

**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 Parisi, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Jean O'Hearn, Esq.
Kreisberg & Maitland, LLP
75 Maiden Lane, Unit 603
New York, New York 10038

██████████

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 serious physical abuse.

The substantiated report is properly categorized, as a Category 1 act.

NOW, THEREFORE, IT IS DETERMINED that reports resulting in a Category 1 finding shall cause the Subject's name to be permanently placed on the staff exclusion list of the Vulnerable Persons' Central Register (VPCR), and the report to be permanently retained. Thus, the record of this report for serious Physical Abuse shall be permanently retained by the VPCR, and the Subject's name shall be placed permanently on the staff exclusion list, pursuant to SSL §§ 493(5)(a) and 495.

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: August 24, 2016
Schenectady, New York

A handwritten signature in dark ink, appearing to read "David Molik", 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**

Adjudication Case #:

██████████

Before:

Sharon Golish Blum
Administrative Law Judge

Held at:

Adam Clayton Powell Jr. State Office Building
163 West 125th Street
New York, New York 10027
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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████████████████████
██
██

By: Jean O'Hearn, Esq.
Kreisberg & Maitland, LLP
75 Maiden Lane, Unit 603
New York, New York 10038

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], [REDACTED] of physical abuse by the Subject of a Service Recipient.

2. The Justice Center concluded that:

Allegation 1

It was alleged that on [REDACTED], outside of a homeless shelter near [REDACTED], located at [REDACTED], while acting as a custodian, you and another custodian committed physical abuse when you followed a service recipient outside of the residence after an altercation and the two of you beat her, which included hitting her, throwing her to the ground, ripping off her shirt, and kicking her while she was on the ground, demonstrating a conscious disregard of a substantial and unjustifiable risk that physical injury, impairment of the service recipient's health or loss or impairment of the function of a bodily organ or part would occur.

This allegation has been SUBSTANTIATED as Category 1 serious physical abuse pursuant to Social Services Law § 493(4)(a)(i).

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

4. The facility, [REDACTED], located at [REDACTED], is a voluntary transitional living residence operated by [REDACTED]

██████████ that is licensed by the New York State Office of Mental Health (OMH), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse, the Subject, who had been employed at the facility as a Rehabilitation Aide and Caseworker for approximately one year, was working her regular shift from ██████████ at the facility. At that time, the Subject was assigned to provide general supervision to four residents, including the Service Recipient, as well as to dispense medication to all of the residents. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged abuse, the Service Recipient was thirty years of age and had been a resident of the facility since ██████████ 2012. The Service Recipient is a person with diagnoses of schizoaffective disorder, substance dependence, borderline personality disorder and antisocial personality disorder. (Justice Center Exhibit 7)

7. On ██████████, at approximately 10:15 p.m., the Subject was supervising the front desk of the facility and repeatedly instructed the Service Recipient to go back to her room and dress more appropriately. The Service Recipient, who ignored the Subject's directions, argued with the Subject, then walked over, leaned across the desk and slapped the Subject across the face. The Service Recipient immediately exited the facility, which she was permitted to do. (Hearing testimony of the Subject)

8. The Subject immediately arranged for facility staff ██████████ to return early from his break, to assume responsibility for the front desk, and recruited facility staff ██████████ to go outside with her and help her locate the Service Recipient. (Hearing testimony of the Subject)

9. As soon as the Subject and facility staff ██████████ crossed the street in front of the facility, they observed the Service Recipient walking in their direction and they approached her in front of

the [REDACTED] (Hearing testimony of the Subject)

10. Upon seeing the Subject and facility staff [REDACTED], the Service Recipient raised her hands in a fighting stance. The Subject and facility staff [REDACTED] continued to approach the Service Recipient and the Service Recipient moved forward and pushed the Subject's face with her hand. The Subject reacted by grabbing the Service Recipient, fighting back with punches and pulling her hair. At the same time, facility staff [REDACTED] grabbed the Service Recipient and hit and kicked her as well. On two occasions, the Subject and facility staff [REDACTED] wrestled the Service Recipient to the ground, where facility staff [REDACTED] persisted in fighting with the Service Recipient. The second time that the Service Recipient was on the ground, the Subject held on to her while facility staff [REDACTED] punched her in the torso four times, then the Subject released her. After the Service Recipient got up from the ground the second time, she fled from the Subject and facility staff [REDACTED] into the [REDACTED]. (Justice Center Exhibit 23)

11. Thereafter, the Subject and facility staff [REDACTED] returned to the facility and did not disclose what had transpired to any of the other facility staff who were working that night. The Subject, however, sent text messages related to the incident to facility staff [REDACTED] starting at 10:30 p.m. that night, just two minutes after the incident ended. (Justice Center Exhibit 4)

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 physical abuse of a person in a facility or provider agency is defined by SSL § 488(1)(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)(a)(i) including Category 1 serious physical abuse which is defined as follows:

(i) intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;

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 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 established by a preponderance of the evidence that the Subject committed the 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, as well as visual only video of the incident. (Justice Center Exhibits 1-23) The investigation underlying the substantiated report was conducted by facility Quality Assurance Manager for Behavior Health Services ██████████ and Justice Center Investigator ██████████, who both testified at the hearing on behalf of the Justice Center.

