

**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: Thomas C. Parisi, 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 ██████████
██ 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.

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 these reports 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: September 12, 2016
Schenectady, New York

A handwritten signature in dark ink, appearing to read "David Molik", is written over a horizontal line.

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:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
401 State Street
Schenectady, New York 12305
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: Thomas C. Parisi, Esq.

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████████████████
████████████████████

JURISDICTION

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

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

Allegation 1

It was alleged that on multiple undetermined dates during the fall of 2013, at the [REDACTED], located at [REDACTED] while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you observed but failed to report incidents of both the unlawful use and distribution of a schedule I controlled substance at the workplace, despite your duty as a mandated reporter.

This allegation has been SUBSTANTIATED as Category 2 abuse (obstruction of reports of reportable incidents) pursuant to Social Services Law § 493(4)(b).

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

4. The facility, located at [REDACTED], is an [REDACTED] for adults with intellectual disabilities, and is operated by [REDACTED]

5. At the time of the alleged abuse, the Subject had been employed by [REDACTED]

6. At the time of the alleged abuse, the Service Recipients were all of the residents of

7. [REDACTED] operates several programs in [REDACTED] including a day

8. DSP [REDACTED] worked the day shift at [REDACTED] and used the [REDACTED] as her base of

9. Several [REDACTED] employees admitted that they either purchased, or attempted

10. The Subject worked the day shift at [REDACTED] and had known DSP [REDACTED] since

he had smelled marijuana on some of the other employees during his shifts. The Subject did not report his suspicions to the Justice Center. (Hearing testimony of Subject; Justice Center Exhibits 6, and 11)

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 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), 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 (2), which is defined as follows:

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(s) 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 and/or neglect 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 established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 1” 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 1-10) Additionally, the Justice Center presented two audio recordings of interviews and interrogations of witnesses and subjects of the

report. (Justice Center Exhibits 11 and 12) 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 his own behalf and provided no other evidence.

The Justice Center proved by a preponderance of the evidence that the Subject committed abuse (obstruction of reports of reportable incidents) when, as a mandated reporter, he failed to report other staff engaging in illegal activity on the premises.

In order to sustain a case of failure to report a reportable incident under SSL § 488(1)(f), the Justice Center must prove by a preponderance of the evidence that the Subject was a custodian as defined by SSL § 488 (2), and that he failed to report a reportable incident upon discovery.

There is no dispute in the record that the Subject was a custodian as defined in the statute. He was employed by a provider agency, having direct contact with individuals receiving services by that provider agency. As such, he was a mandated reporter with an affirmative duty to report incidents of suspected abuse or neglect to the VPCR.

The Justice Center must next establish by a preponderance of the evidence that there was a reportable incident which was not reported by the Subject. The Subject admitted that he occasionally detected the smell of marijuana emanating from other staff when they came into the [REDACTED]. (Justice Center Exhibit 11) In addition, the Subject testified that he was aware of some staff members using drugs, and he attempted to get [REDACTED] to institute a drug testing procedure, to no avail. (Hearing testimony of Subject) However, the [REDACTED] Handbook specifically states that any employee who reports to work under the influence of drugs or alcohol is subject to discipline. (Justice Center Exhibit 6) Therefore, the Subject was aware of an issue at the [REDACTED] regarding drug use, and either knew or should have known that such behavior is prohibited pursuant to [REDACTED]

policy, yet did not report it upon discovery. Furthermore, such conduct constitutes a reportable incident pursuant to the statute, and as a mandated reporter, the Subject has an affirmative duty to report it upon discovery.

There is no dispute in record that the Subject never called the Justice Center. In his defense, the Subject asserts that he had reported incidents internally in the past, but that management had not responded with any significant investigation. Staff were allowed to ignore policies and procedures with impunity. (Hearing testimony of Subject) However frustrating that may have been, once SSL § 488 was enacted, and a mechanism through which reporting acts of suspected abuse, neglect and significant incidents was created, the Subject had a duty to report such suspected incidents to the Justice Center.

Furthermore, the evidence clearly establishes that the illicit activities went much further than staff occasionally reporting for duty while under the influence of marijuana. Several staff admitted to buying marijuana from DSP [REDACTED] during their shifts, none of the staff interviewed were surprised that she was being investigated for selling marijuana, and one even said that it was common knowledge that she sold marijuana while at work. (Justice Center Exhibit 11) Therefore, the Subject's contention that he was not aware of this illegal activity is not credited.

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 of abuse or neglect set forth in the substantiated report. Engaging in illegal activity such as selling, distributing, and using marijuana seriously endangers the safety, health, and welfare of the Service Recipients under their care. It is

██████████ particularly disturbing that on at least one occasion, a service recipient was brought on a van run where marijuana was delivered to an employee of the day habilitation program. 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 2 act.

DECISION:

The request of ██████████ that the substantiated report 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.

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

DATED: August 31, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge