

**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]

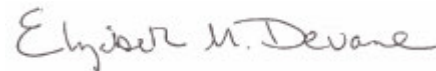
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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 Elizabeth M. Devane, ALJ, of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: January 16, 2019
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Matthew J. Klimasauskas, Esq.
[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:

Brian T. Hughes
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
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: Matthew J. Klimasauskas, Esq.

[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for physical 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 New York State Social Services Law (SSL) § 494 and Part 700 of 14 New York Codes, Rules, and Regulations (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 interacted in an inappropriate manner with a service recipient, including pulling on his clothing, and/or wheelchair, causing him to fall out of his chair and onto the floor.

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, [REDACTED], located at [REDACTED]

[REDACTED], provides residential treatment and rehabilitation services to adults with serious mental illness. The facility is operated by the New York State Office of Mental Health (OMH), which is an agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibit 6)

5. At the time of the alleged physical abuse, the Subject was employed by [REDACTED] as a Mental Health Therapy Aide (MHTA) and had been employed by the facility for approximately six years. (Hearing testimony of Subject) The Subject was assigned to work the overnight shift on Ward [REDACTED] (the Ward) from the [REDACTED] to the [REDACTED] of [REDACTED]. (Hearing testimony of Subject) The Subject was a custodian as that term is defined in Social Services Law § 488(2).

6. At the time of the alleged physical abuse, the Service Recipient was an 80-year-old male and had been a resident of the facility for approximately three years. (Justice Center Exhibit 6 and 14) The Service Recipient was diagnosed with Alzheimer's disease, benign prostatic hyperplasia, and anemia. (Justice Center Exhibit 14) The Service Recipient had an unsteady gait and used a walker to ambulate, was hard of hearing, and spoke Spanish. (Hearing testimony of Justice Center Investigator [REDACTED] (Investigator))

7. At approximately 6:30 a.m. on [REDACTED], the Service Recipient was walking slowly down the hallway of the Ward using the wheelchair as an improvised walker. (Justice Center Exhibit 19) The Subject approached the Service Recipient and through the assistance of a Spanish language interpreter¹ (Interpreter), asked if he would like to shower since he had soiled himself in bed overnight. The Service Recipient had previously received a bed bath during the overnight hours after he refused to shower after soiling himself that night. (Hearing testimony of

¹ The Interpreter was [REDACTED].

Subject) The Service Recipient replied that he was now willing to shower. The Service Recipient continued to walk down the hallway to the nursing station, using his wheelchair as a walker, while also yelling loudly in Spanish about his money. (Hearing testimony of Subject)

8. The Subject, again utilizing the Interpreter, requested that the Service Recipient sit in the wheelchair so that he could be brought to the shower room. The Service Recipient relinquished control of the wheelchair but continued to yell in Spanish about his money. The Interpreter was positioned behind the Subject as the Subject followed the Service Recipient with the wheelchair. (Justice Center Exhibit 20: Audio of interview of Interpreter) The Service Recipient eventually complied with the Subject's request and began to sit in the wheelchair. (Hearing testimony of Subject)

9. The Service Recipient missed the wheelchair as he attempted to sit and fell to the floor, landing on his buttocks. The Subject unsuccessfully attempted to lift the Service Recipient back into the wheelchair and then called for help. (Hearing testimony of Subject) Staff 1² heard the call for help from the opposite end of the hallway and assisted the Subject. Staff 1 observed the Service Recipient sliding down on the wheelchair. The Subject and Staff 1 then lifted the Service Recipient back onto the wheelchair. (Justice Center Exhibit 20: Audio of interview of Staff 1) At that time, Staff 2³ was nearby providing supervision to another service recipient and observed the Service Recipient on the floor but did not witness how he fell. (Justice Center Exhibit 20: Audio of interview of Staff 2)

10. During that time, the Interpreter went to the nursing station to report the fall. The Service Recipient was then transported to the shower room. (Hearing testimony of Subject) Nurse

² Staff 1 was MHTA [REDACTED].

³ Staff 2 was MHTA [REDACTED].

1⁴ entered the shower room to assist the Subject with showering the Service Recipient. (Justice Center Exhibit 20: Audio of interview of Nurse 1) The Interpreter then entered the shower room and proceeded to interpret for the Service Recipient. (Hearing testimony of Subject; Justice Center Exhibit 20: audio interview of Subject) The Service Recipient was evaluated by a doctor later that morning. The doctor did not observe any apparent injuries to the Service Recipient. (Justice Center Exhibit 11 and 15)

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.
- Pursuant to Social Services Law § 493(4), the category of abuse 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), as follows:

- (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

⁴ Nurse 1 was [REDACTED].

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 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 several documents obtained during the investigation. (Justice Center Exhibits 6 through 16, and 21) The Justice Center also presented audio recordings of the Justice Center Investigator’s interview of witnesses

and the interrogation of the Subject, as well as surveillance video from the facility. (Justice Center Exhibits 19 and 20) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED] (Investigator), who testified at the hearing on behalf of the Justice Center. The Subject testified in her own behalf and presented no further evidence.

