

**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

**AMENDED
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: August 23, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

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

**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

**AMENDED
RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Office for the Protection of People
with Special Needs
Eleanor Roosevelt State Office Building
4 Burnett Boulevard
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: Laurie Cummings, Esq.

[REDACTED]

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] 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 the overnight shift between [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you were sleeping or less than alert while on duty, during which time one or more service recipients were not properly supervised.

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, located at [REDACTED], is an Individualized Residential Alternative whose residents are hearing impaired as well as having intellectual disabilities. The facility is operated by [REDACTED], and is certified

by the Office for People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Investigator [REDACTED])

5. At the time of the alleged neglect, the Subject was employed by [REDACTED] as a Direct Support Professional (DSP). (Justice Center Exhibit 5)

6. At the time of the alleged neglect, the Service Recipients were four male residents of the facility of varying ages with diagnoses of intellectual disabilities and hearing impairment. The Service Recipients were mobile and communicated their needs by either American Sign Language (ASL) or a combination of ASL, tactile sign language, and gestures. (Justice Center Exhibits 5, 15, 16, 25, and 26; Hearing testimony of Investigator [REDACTED])

7. During the overnight shift, the Subject would spend about two hours cleaning the house. After he was done with his chores, the Subject would occupy himself by watching television in the living room. If he started to drift off, the Subject would catch himself immediately and become alert. (Hearing testimony of Subject; Justice Center Exhibit 24: second audio interview of Subject dated [REDACTED])

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 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))

Neglect is defined by SSL § 488(1)(h) as:

"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/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 2, which is defined as follows:

(a) 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. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one 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 neglect alleged in the substantiated report

that is the subject of the proceeding and that such act or acts constitute the category of neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10[d])

If the Justice Center proves the alleged 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 neglect cited in the substantiated report constitutes the category of neglect as set forth in the substantiated report.

If the Justice Center did not prove the 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 an act, described as “Allegation 1” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents and recorded interviews obtained during the investigation. (Justice Center Exhibits 1-26) The investigation underlying the substantiated report was conducted by Justice Center Investigators [REDACTED] and [REDACTED]. Investigator [REDACTED] testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and provided no other evidence.

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that he breached that duty, and that his breach either 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. (SSL § 488(1)(h))

Here, there is no dispute regarding the Subject’s status as a custodian under SSL § 488(2).

The Subject was employed as a DSP for an agency certified by OPWDD and therefore was custodian pursuant to the statute.

There is also no dispute regarding the subject's duty to the Service Recipients. The Subject worked during the overnight shift, and knew that he was expected to remain awake during his shift.

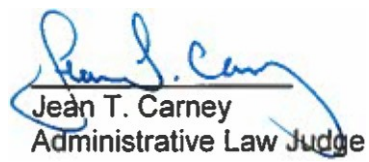
However, the record does not support the Justice Center's contention that the Subject breached that duty. The Subject's co-worker during the shift in question admitted to investigators that she fell asleep, but she could not say that the Subject also slept that night. (Justice Center Exhibit 24; audio interview of [REDACTED]) During his interviews with investigators and during his testimony at the hearing, the Subject denied falling asleep while on duty. The Subject did admit that, on occasion, he would start to doze off, but would catch himself immediately and become alert. (Hearing testimony of Subject; Justice Center Exhibit 24: audio interview of Subject) The Administrative Law Judge presiding over the hearing, having observed and evaluated the hearing testimony of the Subject on this material issue, finds his testimony to be credible. There is no credible evidence in the record to corroborate the allegation that on the night in question, the Subject either fell asleep or was less than alert.

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 the neglect alleged. The substantiated report will 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 neglect.

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

DATED: July 28, 2017
Schenectady, New York



Jean T. Carney
Administrative Law Judge