

**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: Juliane O'Brien, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Thomas D. Latin, Esq.
Lippes Mathias Wexler Friedman LLP
54 State Street, Suite 1001
Albany, New York 12207

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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 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: July 29, 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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

Louis P. Renzi
Administrative Law Judge

Held at:

Office of Children and Family Services
Spring Valley Regional Office
11 Perlman Drive
Spring Valley, New York 10977
On: ██████████

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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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 physical abuse when you engaged in a physical altercation with a service recipient.

This allegation has been SUBSTANTIATED as Category 3 physical abuse 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 secure adult psychiatric center that provides treatment for patients admitted by court order as incompetent to stand trial, and is overseen by the Office of Mental Health, 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 the facility for approximately eight (8) years and worked as a Secure Hospital Treatment Assistant (SHTA). At the time of the incident, the Subject, after completing his program responsibilities, was assigned to Ward [REDACTED] wherein the Service Recipient resided. (Hearing Testimony of Subject)

6. At the time of the alleged abuse, the Service Recipient was fifty-five (55) years of age, and had been admitted to the facility on [REDACTED]. The Service Recipient was diagnosed with bipolar disorder. At the time of the incident, he had been refusing prescribed medications for twenty (20) days. (Justice Center Exhibits 5 and 6)

7. There were approximately thirty (30) service recipients on Ward [REDACTED] and the facility protocol was that after the service recipients receive their medications, they are directed to their rooms to enable the common area to be cleaned. On [REDACTED], the Service Recipient refused his medication and initially refused to go into his room. Eventually the Service Recipient did go into his room, but then began to repeatedly exit his room into the common area and then re-enter his room. The Subject attempted to redirect the Service Recipient back into his room and the Service Recipient made racial slurs towards the Subject. (Hearing Testimony of [REDACTED], RN; Justice Center Exhibits 4 and 22)

8. The Subject and the Service Recipient engaged in a heated verbal exchange in the dormitory area. The Subject then walked towards the Service Recipient's room and gestured for the Service Recipient to follow him into the room, which he did. The Subject and the Service Recipient continued to argue inside of the Service Recipient's room. Inside the room, the Service Recipient kicked the Subject in the buttocks. (Hearing testimony of Subject; Justice Center Exhibits 4, 10 and 22)

9. The Service Recipient shared a bedroom with three other service recipients, who were present during the time of the alleged abuse. No other SHTAs were inside of the Service Recipient's bedroom at the time of the incident, but two other service recipients were looking into the Service Recipient's room from the doorway. SHTA [REDACTED] approached the doorway, looked into the Service Recipient's room; she immediately turned and called for assistance. SHTA [REDACTED] reported hearing SHTA [REDACTED] state that someone was fighting. (Justice Center Exhibits 4, 17 and 22)

10. While SHTA [REDACTED] called for assistance, one of the service recipients who had been looking into the room entered the Service Recipient's room and pulled the Service Recipient away from the Subject. A few seconds later, the Subject exited the Service Recipient's room and brushed off the front of his clothing. (Hearing Testimony of [REDACTED], RN and Justice Center Exhibits 4, 15 and 18)

11. The Service Recipient was examined by a nurse and found to have three abrasions on his left upper arm and a hematoma on the back (left side) of his head, behind his left ear. (Justice Center Exhibits 4, 14 and 21)

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 of a person in a facility or provider agency is defined by SSL § 488(1)(a), to include:

(a) "Physical abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or causing the likelihood of such injury or impairment. Such conduct may include but shall not be limited to: slapping, hitting, kicking, biting, choking, smothering, shoving, dragging, throwing, punching, shaking, burning, cutting or the use of corporal punishment. Physical abuse shall not include reasonable emergency interventions necessary to protect the safety of any person.

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:

(c) 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 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. Specifically, the evidence establishes that the Subject committed physical abuse on [REDACTED] when, while acting as a custodian, the Subject engaged in a physical altercation with the Service Recipient.

In order to sustain an allegation of physical abuse in this matter, the Justice Center must show that the Subject was a custodian who had physical contact with the Service Recipient; that such contact was either intentional or reckless; and that such contact caused either physical injury or serious or protracted impairment of a Service Recipient’s physical, mental or emotional condition; or caused the likelihood of such injury or impairment.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-22) The investigation underlying the substantiated report was conducted by [REDACTED], RN, Risk Management Specialist at [REDACTED], who testified at the hearing on behalf of the Justice Center. [REDACTED], Director of Risk Management at the facility, who conducted the interrogation of the Subject, also testified at the hearing on behalf of the Justice Center.

