

**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
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: Todd M. Sardella, 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 the substantiated report dated ██████████
██████████, ██████████ received and dated ██████████
██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

The substantiated report is properly categorized as a Category 2 act as to each of the two offenses charged.

NOW THEREFORE IT IS DETERMINED that reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. 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)(b).

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: December 31, 2015
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

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Louis P. Renzi
Administrative Law Judge

Held at:

Adam Clayton Powell State Office Building
165 West 125th Street
New York, NY 10027
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: Todd M. Sardella, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or 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] [REDACTED], received and dated [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:

Offense 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, after another custodian reported an allegation of abuse and/or neglect, you approached her and asked "[W]hy are you snitching on my son?"

These allegations have been SUBSTANTIATED as Category 2 abuse (obstruction of reports of reportable incidents), pursuant to Social Services Law §493.

Offense 2

It was alleged that on [REDACTED], during the course of an investigation into an allegation of abuse and/or neglect that occurred at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you lied

about your contact and communication with your co-workers since the incident on [REDACTED].

This allegation has been SUBSTANTIATED as Category 2 abuse pursuant to Social Services Law §493.

3. An Administrative Review was conducted and as a result the substantiated report was retained.

4. The facility, [REDACTED], [REDACTED], [REDACTED], is a group home housing approximately 10 significantly disabled adult males. The facility is operated by [REDACTED], certified by the NYS Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibit 4; Hearing testimony of Investigator [REDACTED])

5. The incident occurred on [REDACTED] at approximately 6:50 PM. At the time of the incident, the Subject had been employed by [REDACTED] since [REDACTED] 2013. The Subject worked as a Direct Support Professional (DSP). (Justice Center Exhibits 2, 3, 4 and 5; Hearing testimony of Investigator [REDACTED]; Hearing testimony of Subject)

6. At the time of the incident, the Service Recipient was a male, 36 years of age. The Service Recipient has a diagnosis of autism, profound mental retardation and anxiety disorder. He is non-verbal and uses signs and pictures to communicate. (Justice Center Exhibit 4)

7. At the time of the incident, the Subject was on duty at [REDACTED] as a custodian. (Hearing testimony of the Subject; Justice Center Exhibits 2, 4, 5) Another [REDACTED] staff member ("DSP [REDACTED]") sprayed "Resolve" aerosol carpet cleaner directly into the face and eyes of the Service Recipient, causing irritation to his eyes. The Subject was in the room with the

Service Recipient, DSP [REDACTED] and DSP [REDACTED]. The Service Recipient was seated on the living room couch watching TV; DSP [REDACTED] was seated next to him on the couch. The Subject was seated on a chair next to the couch. Immediate medical attention was provided, preventing permanent physical injury to the Service Recipient. (Justice Center Exhibits 4, 5, 6, 11; Hearing testimony of Investigator [REDACTED]; Hearing testimony of [REDACTED]; Hearing testimony of Subject)

8. Immediately following the incident, DSP [REDACTED] attempted to intervene and asked DSP [REDACTED] what he was doing. In contrast, the Subject made no effort to intervene or assist in any manner; indeed, he was observed to be laughing immediately afterwards, also described as “laughing continuously” by DSP [REDACTED]. (Justice Center Exhibits 4, 19; Hearing testimony of [REDACTED]; Hearing testimony [REDACTED])

9. It is concluded that the Subject saw that DSP [REDACTED] had physically abused the Service Recipient, a reportable incident as defined by SSL § 488(1)(a). It is further concluded that the Subject became aware that DSP [REDACTED] was reporting the incident to her supervisor. (Justice Center Exhibit 4; Hearing testimony of Inv. [REDACTED]; Hearing testimony of [REDACTED]; Hearing testimony of [REDACTED])

10. The Subject confronted DSP [REDACTED] and attempted unsuccessfully to dissuade or intimidate DSP [REDACTED] with the intent to suppress the report. (Justice Center Exhibit 4; Hearing testimony of Inv. [REDACTED]; Hearing testimony of [REDACTED]; Hearing testimony of [REDACTED])

11. DSP [REDACTED] timely and properly reported the incident involving the injury to the Service Recipient to her supervisor, [REDACTED], the Assistant Residence Manager. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibit 4)

12. On [REDACTED], the Subject was interviewed by Investigator [REDACTED] about the telephone /text and verbal communications he had had with [REDACTED], [REDACTED] and DSP [REDACTED] after the incident. In response to questioning, the Subject lied to the Investigator. (Hearing testimony of Inv. [REDACTED]; Justice Center Exhibit 4)

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 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 (by obstruction of reports of reportable incidents) of a person in a facility or provider agency is defined by SSL § 488(1)(f) as:

"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 2, which is defined as follows:

(b) 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 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/or 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/or neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

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

If the Justice Center did not prove the abuse and/or neglect by a preponderance of evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of evidence that the Subject committed prohibited acts, described as “Offense 1” and “Offense 2” in the substantiated report.

