

**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 is hereby adopted in its entirety.

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: December 1, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

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

**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:

Mary B. Rocco
Administrative Law Judge

Held at:

Adam Clayton Powell State Office Building
163 West 125th Street
New York, New York 10027
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: Todd Sardella, Esq.

[REDACTED]

By: Nicole Murphy, Esq.
Fine, Olin & Anderman, LLP
39 Broadway, Suite 1910
New York, New York 10006

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 physical 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 a custodian, you committed physical abuse when you stabbed a service recipient in the hand with a pen.

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 treatment facility for individuals with severe psychiatric illnesses, and is operated by the New York State Office of Mental Health (hereinafter "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 had been employed as a Mental Health Therapy Aide (hereinafter "MHTA") at the [REDACTED] (hereinafter "Facility") for approximately five years. The Subject worked a regular shift from [REDACTED], and was working a double shift that day, which included the 3:30 p.m. until 11:00 p.m. shift. (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 a 25-year-old male with a relevant diagnosis of schizophrenia. (Justice Center Exhibit 9)

7. At approximately 3:30 p.m. on the day of the alleged abuse, the Subject was assigned to one-to-one eye-sight supervision of another service recipient and was situated in the hallway/doorway of the dayroom with a clipboard and pen in her hand. The Service Recipient approached the Subject and requested the remote control for the television which was located in the dayroom. The Subject told the Service Recipient that he would have to ask another staff member because she was assigned the supervision of another service recipient. Unhappy with the answer he received, the Service Recipient continued to ask the Subject for the remote control. The Subject again denied his request and, in view of Service Recipient A, the Subject poked the Service Recipient with her pen to stop his continued behavior. The Subject then retreated to the plexi-glass enclosed nurses station. (Justice Center Exhibits 5, 6 and 10; Hearing testimonies Justice Center Investigator [REDACTED] and the Subject)

8. Extremely agitated, the Service Recipient continued to yell and pace the hallways. The Service Recipient immediately reported to Staff 1 and the Facility nurse that the Subject had stabbed him with a pen. The Facility nurse noted a bleeding puncture wound on his left hand, contacted the Facility physician on call and treated the wound with bacitracin ointment. (Justice

Center Exhibits 5, 10, 14 and 19)

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 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) 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 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 of abuse alleged in the substantiated report that is the subject of the proceeding and that such act constitutes 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.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-26) The investigation underlying the substantiated report was conducted by New York State Justice Center Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

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

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; and that such contact either intentionally or recklessly caused either physical injury or serious or protracted impairment of a Service Recipient’s physical, mental or emotional condition; and that such contact caused the likelihood of such injury or impairment.

On the day of the alleged physical abuse, the Subject was employed by the [REDACTED] [REDACTED] as a MHTA, and was therefore clearly a custodian as that term is defined in Social Services Law § 488(2).

There is no doubt that the Service Recipient sustained a puncture wound to his left hand. The dispute lies in how the injury occurred. The record indicates, and the Subject testified, that on the afternoon in question, the Service Recipient was antagonizing the Subject. By his own admission, the Service Recipient acknowledged that he was “horse playing” with the Subject and that the Subject did not like it. (Justice Center Exhibits 5 and 26) The Subject testified that after she denied the Service Recipient’s request for the television remote he became enraged, so she retreated to the nurses’ station for her safety, leaving her assigned one-to-one in the dayroom and the Service Recipient yelling and cursing in the hallway. The Service Recipient immediately reported to Staff 1 and the Facility nurse that the Subject stabbed him with a pen and showed them both a bleeding puncture wound to his left hand. (Justice Center Exhibits 5 and 26; Hearing testimonies of Investigator [REDACTED] and the Subject)

The evidence upon which the Justice Center relied consisted of statements provided by the Service Recipient and two other service recipients (hereinafter “Service Recipient A” and “Service Recipient B”) together with medical findings of the injury. In his interview, Service Recipient A described the Service Recipient as always antagonizing the staff, especially the Subject. Service recipient A stated that he was standing in the doorway of the dayroom and witnessed the Subject “pierce” the Service Recipient in the hand with a pen because she had “no other defense” from his continued harassment. (Justice Center Exhibits 5 and 26) In his statement to Investigator [REDACTED], Service Recipient B reiterated Service Recipient A’s description of the Service Recipient as antagonistic. Service Recipient B stated that he did not witness the incident, but that

he was in the hallway at the time and heard the Service Recipient ask the Subject why she stabbed him with a pen. The Service Recipient then showed Service Recipient B the bleeding wound and told him that the Subject had stabbed him with a pen. (Justice Center Exhibits 5 and 26) Both statements are found to be consistent, detailed and credible and corroborate the statement made by the Service Recipient.

In her defense, the Subject denied stabbing the Service Recipient, but she offered no explanation as to why the Service Recipient would fabricate such an allegation other than that he was upset because she did not help him with the television remote control. There is no evidence in the record indicating a history of, or reason for, false reporting by the Service Recipient. The Subject further asserted that both Service Recipient A and Service Recipient B were unreliable; however, she offered no evidence to support this contention. The Subject testified that she was in the nurses' station when the Service Recipient was injured and the statement of Staff 1 confirms that. (Justice Center Exhibit 5) Conversely, Staff 1's statement corroborates the Service Recipient's and witnesses' version of events. In her interview, Staff 1 stated that she witnessed the Service Recipient pacing the hallway and insulting the Subject after she denied the Service Recipient's request for the remote control, and that he had subsequently showed Staff 1 his hand and said the Subject stabbed him. (Justice Center Exhibits 5 and 26) Staff 1 corroborated the timeline established by the Service Recipient and other witness statements as to when the Service Recipient was injured and the Subject's subsequent retreat to the nurses' station. Counsel for the Subject asserted that the Service Recipient, in his agitated state, could have injured himself while he was pacing the hallways, yet the record is void of any evidence supporting this hypothesis.

Based on all the evidence in the record, it is found that the Subject's testimony was self-serving and unsupported. While the Service Recipient had no motive to fabricate the allegation,

the Subject did have the incentive of job security and reputation to deny and prevaricate. In considering the totality of the evidence presented, including witness statements, medical findings and the Service Recipient's consistency in the reporting of this incident, the Service Recipient's statements are credited.

In addition to proving that the Service Recipient was injured through physical contact, in order to sustain an allegation of physical abuse, the Justice Center must show that the Subject acted either recklessly or intentionally in causing that physical injury. SSL § 488(16) indicates that the word "recklessly" has the same meaning as provided in New York Penal Law § 15.05. Under New York Penal Law § 15.05(3), a person acts "recklessly with respect to a result or to a circumstance" when the person is "aware of and consciously disregards a substantial and unjustifiable risk that such result will occur." Here, the Subject was clearly reckless in stabbing the Service Recipient with a pen, which caused an actual physical injury to his hand.

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 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. Accordingly, the record of the report shall be retained by the Vulnerable Persons' Central Register. The report will be sealed after five years.

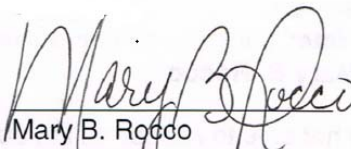
DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED], [REDACTED] be amended and sealed is
denied. The Subject has been shown by a preponderance of the evidence to
have committed physical abuse.

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

This decision is recommended by Mary B. Rocco, Administrative Hearings
Unit.

DATED: October 25, 2017
Plainview, New York



Mary B. Rocco
Administrative Law Judge