

**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

**AMENDED
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: Theresa Wells, Esq.

[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 [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse (obstruction of reports of reportable incidents).

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: March 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

[REDACTED]

Pursuant to § 494 of the Social Services Law

**AMENDED
RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

John T. Nasci
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
2165 Brighton Henrietta Town Line Road
Rochester, New York 14623

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: Theresa Wells, Esq.

[REDACTED]

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] of 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 2¹

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to immediately report a reportable incident involving a service recipient to the New York State Justice Center and/or when you withheld information from the resulting investigation.

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

¹ Allegation 1 was unsubstantiated at some point prior to the hearing.

was retained.

4. The facility, the [REDACTED], located at [REDACTED], is a group home for adults with developmental disabilities, and is operated by the [REDACTED]. The [REDACTED] is certified by the New York State Office for People With Developmental Disabilities, which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED], [REDACTED] Quality Improvement Liaison)

5. At the time of the alleged abuse, the Subject had been employed by the [REDACTED], and was assigned to the overnight shift at the [REDACTED]. (Hearing testimony of the Subject) The Subject was a custodian and a mandated reporter of abuse and/or neglect as those terms are so defined in SSL § 488(2) and (5).

6. At the time of the alleged abuse, the Service Recipient was a sixty-four year old adult male resident of the [REDACTED], with diagnoses of severe mental retardation and cerebral palsy. (Hearing testimony of [REDACTED], [REDACTED] Quality Improvement Liaison, and Justice Center Exhibit 13)

7. In [REDACTED], the Service Recipient fell and sustained a wound on the top of his head. Since that time, the Service Recipient had been picking at the wound with his hands and the wound never healed. At the time of the alleged abuse, the Service Recipient was under twenty-four hour field-of-vision (FOV) level of supervision to prevent him from picking at the wound. (Justice Center Exhibits 4, 12 and 14; and Hearing testimony of [REDACTED], [REDACTED] Quality Improvement Liaison)

8. After entering the [REDACTED], to the right of the entrance was a hallway off of which there were three bedrooms and a bathroom. The Service Recipient's bedroom was the first door on the right in the hallway. Two other service recipients' bedrooms and the bathroom were located off

the hallway past the Service Recipient's bedroom. Straight forward from the entrance of the [REDACTED] was a living room. The inside of the Service Recipient's bedroom could not be seen from the living room. (Hearing testimony of the Subject)

9. The Subject was assigned to work the overnight shift with Staff A [REDACTED]. During the shift, Staff A was assigned to provide FOV supervision of the Service Recipient and the Subject was assigned to the care of the five remaining service recipients at the [REDACTED]. Care for the other five service recipients included, in part, checking and noting each service recipient's status every one or two hours throughout the shift, depending on each of the service recipients' requirements. (Hearing testimonies of [REDACTED], [REDACTED], [REDACTED] Quality Improvement Liaison and the Subject)

10. During the overnight shift [REDACTED] Staff A remained on the couch in the living room and did not maintain FOV supervision of the Service Recipient. (Justice Center Exhibit 19) Upon arrival at the [REDACTED] at 6:00 a.m., the morning shift staff found Staff A asleep on the living room couch. (Justice Center Exhibits 16 and 17) The Subject reported Staff A's conduct to the Justice Center after discussing the matter with his manager on [REDACTED]. (Justice Center Exhibits 2 and 4, and 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 allegations constitute 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 (obstruction of reports of reportable incidents) 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):

(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 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 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 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 not established by a preponderance of the evidence that the Subject committed an act, 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 through 26) The investigation underlying the substantiated report was conducted by [REDACTED], [REDACTED] Quality Improvement Liaison, who was the only witness to testify at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and presented eight documents. (Subject Exhibits A through H)

The Justice Center contends that Staff A failed to provide FOV supervision for the Service Recipient and that the Subject was aware of this. The Subject testified that he knew of the Service Recipient’s FOV supervision requirement but that he was not aware that Staff A failed to provide FOV supervision of the Service Recipient until he was informed of this by his manager the next day. (Justice Center Exhibit 2 and Hearing testimony of the Subject)

In support of its contention, the Justice Center offered the statements of the two morning

shift staff and Staff A. The two morning shift staff each stated that, when they arrived at the [REDACTED] for the beginning of their shift at 6:00 a.m., they found Staff A lying on the living room couch and she appeared to be sleeping. (Justice Center Exhibits 6, 16 and 17) Staff A denied that she was asleep, but admitted that, when the Service Recipient was sleeping, she was on the living room couch where she could hear him. Staff A explained that she thought that the Service Recipient's level of supervision was "range of hearing" and not FOV. Staff A further stated that the Service Recipient slept through the night and that she and the Subject "both did hourly checks on [the Service Recipient]." (Justice Center Exhibit 19)

The Subject testified that when he performed his hourly checks on the other service recipients, who were in bedrooms off the same hallway as the Service Recipient, he saw Staff A at the Service Recipient's doorway. The Subject also testified that he was assisting another service recipient with waking up and showering, from 5:00 a.m. to approximately 6:00 a.m., when Staff A was found on the couch by the two morning shift staff. (Hearing testimony of the Subject) In morning shift Staff B's written statement contained in the [REDACTED] Event Report Form completed on [REDACTED], she stated: "The [Subject] had to get her up and tell her that [the Service Recipient] was ready for his shower ..." (Justice Center Exhibit 6) However, in Staff B's written statement, completed on [REDACTED], she stated: "[The Subject] came out & I heard him tell [Staff A] that [the Service Recipient] was ready for shower." (Justice Center Exhibit 17)

Due to the conflicting evidence in the record, it is not clear that the Subject knew that Staff A failed to continuously provide FOV supervision of the Service Recipient either throughout the overnight shift or when the morning shift staff found Staff A on the couch. As a result, the Subject's testimony, that he did not learn of Staff A's conduct until he was informed of it by his manager the next day, is accepted as credible evidence.

The Subject's contention, that he did not learn of Staff A's conduct until the next day, is

██████████, at 1:30 p.m. when he provided a statement by telephone, concerning Staff A's conduct, to the person who prepared the Reportable Incidents and Notable Occurrences Reporting Form (Form OPWDD 147). The Form OPWDD 147 indicates that because of the Subject's statement, the decision was made to call the Justice Center and that the Justice Center was called thereafter on ██████████ at 2:40 p.m. (Justice Center Exhibit 4)

The Justice Center contends both that the Subject failed to report the incident to the Justice Center and that the Subject failed to timely report the incident to the Justice Center. (Hearing: Justice Center opening and closing arguments) However, the Justice Center presented no evidence that the Subject did not make a report to the Justice Center. Consequently, the Subject's testimony, that he reported the incident to the Justice Center shortly after speaking with his manager, is accepted as credible evidence.

Failure to Report

In order to prove that the Subject committed abuse (obstruction of reports of reportable incidents) by failing to report the failure of Staff A to maintain FOV supervision of the Service Recipient, the Justice Center must establish that the Subject was a mandated reporter who was a custodian and failed to report a suspected reportable incident upon the Subject's discovery of the incident. (SSL §488(1)(f)) 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. (SSL §488(1)(a) through (i)) The term "discovery" is defined by statute as occurring when a "mandated reporter witnesses a suspected reportable incident ... or has reasonable cause to suspect that the vulnerable person has been subjected to a reportable incident." (SSL §491(1)(b)) The Justice Center interprets the relevant statute to mean, and argues that for a report to be timely, the report should be made to the VPCR within twenty-four hours of the incident.

The credible evidence in the record establishes that continuous FOV supervision was

required for the Service Recipient, that Staff A was assigned to provide FOV supervision for the Service Recipient but failed to do so, and that the Subject became aware that Staff A failed to provide FOV supervision for the Service Recipient when he spoke by telephone with his manager on [REDACTED] at 1:30 p.m. Staff A's failure to provide FOV supervision of the Service Recipient was a violation of the Service Recipient's treatment plans and, therefore, a breach of her duty to the Service Recipient. Consequently, Staff A's conduct amounted to a reportable incident, of which the Subject had a duty to report.

The record further reflects that by the nature of the Subject's employment, he was a mandated reporter and a custodian. The credible evidence in the record establishes that shortly after the Subject became aware that Staff A was not providing FOV supervision during the overnight shift on [REDACTED], he reported Staff A's conduct to the Justice Center. Because the Subject reported the incident to the Justice Center shortly after he learned of Staff A's conduct, the Justice Center has not established that the Subject failed to report the suspected reportable incident to the Justice Center immediately after his discovery of the incident.

Consequently, the Justice Center has not proven by a preponderance of the evidence that the Subject committed abuse (obstruction of reports of reportable incidents) by failing to report a suspected reportable incident immediately upon his discovery of the incident.

Withholding Information from the Investigation

In order to prove that the Subject committed abuse (obstruction of reports of reportable incidents) by withholding information from the investigation, the Justice Center must establish that the Subject was a custodian and impeded the Justice Center's investigation by intentionally withholding material information during an investigation into the report. (SSL §488(1)(f))

The credible evidence in the record establishes that the Subject was a custodian. The only evidence in the record of statements given by the Subject during the investigation is found in the

Form OPWDD 147 where he stated: “no one was following [the Service Recipient’s] supervision levels on the overnight anymore,” (Justice Center Exhibit 4) and in the Subject’s written statement made on [REDACTED], in which he stated: “I check on [the Service Recipient] too, [Staff A] was outside his room during my checks.” (Justice Center Exhibit 15)

Although the Subject never mentioned in either statement that Staff A was not providing FOV supervision of the Service Recipient, because it was determined above that the Subject learned of Staff A’s conduct during a telephone discussion with his manager after his shift ended, it cannot be concluded that he intentionally withheld material information from his statements contained in the record.

Furthermore, the Justice Center has not established that the Subject’s statements impeded the investigation. When asked by the Administrative Law Judge how the Subject’s statements impeded the investigation, [REDACTED] Quality Improvement Liaison [REDACTED], who investigated the matter, stated that she did not know how to answer the question. No other evidence was submitted or is otherwise in the record establishing how the investigation was impeded by the Subject’s statements. Consequently, the Justice Center has not proven by a preponderance of the evidence that the Subject committed abuse (obstruction of reports of reportable incidents) by withholding information from the investigation.

Because it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed abuse (obstruction of reports of reportable incidents) by failing to report a reportable incident and withholding information from the investigation, the substantiated report will be amended and sealed.

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

granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse (obstruction of reports of reportable incidents).

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

DATED: February 27, 2017
Schenectady, New York

A handwritten signature in dark ink, appearing to be 'J. Nasci', written over a horizontal line.

John T. Nasci, ALJ