██████████

In order to establish abuse under the theory that the Subject obstructed reports of reportable incidents, the Justice Center must prove that (a) the Subject was a custodian, who (b) impeded the discovery, reporting or investigation of the treatment of a service recipient by either (c) actively persuading a mandated reporter from making a report to the VPCR (d) with the intent to suppress the reporting, or (e) by making a false statement or withholding material information during an investigation into such a 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 conducted by ██████████ Incident Investigator ██████████, who testified at the hearing on behalf of the Justice Center. In addition, the Justice Center called as witnesses Direct Support Professionals (DSP) ██████████ and ██████████.

The Subject testified on his own behalf and provided one document. (Subject's Exhibit A)

Offense 1

The Justice Center proved by a preponderance of the evidence that the Subject, while acting as a custodian, attempted to impede or intimidate a co-worker who was engaged in the reporting of a reportable incident, all with intent to suppress the investigation of the report.

Specifically, the evidence establishes that at the time of the incident, the Subject was on duty and was seated in a chair near the Service Recipient when another staff member ("DSP ██████████") committed an act of physical abuse against the Service Recipient. The comment cited in "Offense 1" and attributed to the Subject was described by two direct witnesses, and was clearly an attempt to dissuade a report being made to the VPCR against DSP ██████████.

Direct Support Professional (DSP) [REDACTED] was present in the room at the time of the incident and testified on behalf of the Justice Center. [REDACTED] testified that she directly observed the abuse by DSP [REDACTED], and within approximately fifteen minutes made a report to her supervisor, [REDACTED], the Assistant Residence Manager. [REDACTED] further testified that the Subject then confronted her and said “Why are you snitching on my son?”, or “You snitched on my son”, or words to that effect.¹ [REDACTED] hearing testimony was consistent with her contemporaneous written reports, and made it clear that the tone and manner of these comments by the Subject showed that the Subject was angry and was attempting to interfere with or influence [REDACTED], with the intent to suppress the report. DSP [REDACTED] also testified on behalf of the Justice Center. She testified that she had entered the room after the abuse occurred and directly witnessed the Subject’s comments to DSP [REDACTED]. She corroborated the account given by DSP [REDACTED]. The Subject’s meaning and intent appeared clear to both witnesses. (Justice Center Exhibits 3, 4, 6, 11, 13, 16, 18; Hearing testimony of Investigator [REDACTED]; Hearing testimony of DSP [REDACTED]; Hearing testimony of DSP [REDACTED])

Offense 2

The Justice Center further proved by a preponderance of the evidence that the Subject intentionally made false statements and/or withheld material information during the investigation of an allegation of abuse to a service recipient.

Specifically, the evidence establishes that, despite his insistence that he did not witness the acts of abuse by DSP [REDACTED] toward the Service Recipient, the Subject was sitting in the same room as, and close to, the Service Recipient during the abusive incident. It was [REDACTED]

¹ The evidence indicated that there was no familial relationship between the Subject and DSP [REDACTED]. (Justice Center Exhibit 4)

testimony at the hearing that, due to his proximity to the Service Recipient, it would have been impossible for the Subject not to have seen the abuse take place. (Justice Center Exhibit 4; Hearing testimony of DSP [REDACTED])

The evidence further establishes that the Subject, in the moments immediately following the abuse, had a phone call from DSP [REDACTED], which was not answered, and further had direct conversations with DSP [REDACTED] and DSP [REDACTED] later the same evening. Evidence taken from the Subject's cell phone, and video recordings from the facility, support the conclusion that such phone contact and direct conversations had taken place, all of which would have been relevant and material to the agency's investigation. The Subject flatly denied all of the aforementioned contact with his co-workers during his interview with Investigator [REDACTED], in his written statements, and during his hearing testimony. (Justice Center Exhibit 4; Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject)

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. 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 level of abuse or neglect set forth in the substantiated report. Category two conduct is that in which a custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Here, the Service Recipient was physically injured², and there was a likelihood of serious injury, therefore category two is the correct designation. Based upon the totality of the circumstances,

² According to the evidence, the injury (irritation to the Service Recipient's eyes) was not permanent, as noted above in paragraph no. 7, p. 4.

the evidence presented and the witnesses statements, it is determined that the substantiated report is properly categorized as Category 2 conduct with respect to both Offense 1 and Offense 2.

DECISION:

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

The substantiated report is properly categorized as a Category 2 act as to each of the two offenses charged.

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

DATED: December 28, 2015
Schenectady, New York



Louis P. Renzi, ALJ