

**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: Laurie Cummings, 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 [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.

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: March 1, 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:

Mary B. Rocco
Administrative Law Judge

Held at:

New York State Justice Center For the Protection
Of People With Special Needs
125 E. Bethpage Road
Plainview, New York 11803
On: ██████████

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: Laurie Cummings, Esq.

████████████████████
████████████████
████████████████████

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 by the Subject of a Service Recipient.
2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Allegation 2¹

Regarding an alleged incident that occurred on [REDACTED], at the [REDACTED] [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 involving a service recipient 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).

3. An Administrative Review was conducted and, as a result, the substantiated report was retained.
4. The facility, located at [REDACTED], is an [REDACTED] [REDACTED] for individuals with developmental disabilities. The [REDACTED] is operated

¹ . Allegation 1 was unsubstantiated.

by [REDACTED] which is certified by the 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 abuse, the Subject had been employed by [REDACTED] since 2011 and became the [REDACTED] Senior Residence Manager in [REDACTED]. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged abuse, the Service Recipient was a 75 year old blind female with diagnoses of mild intellectual disability and depression; she had history of chronic renal failure, osteoporosis and a number of other medical conditions. The Service Recipient used a rolling walker to ambulate and required arms-length supervision when navigating throughout the facility due to her visual impairment and her history of falls. The Service Recipient's Plan of Protective Oversight dated [REDACTED] delineated specific requirements when preparing the Service Recipient for a shower, including testing the water temperature and ensuring the tile floor was clear to prevent slip and falls. (Justice Center Exhibit 6, Subject Exhibit C; Hearing testimony of Justice Center Internal Investigator [REDACTED] and the Subject)

7. On [REDACTED], the Service Recipient requested assistance with a shower and was told that she would have to wait until medication for facility residents was dispensed. The Service Recipient snuck into the bathroom adjacent to her bedroom, which she had a history of doing, and proceeded to take a shower. A staff member noticed the Service Recipient in the shower and, leaving the Service Recipient unsupervised, went to notify the staff member responsible for the Service Recipient for that shift. The Service Recipient finished showering and upon exiting the shower slipped on a towel on the bathroom floor and fell to the floor, landing on her bottom.

Staff immediately responded to her calls for help. The Service Recipient was evaluated by the facility registered nurse (RN) and no injuries were noted. (Justice Center Exhibit 6, 7, and 8; Hearing testimony of Justice Center Internal Investigator [REDACTED] and the Subject).

8. The incident was immediately reported to the Subject, who conducted an internal investigation. The Subject did not report the incident to the Justice Center. (Hearing testimony of the Subject)

9. On [REDACTED], upon being notified of the incident by a staff member, the [REDACTED] Assistant Program Director reported the incident [REDACTED]. (Justice Center Exhibit 7 and Hearing testimony of [REDACTED] Assistant Program Director [REDACTED])

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 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) 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 and/or neglect 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 (obstruction of reports of reportable incidents) 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 and/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 act of abuse (obstruction of reports of reportable incidents), described as “Allegation 2” in the substantiated report. Specifically, the evidence establishes that the Subject, upon discovery, failed to report a reportable incident to the VPCR.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-9) In addition to the documentary evidence, the Justice Center also presented audio recordings of the Justice Center Internal Investigator’s interrogation of the Subject. The investigation underlying the substantiated report was conducted by Justice Center Internal Investigator [REDACTED], who 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 number of documents. (Subject Exhibits A-L) In addition, the Subject called [REDACTED], who was employed at the Facility as a member of the support staff, and [REDACTED], [REDACTED] Assistant Program Director.

The facts in this matter are not in dispute. The Subject was a custodian, and as a result, a mandated reporter. Following the [REDACTED] incident, the Subject was made aware of a reportable incident. Namely, that the Service Recipient took a shower unsupervised and fell onto the floor while getting out of the shower. The Subject did not report the incident to the Justice Center. (Justice Center Exhibits 6, 7 and 8; Hearing testimony of the Subject)

A mandated reporter is required to report allegations of reportable incidents to the Justice Center immediately upon discovery. Where, as here, the mandated reporter does not actually witness a suspected reportable incident, discovery occurs when another person, including a service recipient, gives reasonable cause for the mandated reporter to suspect that the service recipient was

subjected to a reportable incident. (SSL §491(1)(b)) As pertinent to this case, a reportable incident includes conduct defined as a “significant incident,” which includes, under SSL § 488((1)(i), “an incident, other than an incident of abuse or neglect, that because of the 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...” The Service Recipient’s unsupervised shower and resulting fall constituted a reportable incident. The likelihood of injury is clear. Upon discovery, the Subject had a legal obligation to immediately report the incident which she failed to do so.

In her defense, the Subject testified that she did not believe that the occurrence rose to the level of abuse requiring her to call the Justice Center. She testified that following her internal investigation, she determined that the Service Recipient’s treatment plan allowed the Service Recipient some privacy when showering and the fact that the Service Recipient did not sustain an injury led to her decision not to report the incident. The Subject asserted that because the Service Recipient snuck into the bathroom without notifying the staff, and because the Service Recipient had not been injured, the Subject did not have a duty to report the incident. (Hearing testimony of the Subject) However, it is notable that, during her interrogation and hearing testimony, the Subject was able to clearly and concisely explain her responsibilities as a mandated reporter. In her testimony, the Subject demonstrated a clear knowledge of the Service Recipient’s physical condition, her history of falls, her proclivity to sneak into the bathroom unsupervised and the potential for injury. Moreover, the Subject testified further [REDACTED] in an effort to be extremely cautious as a mandated reporter. (Justice Center Exhibit 9 and Hearing testimony of the Subject)

It is clear that, under the statute, the Subject, as a mandated reporter, had an affirmative duty to report the incident upon discovery. None of the Subject's contentions excused her from her obligation to report and, therefore, her conduct constituted abuse (obstruction of reports of reportable incidents).

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 (obstruction of reports of reportable incidents) 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 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:

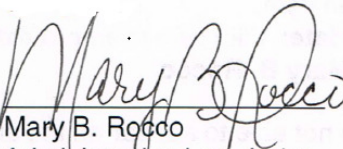
The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] be amended and sealed is denied.

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 Mary B. Rocco, Administrative Hearings
Unit.

DATED: February 6, 2017
Plainview, New York



Mary B. Rocco
Administrative Law Judge