

**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: Todd Sardella, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

ORDERED:

DATED: June 30, 2016
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:

John T. Nasci
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Office Building
333 East Washington Street
Hearing Room B
Syracuse, New York 13202
On: [REDACTED]

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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New York State Justice Center for the Protection
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By: Todd 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 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], of abuse and neglect by the Subject of two Service Recipients.

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

Offense 2¹

It was alleged that on [REDACTED], at the JC Penney store located at the [REDACTED] Mall, [REDACTED], while acting as a custodian, you neglected two service recipients when you failed to provide them with adequate supervision, by shoplifting while on an outing with them, causing your detention by store security and arrest by police.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493.

Offense 3

It was alleged that on [REDACTED], during your interrogation at the [REDACTED] office located at [REDACTED], concerning the events of [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you intentionally made false statements regarding the events at the [REDACTED] Mall while you were caring for two service recipients, including those that resulted in your arrest for shoplifting.

¹ Offense 1 was unsubstantiated.

These allegations have been SUBSTANTIATED as Category 3 abuse (obstruction of reports of reportable incidents) pursuant to Social Services Law § 493.

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

4. [REDACTED], located at [REDACTED] [REDACTED] (the Facility), is an adult group home operated by the New York State 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 3 and Hearing testimony of Justice Center Investigator [REDACTED])

5. At the time of the alleged abuse and neglect, the Subject was employed by the Facility as a Direct Support Assistant (DSA), and had been employed at the Facility for approximately three years immediately preceding the date of the incident on [REDACTED]. (Justice Center Exhibit 16 - interrogation of Subject)

6. At the time of the alleged abuse and neglect, the Service Recipients, who were the objects of the Subject's alleged abuse and neglect, were adult residents of the Facility. Both Service Recipients suffered from profound mental retardation and other intellectual disabilities. Both Service Recipients were non-verbal and required almost constant close proximity supervision and care. (Justice Center Exhibit 3 pages 7 and 8)

7. On [REDACTED], the Subject and Staff A (another DSA) were supervising the Service Recipients on an outing to the [REDACTED] mall in [REDACTED]. While at the mall, the Subject, Staff A and the two Service Recipients (both in wheelchairs) entered the JC Penney store. While in the JC Penney store, the Subject secreted three pairs of female underpants in the wheelchair behind the back of one of the Service Recipients. The Subject also placed a

single pair of female underpants in the same Service Recipient's bra. (Justice Center Exhibit 11 and Hearing testimony of Justice Center Investigator [REDACTED] and the Subject)

8. Shortly thereafter, the Subject and Staff A exited the store with the two Service Recipients, without having paid for the four female underpants and a pair of reading glasses that were in the possession of Staff A. After exiting the store the Subject and Staff A were approached by JC Penney store loss prevention personnel regarding the store merchandise that was taken and not paid for. The Subject and Staff A, together with the Service Recipients, were taken back to the store where they were held by the store's loss prevention officer until police arrived. While the Subject and Staff A were in store custody, three pair of underwear and the glasses were recovered from the wheelchair by the loss prevention officer. (Justice Center Exhibit 8 and Hearing testimony of Justice Center Investigator [REDACTED])

9. As a result of the incident and while still at the store, the Subject and Staff A were arrested for Petit Larceny. Staff A was given an appearance ticket and the Subject was taken into police custody due to her inability to produce identification at the time of her arrest. (Justice Center Exhibits 8 and 3, and Hearing testimony of Justice Center Investigator [REDACTED])

10. Because the Subject was taken into police custody and Staff A had been arrested, Facility management determined that it was necessary to have other Facility staff go to the mall to retrieve the Service Recipients and transport them back to the [REDACTED]. After the Service Recipients had been returned to the [REDACTED], Facility Program Manager [REDACTED] found the fourth pair of women's underwear in the back of the bra of one of the Service Recipients. (Justice Center Exhibits 11 and 13)

11. On [REDACTED], during an interrogation of the Subject by Justice Center Investigator [REDACTED], the Subject stated that she had returned all four pairs of underwear to

the shelf before leaving the store, and that she did not steal anything from the store. The Subject further stated that, on [REDACTED], in her [REDACTED] Court appearance concerning the petit larceny charge, the charge had been “thrown out” and the Court gave her a six month Adjournment in Contemplation of Dismissal (ACD). (Justice Center Exhibit 16 – Audio Recording of the Interrogation of the Subject)

12. The Subject’s Petit Larceny charge was disposed of by [REDACTED] Court with a six month ACD upon the Subject’s appearance in court on or about [REDACTED]. (Justice Center Exhibits 8 and 3, and Hearing testimony of Justice Center Investigator [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) (f) and SSL § 488(1)(h) to include:

(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.

(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)(c), 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, described as “Offense 2” and “Offense 3” 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 1-15) The Justice Center also presented an audio recording of the Justice Center Investigator’s interrogation of the Subject. (Justice Center Exhibit 16) The investigation underlying the substantiated report was conducted by Justice Center 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 no other evidence.

Offense 2

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect by failing to properly supervise the Service Recipients when she and Staff A committed petit larceny by shoplifting merchandise while on an outing with the Service Recipients at the [REDACTED] mall.

The facts were not disputed at the hearing. The Subject admitted in her testimony that she took the underwear from the store without paying for it, that she was arrested for her actions, that she was taken into police custody thereafter and that she ultimately received a six month ACD from [REDACTED] Court in satisfaction of the criminal charges. (Hearing testimony of the Subject)

In order to prove neglect based on the allegations contained in Offense 2, the Justice Center must first establish that by any action, inaction or lack of attention, the Subject breached a custodial duty that she owed to the Service Recipients. The record reflects that because of their actions, the Subject and Staff A were no longer able to properly care for the Service Recipients and, as a result, the Facility was required to send additional staff to the mall to transport the Service Recipients home. Consequently, the Subject's conduct put her in direct conflict with her duty to properly supervise the Service Recipients. The Subject contends that the Service Recipients were never left alone. However, maintaining proper supervision means not only remaining in close proximity to the Service Recipients, as required for both Service Recipients, but also maintaining the ability to care for the Service Recipients. It is clear from the record that being placed into police custody hindered the Subject's ability to carry out her custodial responsibilities to the point of requiring the Facility to send other staff to the mall to transport the Service Recipients home.

The Justice Center must also establish that the Subject's breach of her duty to properly supervise the Service Recipients 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 Recipients. Both Service Recipients had diagnoses of profound mental retardation, both were non-verbal and both required staff to remain within close proximity of them. Both Service Recipients communicated only through facial expressions, vocalization and touch. It logically follows that

any desire, need or distress by the Service Recipients could only have been communicated via these methods, and that only the Facility staff would understand and be able to take action, should such communication take place. As stated above, the Subject's ability to carry out her custodial responsibilities to the Service Recipients was hindered when she was placed into police custody. Given the Service Recipients' limited and unique methods of communication, physical injury to the Service Recipients was a likely consequence of the Subject's conduct.

Offense 3

The Justice Center also proved by a preponderance of the evidence that the Subject committed abuse by intentionally making false statements to the Justice Center investigator concerning the shoplifting incident at the [REDACTED] mall.

In order to prove abuse based on the allegations contained in Offense 3, the Justice Center must establish that the Subject intentionally made a false statement that impeded the investigation of the allegations.

The hearing testimony revolved around the Subject's statement to the Justice Center investigator made during the [REDACTED] interrogation, that the Subject had received an ACD when, in fact, the ACD had not yet been granted. However, it is not clear from the record that the Subject intentionally lied about being given an ACD and might instead have been confused about the process. In any case, the Justice Center investigator admitted that the Subject's statement in this regard did not impede her investigation of the report. (Hearing testimony of Justice Center Investigator [REDACTED]).

However, in the same interrogation the Subject denied outright having stolen the underwear. The overwhelming weight of evidence in the record, including the Subject's admission in her hearing testimony, that she took the underwear from the store without paying for it, supports

a finding that her interrogation statement was false. Furthermore, the Subject offered no evidence to explain her contradictory statement to the Justice Center investigator, or why her statement should not be taken as intentional. Because the Subject failed to rebut the Justice Center's evidence, the conclusion is drawn that the conveyance of such a prevarication by the Subject was intentional.

Additionally, the record reflects that the Subject's denial of her involvement in the shoplifting incident impeded the investigation by creating an alternate explanation of events that conflicted with other evidence gathered by the Justice Center investigator, and which caused the Justice Center investigator additional effort and work to resolve.

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 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 abuse or 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 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 and neglect.

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

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

DATED: June 28, 2016
Schenectady, New York

A handwritten signature in dark ink, consisting of a large, stylized 'J' followed by a horizontal line and a small flourish.

John T. Nasci, ALJ