

**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**

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: Julianne O'Brien, Esq.

[REDACTED]

By: William G. James, Esq.
P.O. Box 565
Willsboro, New York 12996

[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 modified is granted. The determination that the Subject committed neglect by failing to activate a fire alarm to evacuate a service recipient after smelling smoke is substantiated, while the determination that the Subject committed obstruction of reports of a reportable incident is deemed unsubstantiated.

It is agreed that the substantiated report should be categorized as a Category 3 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report is substantiated in part and 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: April 27, 2016
Schenectady, New York

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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
UPON STIPULATED
FACTS**

Adjud. Case #:

[REDACTED]

Before:

David Molik
Administrative Law Judge

Held at:

Upon written stipulation,
Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
401 State Street
Schenectady, New York 12305

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: Juliane O'Brien, Esq.

[REDACTED]

By: William James, Esq.
P.O. Box 565
Willsboro, New York 12996

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for two separate Category 3 offenses, one for neglect and the other for 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 upon consideration of a stipulation of facts, it is hereby found:

1. On [REDACTED], an allegation was reported to the VPCR that [REDACTED] (the Subject), an employee of the Office for People with Developmental Disabilities (OPWDD), assigned to work at the [REDACTED] located at [REDACTED], committed neglect when she failed to activate a fire alarm to evacuate a service recipient after smelling smoke. It was subsequently alleged that on [REDACTED], the Subject committed abuse when she provided false or misleading statements during an investigation into the allegation of [REDACTED]. The Justice Center classified the matter as both a neglect case and an abuse case, and assigned [REDACTED] to the report.

2. On [REDACTED] the Justice Center substantiated the allegations against the Subject for neglect and abuse. 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 neglect when you failed to activate a fire alarm to evacuate a service recipient after smelling smoke.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c).

Allegation 2

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 provided false or misleading statements during an investigation into an allegation of neglect involving a service recipient.

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. Notwithstanding that the Subject was entitled to a full evidentiary hearing, the Subject elected to waive her rights to an evidentiary hearing on the relevant issues and instead the Subject elected to proceed to a hearing decision based upon stipulated facts. The Parties have entered into a Stipulation of Facts, which is attached hereto and incorporated into this decision. As part of the Stipulation of Facts, it was agreed and it is understood that, subject to the approval of the Executive Director of the Justice Center, the report will be maintained in part and amended in part within the VPCR as a Category 3 finding of neglect, while the Category 3 finding of obstruction of a reportable incident will be deemed unsubstantiated.

ISSUE

Whether the resolution of this substantiated report proposed in the Stipulation of Facts is both legally correct and consistent with the public policy expressed in the Protection of People with Special Needs Act (PPSNA) (Ch. 501, L. 2012) that the primary focus of the Justice Center

will be on “the protection of vulnerable persons” and that workers found responsible for abuse or neglect are held accountable.

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 neglect presently under review was substantiated, as was the subsequent report of obstruction of reports of a reportable incident. 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 in relevant parts by SSL § 488 (1) (a) and (h).

Substantiated reports of abuse and neglect are categorized into categories pursuant to SSL § 493(4), including Category 3 abuse or neglect, which is defined, as relevant here, 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.

DISCUSSION

The stipulated facts agreed to by the parties, namely that the Subject, while acting as a custodian, failed to activate a fire alarm to evacuate a service recipient after smelling smoke, establish by a preponderance of evidence that the Subject committed the neglect that was alleged in the substantiated report as contained in Allegation 1. Although the Justice Center also alleged in Allegation 2 that the Subject committed abuse by providing false or misleading statements during an investigation into an allegation of neglect involving a service recipient, the parties have

asked that Allegation 2 be dismissed. Because dismissal of this allegation, under these circumstances, is not inconsistent with the public policy set forth in the PPSNA, I am recommending that the Executive Director accept so much of the stipulated outcome as would uphold the finding of neglect based upon the allegation that the Subject failed to activate a fire alarm to evacuate a service recipient after smelling smoke.

The parties have also requested, as part of the proposed stipulated resolution of this case, that the substantiated finding of neglect remain a Category 3 finding. Based upon the facts contained in the parties' stipulation, 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 modified is granted. The determination that the Subject committed neglect by failing to activate a fire alarm to evacuate a service recipient after smelling smoke is substantiated, while the determination that the Subject committed obstruction of reports of a reportable incident is deemed unsubstantiated.

It is agreed that the substantiated report should be categorized as a Category 3 act.

This decision is recommended by David Molik, Administrative Hearings Unit.

DATED: April 26, 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

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The presiding Justice Center Administrative Law Judge (ALJ) will draft and recommend a hearing decision based upon the stipulation of facts. However, the ultimate authority to approve the hearing decision is vested with the Executive Director of the Justice Center. Therefore, any hearing decision which may be issued based upon this stipulation is subject to the approval of the Executive Director of the Justice Center. The Subject also agrees, after having had an opportunity to consult with counsel, and upon the receipt of the approval of the recommended decision by the Executive Director, that the report will continue to be maintained within the VPCR as a Category 3 finding of neglect, and that the Subject is waiving any rights that she may have for an appeal of this proceeding.

In the event that the Executive Director shall not approve a recommended decision based upon the stipulation of facts, a full evidentiary hearing will be scheduled and the existence of this stipulation and any facts admitted herein will not be admitted into the hearing record and this document shall not be used for any purpose whatsoever, at the evidentiary hearing.

STIPULATION OF FACTS

██████████, hereby authorizes her attorney, William G. James, Esq., to enter into this Stipulation of Facts on her behalf.

Juliane O'Brien, Esq. is an Assistant Counsel of the Administrative Appeals Unit, New York State Justice Center and has the authority to enter into this Stipulation of Facts on behalf of the Justice Center.

The parties hereby agree to the following facts:

1. The facility, ██████████, located at ██████████
██████, is operated by the Office for People With Developmental Disabilities, which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

2. On [REDACTED], the Subject, was employed as a Per Diem Staff and at all times relevant hereto was a custodian pursuant to Social Services Law § 488(2)
3. On [REDACTED], the Subject worked at [REDACTED] from 5:30 a.m. to 9:30 a.m. At approximately 9:05 a.m., staff reported that something smelled to the Subject who went in the kitchen and smelled something "plastic" and a smell like something was burning. The Subject and the other staff shut off all the appliances, unplugged everything and shut off the lights. While the staff were doing this, they reported this smell to their Supervisor who was also in the home. The Supervisor called Maintenance who arrived approximately 35 minutes later and found that the smell was because of a 14 watt Compact Florescent Light Bulb had burned out.
4. At the time of the incident, the Service Recipient was the only resident in the home. The Service Recipient cannot ambulate on his own and requires a wheelchair for transportation. According to his Individual Fire Evacuation Assessment, the Service Recipient requires staff assistance to evacuate the home and must be supervised once outside at the designated safe area.
5. The Service Recipient was evacuated from the home approximately twenty minutes after the smell was discovered.
6. The fire alarm at [REDACTED] was never activated.
7. The Fire Evacuation Plan for [REDACTED] states the action to be taken upon actual discovery of a fire and/or smell of smoke and/or sound of alarm is to go into RACE procedures immediately: Rescue - Alarm - Confine - Evacuate. Rescue requires staff to close the door to the room of fire or smoke origin. Alarm requires staff to pull the nearest fire alarm and yell "fire". Confine requires staff to confine the

fire by closing all doors as evacuation proceeds. Evacuate requires staff to evacuate all individuals through the closest exit and go outside; once outside staff are to proceed to the [REDACTED] designated safe area.

8. The Subject was trained on [REDACTED]. Once the Subject smelled something burning, she had obligation to initiate the Fire Evacuation Plan. Despite such, she failed to activate the alarm and evacuate the Service Recipient immediately.


9. The Subject was interrogated on [REDACTED], where she reported that at approximately 9:05 a.m., another staff member had informed her that she had smelled "something". The Subject told the Investigator that she entered the kitchen where she also smelled something "plasticy" and described the smell as if "something was burning". Later in her interrogation, she reports that she did not smell something burning, rather stated that "it did not smell as if anything was on fire." The Subject states that based on the fact that she did not smell smoke or something burning that is why she did not activate the fire alarm.

10. Although the Subject's description of the smell was inconsistent during her interrogation, this inconsistency did not impede the investigation of this incident. It was reported that staff smelled an unusual smell with varying descriptions, that staff attempted to located the source of the smell and that none of the staff activated the fire alarm.

11. Based on the above, the parties have agreed that the report will be maintained in part and amended in part to reflect that the Category 3 finding of neglect will be deemed substantiated, while the Category 3 finding of obstruction of a reportable incident will be deemed unsubstantiated.

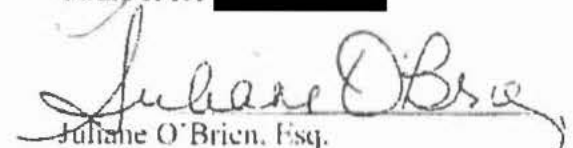
Dated:

4/24/16


William G. James, Esq.
Counsel for [REDACTED]

Dated:

4/21/2016


Julianne O'Brien, Esq.
NYS Justice Center

Approved for recommendation:

Elizabeth M. Devane
Administrative Law Judge
New York State Justice Center for the Protection of People with Special Needs

Dated: _____, 2016