

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 granted. The Subject has not been found to have committed neglect.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be amended and sealed by the Vulnerable Persons' Central Register, pursuant to SSL § 493(3)(d).

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: March 20, 2017
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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjudication Case #

██████████

Before:

Sharon Golish Blum
Administrative Law Judge

Held at:

Justice Center for the Protection of People with
Special Needs
125 East Bethpage Road, Suite 104
Plainview, New York 11803
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: Jacqueline Seitz, Esq.

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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for 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] of neglect by the Subject of Service Recipients.
2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Allegation 1

It was alleged that on [REDACTED], in an agency van away from the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you used a cell phone or other portable electronic device while transporting service recipients.

This allegation has been SUBSTANTIATED as Category 2 neglect 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, [REDACTED], located at [REDACTED], is operated by [REDACTED]. [REDACTED] is certified by the New York State Office for People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged neglect, the Subject was assigned an overnight shift that ended at 9:00 a.m. on [REDACTED] and it was her second day of employment at the facility as a Direct Support Professional (DSP). One of the Subject's assignments that morning was to transport three service recipients by facility minivan to their separate day programs, while working alone. Although the Subject, a [REDACTED] resident, had been taken on the route the previous day, which was her first day of work, she was unfamiliar with the specific destinations and the roadways on which she was required to travel. (Hearing testimony of the Subject and Justice Center Exhibits 2 and 12) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. The Subject was not provided with driving directions to her various destinations, but she was provided with a facility GPS device to assist her. The facility van was not equipped with a GPS mounting device. Because there was no place to secure the GPS device in the facility minivan where it could be easily viewed, the Subject held it in her hand as she drove and raised it to her line of vision when she needed to view it. Each time that the Subject programmed the GPS, she did so from a parked position. When the Subject lost her way, she pulled the minivan over into a parked position and reprogrammed the GPS device. (Hearing testimony of the Subject and Justice Center Exhibits 2 and 12)

7. Service recipient A was the last service recipient to be dropped off and, because she was frustrated with the length of time that the trip was taking, she began crying. Service recipient A repeatedly requested that she be taken back to the facility and not to her day program. From the parking lot of the day program, the Subject used her cell phone to telephone the facility manager to seek instructions. The facility manager asked the Subject if she was driving during the call and the Subject responded that she was calling from a parked position. (Hearing testimony of the Subject and Justice Center Exhibits 2 and 12)

8. The facility manager then told the Subject that, once service recipient A entered her

day program, her mood would change and she would happily participate. The Subject proceeded to take service recipient A to her day program and she was cooperative and pleasant once she arrived inside. (Hearing testimony of the Subject)

9. While the Subject was driving the facility minivan, a local vocational center employee (Witness A), who was driving to work in his personal vehicle on the ██████████ Parkway, noticed the facility minivan with its three passenger service recipients, and recognized one of the service recipients. When Witness A arrived at work, he reported to his program manager that he had observed the driver of the facility minivan holding a cell phone to her left ear while the vehicle was being driven northbound on the ██████████ Parkway. Based upon the license plate and the time that Witness A saw the vehicle, it was determined that the Subject was the driver at the time of the alleged occurrence. (Justice Center Exhibits 10 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 allegation constitutes 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 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 neglect of a person in a facility or provider agency is defined by SSL § 488(1)(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.

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.

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 the evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has not established by a preponderance of the evidence that the Subject committed neglect as described in Allegation 1 of the substantiated report.

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In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-24) The investigation underlying the substantiated report was conducted by ██████████ Quality Assurance Investigator ██████████ ██████████, who testified on behalf of the Justice Center.

The Subject testified at the hearing in her own behalf.

In her testimony, the Subject acknowledged that, while transporting service recipients in a facility van that was not equipped with a GPS holder, she held the facility GPS device in her hand and raised it to her line of vision when she needed to view it.

