

**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

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

██████████

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.

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██████████
████████████████████

By: Robert W. Sadowski, Esq.
Sadowski Katz LLP
830 Third Avenue, 5th Floor
New York, New York 10022

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: December 23, 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:

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: [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]

By: Robert W. Sadowski, Esq.
Sadowski Katz LLP
830 Third Avenue, 5th Floor
New York, New York 10022

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 [REDACTED] at the [REDACTED] located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to report allegations of a reportable incident of abuse or neglect and failed to appear for your interview regarding an 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 was retained.

4. The facility, located at [REDACTED] is a day program serving adults with developmental disabilities and is operated by the Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject

to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse, the Subject was employed by OPWDD as a Habilitation Specialist 1 (HS1), and as such she was a custodian as that term is so defined in Social Services Law § 488(2). The Subject started working for OPWDD in 1987 [REDACTED]. (Hearing testimony of Subject)

6. At the time of the alleged abuse, the Service Recipient had been receiving [REDACTED] since 1998. The Service Recipient is an adult male with a diagnoses of mild intellectual disability, adjustment disorder, and attention deficit disorder. (Justice Center Exhibits 5, and 7; Hearing testimony of [REDACTED])

7. At a treatment team meeting on [REDACTED], the Subject disclosed to the team that another staff person at the day program had been singling out the Service Recipient, reprimanding and ostracizing him in front of his peers, for no reason. The Service Recipient and his guardian also reported to the team instances where that staff person had been rude and yelled at the Service Recipient for no reason. The team decided that they should report these incidents to the Justice Center. (Justice Center Exhibits 5 and 9; Hearing testimony of [REDACTED])

8. Every time the other staff person was rude to the Service Recipient, or treated him unfairly, the Service Recipient reported it to the Subject. (ALJ Exhibit 1) In addition, the Subject observed the other staff person yelling at the Service Recipient, treating him differently from the other service recipients, and behaving in an abusive manner toward the Service Recipient. The Subject did not report any of this to the Justice Center, even after the treatment team meeting on [REDACTED] (Hearing testimonies of Subject and OPWDD Investigator [REDACTED])

9. On [REDACTED], the Subject was scheduled to appear at an interrogation regarding this matter. OPWDD Investigator [REDACTED], who was to conduct the interrogation,

called the Subject to ascertain whether she would appear. The Subject informed Investigator [REDACTED] that, on the advice of her attorney, she would not appear at the interrogation. (Justice Center Exhibit 11) Also on [REDACTED] the Subject's attorney filed a motion in the United States District Court for the Northern District of New York, requesting a Protective Order "halting any further interrogations of [REDACTED]". (Subject Exhibit A)

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), 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 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 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 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. Specifically, the Subject failed to report allegations of a reportable incident of abuse or neglect.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-11) The investigation underlying the

substantiated report was conducted by OPWDD 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 one document. (Subject Exhibit A) Additionally, OPWDD Developmental Aide [REDACTED] and the Service Recipient's Legal Guardian, [REDACTED] testified on behalf of the Subject.

The facts in this matter are not in dispute. The Subject testified that on more than one occasion, she observed another staff person at the [REDACTED] yell at, and behave in a confrontational manner toward the Service Recipient. The Subject testified that she never reported any of these incidents to the Justice Center, despite her understanding that as a custodian and a mandated reporter, she was required to call the VPCR and report such incidents. (Hearing testimony of Subject)

The record further reflects that every time this other staff person mistreated the Service Recipient, he reported those additional instances to the Subject. (Subject Exhibit A) Yet the Subject never called in a report to the VPCR. Even after the Service Recipient reported these incidents during a treatment team meeting, and all the other participants at the meeting called the Justice Center, the Subject failed to do so. (Justice Center Exhibits 5 and 9; Hearing testimonies of OPWDD Investigator [REDACTED] and [REDACTED])

In her defense, the Subject contends that prior to the inception of the Justice Center, she reported such incidents to her supervisors, and she was retaliated against by her co-workers. Whether the Subject was retaliated against is not relevant to this proceeding. Her obligations as a custodian and a mandated reporter are neither abrogated nor alleviated in this instance.

The Justice Center has not proved by a preponderance of the evidence that the Subject

¹ At the time of the hearing, [REDACTED] had changed jobs and was a Program Operation Specialist with OPWDD.

committed abuse (obstruction of reports of reportable incidents) by failing to appear at her interrogation. The Subject acted in good faith on the advice of her counsel, who filed a motion requesting a Protective Order on the same day as the interrogation was scheduled to take place. Additionally, the evidence does not indicate that any offer to re-schedule the interrogation was made by the investigator. Therefore, the Justice Center has failed to meet its burden to show by a preponderance of the evidence that the Subject obstructed the investigation by not appearing at her interrogation.

Accordingly, it is determined that the Justice Center has 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 allegations of a reportable incident of abuse or neglect. Additionally, it is determined that the justice Center has failed to meet its burden of proving by a preponderance of the evidence that the Subject committed abuse (obstruction of reports of reportable incidents) by failing to appear at her interrogation. 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.

Substantiated Category 3 findings of abuse and/or neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to SSL § 496(2). The report will be sealed after 5 years.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[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 Jean T. Carney, Administrative Hearings
Unit.

DATED: December 19, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge