engaged in a verbal altercation with the Service Recipient, and threatened to take away her morning cigarette privilege.

Allegation of Neglect

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that she breached that duty, and that this breach either resulted in or was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. (SSL § 488(1)(h))

On the day of the alleged neglect, the Subject was working as a DSA and was a custodian as that term is defined in Social Services Law § 488(2). According to the Service Recipient's

Individualized Plan of Protective Oversight, the Subject owed a duty to the Service Recipient to offer verbal calming and redirection, when the Service Recipient resisted staff direction. (Justice Center Exhibit 17) When questioned by Treatment Team Leader (TTL) [REDACTED] as to what should be done when the Service Recipient refuses to comply with a request, the Subject answered that the Service Recipient should be redirected or another staff asked to step in to assist. (Justice Center Exhibit 6) In this case the Subject did neither, instead relying upon threat and intimidation. Accordingly, the Subject breached her duty to the Service Recipient. This breach resulted in the protracted impairment of the mental and emotional condition of the Service Recipient. The psychologist concluded that the Service Recipient was impacted and negatively affected by the Subject who intimidated the Service Recipient and threatened to withhold her cigarette. The psychologist also stated that the Service Recipient seemed afraid of the Subject. The Service Recipient told her psychologist that she hoped that the Subject did not return to the [REDACTED]. DSA [REDACTED] reported that the Service Recipient felt very threatened and afraid of the Subject.

In her defense, the Subject argued that the allegation of neglect was never investigated. However, the substantiated report dated [REDACTED] included the allegation of neglect. The Subject therefore had notice and at this hearing, the Subject defended against the allegation of neglect.

The evidence establishes that the Subject committed neglect when the Subject engaged in a verbal altercation with the Service Recipient, and threatened to take away her morning cigarette privilege.

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 psychological abuse and neglect 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 psychological abuse and neglect 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 of psychological abuse and neglect is properly categorized as a Category 3 act.

Substantiated Category 3 findings of abuse or neglect 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] be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed psychological abuse and neglect.

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

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

DATED: February 14, 2017
Schenectady, New York



Louis P. Renzi, ALJ