The Subject testified on her own behalf and provided no further evidence. One document was admitted independently as evidence. (ALJ Exhibit 1)

Because the Justice Center substantiated this allegation of physical abuse as a Category 1 act, which is the most serious category determination, the elements as set out in SSL § 493(4)(a)(i) must be met. Accordingly, a finding of serious physical abuse in this case requires that a preponderance of the evidence establishes that the Subject intentionally or recklessly caused physical injury as defined in Penal Law 10.10(9), being impairment of physical condition or substantial pain, or that the Subject consciously disregarded a substantial and unjustifiable risk that such physical injury would occur.

██████████

Although there was some evidence of physical injury to the Service Recipient, that the Subject heard that the Service Recipient's nose was bleeding (Justice Center Exhibit 21) and that the Service Recipient complained that she had sustained injuries (Justice Center Exhibits 4 and 11), Counsel for the Justice Center stipulated in the record that the Justice Center was not providing proof of physical injury to the Service Recipient by the Subject. Nonetheless, the evidence in the record is sufficient for a finding of serious physical abuse pursuant to SSL § 493(4)(a)(i), as it clearly establishes that the Subject demonstrated a conscious disregard of a substantial and unjustifiable risk that physical injury, as defined in Penal Law 10.10(9), or impairment of the Service Recipient's health or loss or impairment of the function of a bodily organ or part would occur.

The video shows that at 10:27 p.m. on ██████████, the Subject and facility staff ██████ walking on the sidewalk with their backs to the camera. The Service Recipient comes into view, walking towards them. Upon seeing the two staff members, the Service Recipient continues towards them as they move towards her. Once they are near each other, the Service Recipient raises her arms in a fighting stance and she and the Subject move towards one another. The Service Recipient then moves towards the Subject, attempting to push her face. The Subject responds by grabbing at and hitting the Service Recipient's neck, face and head. Facility staff ██████ immediately joins in the struggle against the Service Recipient, and the Subject and facility staff ██████ are attacking her face and head at the same time. They push and shove the Service Recipient around and then force the Service Recipient down on her back, with the Subject pulling on the Service Recipient's right arm and facility staff ██████ pulling on her left arm. Before the Service Recipient hits the ground, the Subject and facility staff ██████ each pull her up by her arms and then let her drop onto the ground in almost a bouncing motion. Once the Service Recipient is down, the Subject

■■■■■ keeps dragging her by one arm and then releases her hold while facility staff ■■■■ drags the flailing Service Recipient around on the ground by her legs for a few seconds, while kicking at her head and body, before releasing her and stepping away. (Justice Center Exhibit 23)

Then, after the Service Recipient gets up, she and facility staff ■■■■ lunge at each other again. As they struggle, holding on to each other, the Subject grabs the Service Recipient by the head and shoulders from behind. Once again, the Service Recipient is pushed and shoved, and then forced down to the ground. It appears then that the Service Recipient is holding facility staff ■■■■ by her hair and the Subject is holding the Service Recipient by her hair. Then the Service Recipient releases facility staff ■■■■ hair, while the Subject continues to maintain her hold of the Service Recipient. Facility staff ■■■■ punches the Service Recipient in the torso four times before the Subject releases her and steps back from the Service Recipient. The Service Recipient then gets up and enters the ■■■■■■■■■■ building through a doorway, in front of which the incident occurred. The Subject brushes herself off and straightens her clothes while facility staff ■■■■ fixes her hair as they walk out of the screen back towards the direction from which they had come a little over one minute earlier. (Justice Center Exhibit 23)

At 10:30 p.m., less than two minutes after the incident ended, the Subject initiated a conversation by way of text messaging with the Service Recipient's Caseworker, facility staff ■■■■ that continued until ■■■■■■■■■■, an exact copy of which follows:

■■■■■, 10:30 PM

Subject: Just beat ur clients ass
Literally

■■■■■: Who u talking about?
Lol
And what happened?

Subject: Call me

██████████

██████████, 11:00 PM

██████: My mouth still opened

Subject: Smh

██████████ said call the cops

██████: Ok good. What u told her? That she slapped u at the front desk?

Subject: Yes

Niggas got a plan tho

She attacked us and we were trying to hold her down

██████: From the outside fight?

Subject: Yes

██████: [the Service Recipient] have injuries?