To prove physical abuse, the Justice Center must establish that the Subject intentionally or recklessly caused, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient or caused the likelihood of such injury or impairment. (SSL § 488(1)(a)) The terms "intentionally" and "recklessly" are defined by Social Services Law as having the same meanings as provided in New York State Penal Law. (SSL § 488(16)) New York State Penal Law states that "[a] person acts intentionally with respect to a result or to conduct... when his conscious objective is to cause such result or to engage in such conduct." (PL § 15.05(1)) New York State Penal Law also provides that:

[a] person acts recklessly with respect to a result or to a circumstance... when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

(PL § 15.05(3))

The Justice Center alleged that the Subject's conduct of grabbing the Service Recipient's clothing and/or wheelchair recklessly caused the Service Recipient to fall to the floor. The Subject denied the allegation and contended that the Service Recipient merely fell as he attempted to sit in his wheelchair. For the reasons set forth, the Justice Center failed to establish the Subject 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.

The basis of the Justice Center's allegation relied exclusively upon the statement of the

Interpreter. The Interpreter recounted to the Investigator that the Subject grabbed the Service Recipient from behind and pulled him onto the wheelchair. According to the Interpreter, the Subject yanked the wheelchair back when the Service Recipient reached for a dropped slipper which caused him to fall to the ground. The Interpreter was positioned behind the Subject when she allegedly witnessed the Subject's actions. (Justice Center Exhibit 20: audio interview of Interpreter) The Interpreter did not testify at the hearing and no other eyewitness testimony was offered by the Justice Center. The Service Recipient was interviewed by the Investigator but remembered neither the incident nor the Subject. (Justice Center Exhibit 20: audio interview of Service Recipient)

The Justice Center offered the facility's surveillance video and audio interviews of two staff members as evidence of the alleged abuse. The surveillance video provided little evidentiary value because the incident occurred out of view of the facility's cameras. The video merely confirmed the uncontroverted fact that the Subject spoke with the Service Recipient prior to the alleged incident. (Justice Center Exhibit 19; Justice Center Exhibit 20: audio interview of Interpreter; Hearing testimony of Subject)

Similarly, the interviews of Staff 1 and Staff 2 had minor evidentiary value because neither staff member observed the Service Recipient fall. Staff 1 stated that he witnessed the Service Recipient sliding down on the wheelchair after hearing the Subject call for help. However, Staff 1 did not witness the Service Recipient fall. (Justice Center Exhibit 20: audio interview of Staff 1) Staff 2 gave a parallel account of observing the Subject and Staff 1 assisting the Service Recipient back onto the wheelchair from the floor. (Justice Center Exhibit 20: audio interview of Staff 2) Both statements failed to corroborate the Interpreter's version of how the Service Recipient fell. Rather, the statements from Staff 1 and Staff 2 only served to establish that the

Service Recipient fell to the floor. Therefore, the basis of the Justice Center's case relied solely upon the hearsay statement of the Interpreter. The Subject's testimony at the hearing contradicted the Interpreter's account of the incident.

The Administrative Law Judge presiding over the hearing, having observed and evaluated the Subject's testimony on this material issue finds the Subject's testimony to be credible. The video corroborated the Subject's testimony that she spoke with the Service Recipient regarding showering through the assistance of the Interpreter, after which the Service Recipient continued walking down the hallway toward the nursing station. (Hearing testimony of Subject; Justice Center Exhibit 19) The Subject explained that the Service Recipient was unsteady and fell when he attempted to sit in the wheelchair. (Hearing testimony of Subject) The Subject's testimony was credible because the record established that the Service Recipient was unsteady on his feet and generally walked using a wheelchair as a walker. (Hearing testimony of Subject; Justice Center Exhibit 14) The Subject denied pulling the Service Recipient's jacket or moving the wheelchair while the Service Recipient was retrieving his slipper. However, the Subject conceded that the Service Recipient fell. (Hearing testimony of Subject)

Crucially, the Subject credibly testified regarding a motive for the Interpreter to fabricate the allegation. The Subject testified that the Interpreter and the Subject had an unfriendly working relationship stemming from the Subject's disapproval of a relationship the Interpreter had with a married coworker. (Hearing testimony of Subject) The Subject's testimony provided a credible and compelling narrative of the incident. Notably, neither the Subject nor the Interpreter were specifically asked during their interviews about any motive to fabricate the allegation against the Subject. (Justice Center Exhibit 20: audio interview of Interpreter, audio interview of Subject)

The Subject's testimony was found to be credible because of corroborative evidence,

whereas the Interpreter's statement was not found to be credible because of the potential motive for the Interpreter to fabricate her statement. Without credible evidence, the Justice Center failed to establish that the Subject intentionally or recklessly caused the Service Recipient to fall onto the floor. 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 physical abuse alleged. The substantiated report will be amended and sealed.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED], be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed physical abuse.

This decision is recommended by Brian T. Hughes, Administrative Hearings Unit.

DATED: December 12, 2018
Schenectady, New York



Brian T. Hughes, ALJ