

**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]

The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision in its entirety is hereby adopted by the Executive Director.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

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 31, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject, Pro se

**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:

Louis P. Renzi
Administrative Law Judge

Held at:

Eleanor Roosevelt State Office Building
4 Burnett Blvd., 2nd Fl.
Poughkeepsie, New York 12601
On: [REDACTED]

Parties:

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Thomas C. Parisi, Esq.

[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and 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 abuse and neglect 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 slapped a service recipient on the head.

This allegation has been SUBSTANTIATED as Category 3 physical abuse 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 neglect when you yelled at a service recipient and slapped him on the head.

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

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

was retained.

4. [REDACTED] (the facility), located at [REDACTED], is an Individualized Residential Alternative home (IRA) for adults with disabilities, operated by [REDACTED], and 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. Approximately six adult male service recipients were cared for in the facility. (Hearing testimony of [REDACTED] Director of Quality Improvement [REDACTED] (Director [REDACTED]))

5. The incident underlying the allegations here took place on [REDACTED] between 5:30 a.m. and 6:00 a.m. At that time, the Subject had been employed by [REDACTED] as a Direct Service Professional 1 (DSP-1) for approximately two and one-half years. The Subject was assigned to the [REDACTED] IRA and was on duty at the time. She was therefore a custodian as that term is defined in Social Services Law (SSL) § 488(2). (Justice Center Exhibit 7; hearing testimony of the Subject)

6. At the time of the incident, the Service Recipient was an elderly male, eighty years of age, slightly built with a very light complexion. The Service Recipient had been a resident of the facility for a number of years; his date of entry is unclear on this record. The Service Recipient has a diagnosis of dementia with generalized anxiety, Parkinson's disease, mood disorder, impulse control disorder and severe intellectual disability. He presented generally as lively and energetic, but with diminished mobility and communication skills and he requires staff assistance with most or all of his activities of daily living (ADL). As is particularly relevant here, the Service Recipient is a constant food seeker and will take any food he can access, particularly from the plates of other service recipients, which food is usually not consistent with his own dining guidelines or plan. He

also attempts to eat very quickly, which is one of his negative behaviors. The Service Recipient is designated as a significant choking risk. His dining guidelines require pureed food and nectar-thick beverages. He requires arms-length supervision when eating. (Hearing testimony of Director [REDACTED]; hearing testimony of the Subject; Justice Center Exhibits 8, 13, 17, 18, 19)

7. In evidence are several photographs of the Service Recipient. The photographs depict multiple minor bruises on his hands and limbs, which indicate that he was rather thin-skinned and bruised easily, typical of elderly persons. There are no bruises or marks seen on his face or forehead, which fact is corroborated by the statement of Staff [REDACTED]. (Justice Center Exhibits 12-C, 17)

8. At the time of the incident, the Subject and Staff [REDACTED] were serving breakfast to the service recipients of the IRA, including the Service Recipient. In addition, the Subject was administering medications while maintaining arms-length supervision of the Service Recipient. The Service Recipient took food from the plate of another service recipient (X) and began to eat it or attempt to eat it. The food was inconsistent with the Service Recipient's dining guidelines and presented a choking hazard. It is found that there was a risk of the Service Recipient choking had no action been taken by staff to prevent ingestion. (Hearing testimony of the Subject; Justice Center Exhibits 9, 10; Subject Exhibit C)

9. Shortly thereafter, Staff [REDACTED] reported that the Subject then "...smacked his [the Service Recipient's] forehead and pushed his bowl and said 'you can not eat X's food'. [The Service Recipient] replayed (sic) with 'okay'." (Justice Center Exhibits 8, 11, 12-C)

10. It is found that the Subject did not strike ("smack") the forehead of the Service Recipient. The Subject did place her hand on the Service Recipient's chin, face or head and move his head to make eye contact with herself. The Subject was responding to an immediate need to

prevent the Service Recipient from ingesting food that was inconsistent with his dietary guidelines and, to the extent that physical contact was necessary, it was a reasonable and necessary intervention to protect the safety of the Service Recipient. In addition, it is found that the Subject did raise her voice to the Service Recipient in order to overcome his hearing deficiency. (Hearing testimony of the Subject; Justice Center Exhibits 2, 11; Subject Exhibit C)

11. The Subject did not commit physical abuse or neglect.

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the acts giving rise to the substantiated report.
- Whether the substantiated allegations constitute physical abuse and neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and 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 physical abuse and neglect of a person in a facility or provider agency are 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.

(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. Neglect shall include, but is not limited to: (i) failure to provide proper supervision, including a lack of proper supervision that results in conduct between persons receiving services that would constitute abuse as described in paragraphs (a) through (g) of this subdivision if committed by a custodian; (ii) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with the rules or regulations promulgated by the state agency operating, certifying or supervising the facility or provider agency, provided that the facility or provider agency has reasonable access to the provision of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or (iii) failure to provide access to educational instruction, by a custodian with a duty to ensure that an individual receives access to such instruction in accordance with the provisions of part one of article sixty-five of the education law and/or the individual's individualized education program.

Substantiated reports of abuse and 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 acts of abuse and 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 neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse and 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 acts of abuse and neglect cited in the substantiated report constitute the category of abuse and 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 the acts, described as Allegation 1 and Allegation 2 in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-20) The investigation underlying the substantiated report was conducted by [REDACTED] Incident Investigator [REDACTED], and [REDACTED] Director of Quality Assurance [REDACTED], neither of whom testified at the hearing. (Justice Center Exhibit 7) [REDACTED] Director of Quality Improvement [REDACTED] was the only witness who testified at the hearing on behalf of the Justice Center and testified that both investigators were unavailable because they were no longer employed by [REDACTED].

The Subject testified in her own behalf and offered three exhibits (Subject A-C).

At all times relevant to this matter, the Subject was on duty, working as a DSP-1 and was therefore a custodian as that term is defined in Social Services Law § 488(2).

Allegation 1 – Physical Abuse

To establish physical abuse, the Justice Center must prove three elements by a preponderance of the evidence: (1) conduct by a custodian; (2) that results in physical contact with a service recipient; (3) that intentionally or recklessly causes either: (a) physical injury to a service recipient; or (b) serious or protracted impairment of the physical, mental or emotional condition of a service recipient; or (c) the likelihood of such injury or impairment. Thus, the Subject's physical acts, and the actual or likely results of such acts, are what give rise to the allegations charged and must be examined here.

The preponderance of the evidence in this record supports a conclusion that the Subject was a custodian who intentionally made physical contact with the Service Recipient at the time and place alleged, but that such physical contact did not cause either physical injury to the Service Recipient or any serious or protracted impairment of his physical, mental or emotional condition, nor did it create the likelihood of such injury or impairment.

The Subject testified credibly and consistently that she did not remember the exact occasion because it was a very common occurrence with the Service Recipient to take another's food, but she acknowledged that due to the Service Recipient's hearing loss, she probably placed her hand on the head or face of the Service Recipient who generally kept his chin very low, and tilted his face up towards herself in an attempt to communicate with him, while also raising her voice. In the case of purloined food, there was some urgency due to the risk of choking. This physical contact was something the Subject acknowledged that she did with regularity in an attempt to communicate with the service recipients in the IRA. The Subject vehemently and consistently denied smacking or hitting the Service Recipient in any way. (Hearing testimony of the Subject; Justice Center Exhibits 2, 7, 8, 9, 10; Subject Exhibit C)

Although the accuser, Staff [REDACTED], specifically used the words "smack" and "forehead" more than once in her statements, and claimed that the blow caused the Service Recipient's head to move suddenly backwards, she also acknowledged that upon inspecting the Service Recipient, she saw no mark, bruise or other evidence of any physical contact or injury. (Justice Center Exhibit 7 at p.3, 8, 11, 12-C) Given the physicality of the Service Recipient, being of advanced age, with light complexion and age-typical thinning skin (Justice Center Exhibit 17), it is concluded that any physical contact which could reasonably be described as a "smack" and which would cause a person's head to move suddenly backwards could not possibly have happened without leaving a

visible mark of some type on the forehead of the victim. Here, even the accuser admitted that no mark was found, as documented by [REDACTED] QA Director/Investigator [REDACTED], (Exhibit 7) and it is thus concluded that the accusation of Staff [REDACTED] is unfounded. At best, it was a simple misperception or exaggeration of the Subject's actions in addressing the food issue; at worst it was a fabrication for reasons known only to Staff [REDACTED]. (Subject Exhibits A, B, C) Either way, the statements of Staff [REDACTED], as they relate to the Subject's physical contact with the Service Recipient, are not credited evidence.

In addition, the Subject testified credibly that she was responding to a situation that she considered an emergency, since the Service Recipient was a known choking risk and had very specific guidelines for food consistency. She testified that she was afraid that he would choke if he succeeded in eating food from X's plate as he was then attempting to do. The acknowledged fact that this was a common occurrence makes physical intervention by staff no less critical or necessary.

As there is no evidence in this record to corroborate the accusation by Staff [REDACTED], and as the Subject's testimony was credible and consistent with her earlier statements, and as the documentary evidence proffered at the hearing by the Subject (Subject Exhibits A-C) is not controverted on this record, it is determined that the Subject touched the head or face of the Service Recipient and moved his head to face her, but did not slap or "smack" him on the forehead as alleged. It is further determined that the amount of physical force exerted by the Subject was both reasonable and necessary under the circumstances, caused the Service Recipient no actual harm or any likelihood of such harm, as set forth in SSL § 488(1)(a), and thus did not constitute physical abuse.

Accordingly, it is concluded that the Justice Center has not proved by a preponderance of

the evidence that the Subject committed physical abuse.

Allegation 2 - Neglect

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was 1) acting as a custodian at the time of the incident, 2) had a duty to the Service Recipient, 3) breached that duty and 4) the breach caused, or was likely to cause, physical injury or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

The Subject's duty owed to the Service Recipient, as relevant here, can be described as keeping him safe while refraining from hitting or yelling at him and thereby causing him to suffer actual or likely harm as described above.

The sole accusing witness, Staff [REDACTED], gave a statement some 45 minutes after the incident was alleged to have taken place. In that statement, Staff [REDACTED] wrote that "...[the Subject] **said** 'you cannot eat his food'", (emphasis supplied). Staff [REDACTED] was describing the Subject's verbal contact with the Service Recipient. At no time did Staff [REDACTED] claim that the Subject yelled at the Service Recipient, and there is no other evidence to support Allegation 2 in this record. Indeed, the Investigative Report again notes that Staff [REDACTED] accusation is that the Subject "stated" to the Service Recipient that he was not to eat X's food. (Justice Center Exhibit 7) This does not support an allegation that the Subject "yelled" at the Service Recipient. It is only from the statements and testimony given by the Subject herself that there is found any reason to know or believe that she had raised her voice when addressing the Service Recipient during the incident alleged. The Subject claimed that the Service Recipient has impaired hearing, along with most or all his fellow service recipients. Although there is no specific proof in the record of such condition other than the diagnosis of diminished communication skills which may imply hearing loss as well, her belief after working directly with the Service Recipient for over two years is clearly reasonable.

It is determined that the Subject may have raised her voice to some degree, but for legitimate and acceptable reasons which did not violate either the letter or spirit of SSL § 488(1)(h).

Thus, it is concluded that the portion of Allegation 2 which accuses the Subject of yelling at the Service Recipient is entirely unsupported by this record. With respect to Allegation 2 repeating the claim that the Subject struck the Service Recipient, that has already been addressed. Finally, it is determined that the Subject did not breach any duty owed to the Service Recipient. The Justice Center has not proved by a preponderance of the evidence that the Subject committed neglect.

Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed either abuse or neglect on [REDACTED]. The substantiated report shall be amended and sealed.

DECISION:

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

The Subject has not been shown by a preponderance of the evidence to have committed physical abuse or neglect.

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

DATED: July 27, 2017
Schenectady, New York



Louis P. Renzi, ALJ