The Justice Center submitted a visual only video of the incident, which was extremely helpful and illuminating evidence with respect to the substantiated allegation. The Justice Center also submitted an audio of the interrogation of the Subject. (Justice Center Exhibit 22)

The Subject testified in his own behalf and presented three witness statements which were collected during the underlying investigation, but were not offered by the Justice Center at the hearing. (Subject Exhibits A - C).

The Subject was working at the facility on [REDACTED] as a Secure Hospital Treatment Assistant (SHTA) and was a custodian as that term is defined in Social Services Law § 488(2). The Subject, after completing his program responsibilities, had been assigned to Ward [REDACTED].

It is undisputed that the Service Recipient was shouting racial slurs at the Subject and that the Service Recipient and the Subject were arguing. It is also undisputed that the Service Recipient had a bruise on his head behind his left ear and two or three abrasions on his left arm. What is disputed is how those physical injuries were inflicted upon the Service Recipient, and whether they were in fact caused by the Subject.

The video clearly depicts the heated verbal exchange between the Service Recipient and the subject taking place in the dormitory area. The video also clearly shows that the Subject entered the Service Recipient's room with the Service Recipient following close behind and that no other staff members followed them into the room. One of the service recipients present in the room at the time of the alleged incident reported that he was awakened by the argument and saw the Service Recipient and a staff member wrestling around the floor. (Justice Center Exhibits 15 and 22)

The video evidence does not support the statement of SHTA [REDACTED] that she did not see the Subject assault the Service Recipient because in the video she can be observed immediately calling for assistance after looking into the Service Recipient's room. In addition, SHTA [REDACTED] reported that he heard SHTA [REDACTED] say that "someone's fighting.". (Justice Center Exhibits 11, 17 and 22)

The service recipient who was looking into the Service Recipient's room, stated that he saw the Subject push the Service Recipient away and that he heard a rustling in the room. (Justice Center Exhibit 18) After SHTA [REDACTED] went to call for assistance, this service recipient entered the Service Recipient's room and pulled the Service Recipient away from the Subject by his legs. The video then illustrates that the Subject exited the Service Recipient's room and brushed off the front of his shirt/jacket and trousers. (Justice Centers Exhibit 4, 18 and 22)

During the Subject's interrogation, the Subject admitted that he was arguing with the Service Recipient and that when he turned to leave the Service Recipient's room, the Service Recipient kicked him. He further admitted that he returned to continue the argument. The Subject completed an incident report in which he wrote that he reported the assault by the Service Recipient, but the evidence shows that no one was in fact notified. The Subject testified that the Service Recipient used racial slurs toward him and that "it did not work out well." The Subject concluded his testimony by stating that he and the Service Recipient continued to argue. (Hearing testimony of the Subject; Justice Center Exhibits 4 and 22)

At the hearing the Subject denied that a physical altercation took place. However, having observed and considered the Subject's hearing testimony the Administrative Law Judge presiding over the hearing concludes that this testimony not credited evidence. Not only is the testimony self-serving but it is contradicted by credited evidence in the record. The video clearly shows the Subject exiting the Service Recipient's room and brushing off his clothing, which action is consistent with the statements of the Subject and numerous witnesses that report that the Subject and the Service Recipient were wrestling on the floor. SHTA [REDACTED] immediately reacted when she looked into the room and was heard to say "someone's fighting" and called for assistance immediately. The pictures presented by the Justice Center depict the bruise on the Subject's head

and the abrasions on his left arm. (Hearing testimony of Subject; Justice Center Exhibits 4, 10, 15, 17, 21, 22)

It has been clearly established that the Subject acted both intentionally and recklessly by continuing to argue with the Service Recipient, rather than using proper de-escalation techniques. A witness reported observing the Subject push the Service Recipient and other witnesses reported the Subject and the Service Recipient wrestling on the floor. Physical contact did occur and, as the pictures depict, physical injury was the result. (Justice Center Exhibit 21)

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 physical 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. 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.

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

This decision is recommended by Louis P. Renzi, Administrative Hearings
Unit.

DATED: July 22, 2016
Schenectady, New York



Louis P. Renzi, ALJ