In support of the allegation that the Subject used a cell phone while transporting service recipients, the Justice Center relied on the evidence of Witness A, who was interviewed by ██████████ ██████████ Quality Assurance Investigator ██████████ (Justice Center Exhibit 6) and provided a signed statement dated ██████████ (Justice Center Exhibit 11). Witness A indicated that, while he was driving northbound on the ██████████ Parkway, he pulled alongside a minivan whose sticker he recognized. Witness A indicated that he recognized one of the three passengers and noticed that the driver “had a mobile device pressed up to her left ear.” Witness A indicated that upon arriving at his workplace, he reported the occurrence to his facility program coordinator, who thereafter instructed him to report the occurrence to the facility ██████████ ██████████.

The Subject was interviewed by ██████████ Quality Assurance Investigator ██████████ ██████████ (Justice Center Exhibit 6) and provided a signed statement dated ██████████ (Justice Center Exhibit 12). The Subject stated that the facility gave her a GPS, which she held in her hand while she was driving and that the only time that she used her cell phone was when she had parked the facility minivan in a day program parking lot and contacted the facility manager for instructions regarding service recipient A. The Subject stated that she did not use her cell phone while driving

on the ██████████ Parkway.

The Subject's Request for Amendment (Justice Center Exhibit 2) is entirely consistent with her previous written statement and her statement to ██████████ Quality Assurance Investigator ██████████.

The Subject testified that at no time while she was driving the facility minivan did she use her cell phone. The Subject testified that she was aware of the legal and facility prohibitions against the use of cell phones while driving a motor vehicle (Justice Center Exhibit 23), and that she affirmed her signature on the facility employee acknowledgment in which the prohibition was outlined (Justice Center Exhibit 24). The Subject testified that her particular circumstances of navigating unfamiliar roadways, of having to pay close attention to the directions given by the GPS device, of being on the second day of a new job, of performing this duty for the first time and of having the distraught service recipient A in the vehicle, all provided overwhelming deterrents to using a cell phone at the alleged time. The Subject's testimony was provided in a candid, logical and forthright manner.

Given that Witness A was also driving when he allegedly observed the Subject using a cell phone, he was not in a position to have had an undistracted opportunity to observe exactly what the Subject was doing in the facility minivan.

Upon reviewing and considering the Subject's testimony, it is found to be credible. That fact, taken together with paucity of the Justice Center's evidence, leads to the determination that the Subject was not shown by a preponderance of the evidence to have used a cell phone while transporting service recipients.

Counsel for the Justice Center argued that even if the Subject did not use a cell phone while driving, her admitted use of an unmounted GPS device while transporting service recipients constituted distracted driving, which was a breach of duty and that, accordingly, the Subject

committed neglect.

A finding of neglect requires that a preponderance of the evidence establishes that the Subject engaged in conduct that breached her duty to a service recipient and that the breach of duty 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 recipient.

Counsel for the Justice Center conceded that New York State Vehicle & Traffic Law § 1225-d(2)(a) does not include GPS devices in its definition of prohibited portable electronic devices. However, counsel correctly argued that, although there is no legal prohibition against using a GPS device while driving, the Justice Center need not prove a violation of the law to establish neglect.

The evidence shows that the Subject was tasked with the duty of transporting the service recipients to their various day programs in the facility minivan, which was not equipped with a GPS holder, and that she was provided with a facility GPS device to assist her. The credible evidence in the record establishes that the Subject performed her duty to transport the service recipients appropriately and there was no evidence in the record that, while doing so, the Subject became distracted from driving or deviated in any way from that which was expected of her.

Consequently, the Justice Center did not establish by a preponderance of the evidence that the Subject breached her custodial duty to the service recipients.

Also, although not determinative, it is worthwhile to mention that ██████████ Quality Assurance Investigator ██████████ concluded, after a detailed investigation, that the Subject had not committed an act of neglect in this case and unsubstantiated the allegation.

Accordingly, it is concluded that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed neglect under SSL § 488(1)(h), as specified in Allegation 1 of the substantiated report.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED], [REDACTED] be amended and sealed is granted.

The Subject has not been found to have committed neglect.

This decision is recommended by Sharon Golish Blum, Administrative
Hearings Unit.

DATED: March 6, 2017
Plainview, New York



Sharon Golish Blum, Esq.
Administrative Law Judge