Subject: The cops told us that next door called and she was bleeding from the nose
They said she was destroying their property

██████████, 4:19 PM

Subject: She's in the hospital

They're tryna discharge her

██████: Back to ██████████ Smh

Subject: No out of it

██████████ is on it

██████: Lol good. One less client for me

Subject: I'm taking her social down ruining her life real quick lol
(Smirking emoticon)

██████████, 7:08 PM

██████: Lol smh

██████████, 8:14 PM

Subject: So I told ██████████ we went to look for her and didn't find her
(Crying emoticon)

██████████

██████████, 11:13 AM

Subject: They suspended ██████████ ??!!!

██████████: Idk. I thought she called out yesterday.
Or u telling me

Subject: I'm tellin u
All bad

██████████ Oh!!!!!!!!!!!!!! I really thought she called out yesterday because I called out last week.
For the ██████████ situation?

Subject: Idk girl

██████████ (Perplexed emoticon) That don't make sense. They suppose to give her an explanation.

Subject: He told me
Yeah for my ██████████
Trip

██████████: Ok not tryna scare you but [the Service Recipient] out. And she telling

Subject: Lol

██████████: Said her mother coming today.

Subject: I figured
It's going downnnnnn
Hahaaa

██████████: (Sad emoticon)

Subject: Smh all bad

██████████: And why didn't u answer ██████████ and ██████████ when they asked what was going on. U knooooooo ██████████ gonna tell gio tomorrow.

Subject: They were there when 50 came
I'm bout to call ██████████ and tell him cuz this is crazy

██████████: Exactly what happened?

Subject: She slapped me I went to get her she thought she was gonna get jumped so she charged at me again and it was over for her

█: Girl who's idea was it to go outside?!?!

Subject: No they're gonna tell in person lol
MINE lol

█: (Sad emoticon)

Subject: I was furious

Just as the video provides incontrovertible evidence as to exactly what the Subject's acts were with respect to the incident, so, too, do the screen shots of the text messages provide incontrovertible evidence as to what the Subject's thoughts were with respect to the incident.

In the text messages, the Subject admits quite cavalierly to assaulting the Service Recipient, explains her plan to lie to cover up her actions, discloses that she had already lied to facility Director █, expresses her plan to ruin the Service Recipient's life by stealing her social security information and admits that it was her idea to follow the Service Recipient outside that night because she was furious.

At the hearing, the Subject testified that she had pursued the Service Recipient in self-defense, that she sought to have the Service Recipient arrested and was only trying to bring her back to the facility for that purpose, that she recruited the assistance of facility staff █ only as a witness to protect her, that she feared for her life when fighting with the Service Recipient, and that she lied to facility Director █, telling him that she had not found the Service Recipient, as a "prideful thing" to preserve his good opinion of her. (Hearing testimony of the Subject)

The screen shots of the text messages contradict the Subject's testimony and reveal the Subject's conscious disregard as to the effect of her assault of the Service Recipient and that her only concern was self-preservation, which she attempted to effect by concocting fabrications to

██████████

exculpate herself from what she had done.

Accordingly, none of the Subject's hearing testimony is credited evidence. The video and text messages speak for themselves and establish that the Subject acted out of anger when she followed the Service Recipient out of the facility and, together with facility staff ██████, intentionally perpetrated a violent physical assault on her.

Through her actions of recruiting assistance, following the Service Recipient and perpetrating a serious assault upon her, the Subject demonstrated a conscious disregard of a substantial and unjustifiable risk that physical injury, as defined in Penal Law 10.10(9), or impairment of the Service Recipient's health or loss or impairment of the function of a bodily organ or part would occur, which constitutes serious physical abuse under SSL § 493(4)(a)(i).

As the Subject's conduct meets the definition of serious physical abuse pursuant to SSL § 493(4)(a)(i), it also meets the definition of physical abuse found in SSL § 488(1)(a). It is clear that the Subject's conduct intentionally or recklessly caused, by physical contact, the likelihood of physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

In the final analysis, based on all of the evidence, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the act of serious physical abuse as alleged.

Counsel for the Subject argued that, even if it is found that the Subject did commit the physical abuse as alleged, although denied, the category finding should be reduced to reflect that the Subject's actions were not as serious as the types of acts that are described in the legislation as Category 1 acts. Because the report will remain substantiated under SSL § 493(4)(a)(i), it also remains affirmed as a Category 1 act.

██████████

A substantiated Category 1 finding of abuse and/or neglect will result in the Subject being placed on the VPCR Staff Exclusion List and the fact that the Subject has a substantiated Category 1 report will be disclosed to entities authorized to make inquiry to the VPCR. Substantiation of a Category 1 offense permanently places the Subject on the Staff Exclusion List.

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 serious physical abuse.

Allegation 1 of the substantiated report is properly categorized as a Category 1 act.

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

DATED: August 9, 2016
Plainview, New York


Sharon Golish Blum, Esq.
Administrative Law Judge