

**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: November 10, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
William T. Burke, 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:

Elizabeth M. Devane
Administrative Law Judge

Held at:

New York State Justice Center 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: Kristin Kopach, Esq.

[REDACTED]

By: William T. Burke, Esq.
O'Neil & Burke, LLP
135 North Water Street
Poughkeepsie, New York 12601

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 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 substantiated the report against the Subject. The Justice Center concluded that:

Allegation 1

It was alleged that on an unspecified date between [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed physical abuse when you pushed a service recipient.

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, the [REDACTED] (IRA), located at [REDACTED], is an IRA for individuals with developmental disabilities, and is operated by the Office for People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center. The IRA has

five permanent beds and one respite bed. (Hearing testimony of Justice Center Internal Investigator I [REDACTED] (Investigator [REDACTED]); Hearing testimony of the Subject; Justice Center Exhibits 6 and 13)

5. At the time of the alleged physical abuse, the female Service Recipient was 22 years old, and had been at the IRA since [REDACTED] 2014 as a temporary respite placement. The five permanent resident service recipients were elderly, mostly non-verbal and needed significant assistance with activities of daily living. The Service Recipient was somewhat independent but needed support meeting her goals and performing activities of daily life such as hygiene, taking medication and keeping her room orderly. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6, 7, 8, 9 and 13)

6. The Service Recipient had diagnoses of mild intellectual disability, mood disorder, intermittent explosive disorder, chronic mental illness and post-traumatic stress syndrome. The Service Recipient's Behavior Support Plan (BSP) noted her target behaviors as physical and verbal aggression, impulsivity and self-injurious behaviors. In response to a potential crisis, the BSP directs staff to remain calm, give clear expectations for behavior, and remain consistent if the Service Recipient exhibits mood swings or abrupt changes in behavior. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6, 7, 8, 9 and 13)

7. At the time of the alleged physical abuse, the Subject had been employed by the OPWDD for over 15 years as a Direct Care Aide (DCA), was working at the IRA, and was the Service Recipient's advocate. As an advocate, the Subject assisted the Service Recipient with matters including hygiene and organization, dispensed medication to her and monitored whether the Service Recipient's residential habilitation goals were being met. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6, 7, 8 and 13)

8. On [REDACTED], the Service Recipient told the Treatment Team Leader (TTL) that she was afraid to return to the IRA because the Subject pushed her. The Service Recipient told the TTL that on some unknown date, after dinner and before bedtime, she was walking down the stairs when she encountered the Subject standing on the landing. At that point, the Subject told the Service Recipient to “bring it on.” The Subject then pushed the Service Recipient. The Service Recipient did not tell the TTL where on her body she was pushed or if she sustained any injuries. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6, 10 and 13)

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 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 of a person in a facility or provider agency is defined by SSL § 488(1)(a), as:

"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), 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 physical abuse alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of physical abuse as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged physical 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 a number of documents obtained during the investigation. (Justice Center Exhibits 1-12) The Justice Center also submitted an audio recording of the statements of the Service Recipient, Subject and three witnesses. (Justice

Center Exhibit 13) The investigation underlying the substantiated report was conducted by Justice Center Internal Investigator 1 [REDACTED]. Investigator [REDACTED] was the only witness who was called to testify by 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; that such contact was either intentional or reckless; and that such contact caused either physical injury or serious or protracted impairment of a Service Recipient's physical, mental or emotional condition; or caused the likelihood of such injury or impairment. (SSL §488(1)(a)) Social Services Law defines "intentionally" and "recklessly" as having the same meaning as provided in New York Penal Law § 15.05. (SSL §488(16)) Under New York State Penal Law, a person acts "intentionally" with respect to a result or conduct when a person has a "... conscious objective ..." to cause a result or engage in such conduct. (PL §15.05(1)) Under New York Penal Law, 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." (PL §15.05(3))

There is no dispute that the Subject was a custodian of the Service Recipient as that term is defined in Social Services Law §488(2). The issue is whether the Subject committed physical abuse by pushing the Service Recipient as described in Allegation 1.

The Subject denied the allegation in full and testified that she never pushed the Service Recipient at any time. The Subject further argued that Investigator [REDACTED] investigation was thorough, detailed and accurate and the Investigator's unsubstantiation of the allegation should be given full weight and consideration.

The Justice Center argued that the Service Recipient was consistent in her statements and that the substantiation of the allegation of physical abuse should be sustained.

The TTL initially understood the Service Recipient's statement to her, that she was afraid to go home because the Subject pushed her around, to mean that the Subject was bossy. When the TTL asked the Service Recipient about this during a transport, the Service Recipient said that on some evening during the prior week, the Service Recipient was walking down the stairs and the Subject stood at the bottom of the stairs and told the Service Recipient to "bring it on," then pushed the Service Recipient. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6 and 13)

In the Service Recipient's description of the event to Investigator [REDACTED], she stated that the Subject entered her room, hit a cellphone out of her hand then stood at the bottom of the stairs and told the Service Recipient to come at her. The Service Recipient said she went into her room then, when she went downstairs later for medication, the Subject pushed her on her back and told her to go to bed as she did not want to see her. The Service Recipient did not further describe the push or mention what type of force was used by the Subject. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6 and 13)

The Subject stated that one evening the Service Recipient would not get off the phone to go downstairs and take her medication, despite the Subject's repeated prompting. The Subject eventually went upstairs to the Service Recipient's door to dispense the medication. The Service Recipient was upset with the Subject's disruption of her telephone call, but nonetheless took her medication while she remained on the phone, then threw the medication cup at the Subject and shut her door. (Hearing testimony of the Subject; Justice Center Exhibits 6 and 13) The Subject testified credibly that she never hit the phone out of the Service Recipient's hand, never encouraged the Service Recipient to fight her, and that she never pushed or had physical contact with the

Service Recipient. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject: Justice Center Exhibits 6 and 13)

Investigator [REDACTED] interviewed all staff who worked with the Subject during the previous week, as well as the Subject and the Service Recipient. One staff said, and the Service Recipient's BSP noted, that the Service Recipient could get frustrated and exhibited negative behaviors when asked to engage in non-preferred activities, and that the Subject, as the Service Recipient's advocate, often had to prompt and direct the Service Recipient, but that they generally had a good relationship. All staff who were interviewed by Investigator [REDACTED] said they never saw any inappropriate interactions, threats or physical abuse between the Subject and the Service Recipient. None of the staff had any concerns regarding the Subject's interactions with the Service Recipient, or with any other IRA resident. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6, 7, 12 and 13) IRA staff reported that, while the Service Recipient got frustrated on occasion with the Subject's prompting, there were no known inappropriate interactions between the Subject and the Service Recipient. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject: Justice Center Exhibits 6 and 13)

The date, location and description of the Service Recipient's allegation of pushing are ambiguous and not entirely consistent. The fact that an Investigator determines an allegation to be unsubstantiated is not dispositive. However, Investigator [REDACTED] investigation appeared competent, she was skillful when questioning the parties and her determination that there was not a preponderance of evidence to substantiate physical abuse as alleged was well-reasoned. There was no evidence presented of any information discovered subsequent to, or contradictory from, the Investigator's findings.

Due to the inconsistent and ambiguous descriptions of the alleged incident by the Service


Recipient, and lack of corroboration for those statements, it cannot be concluded by a preponderance of the evidence that the Subject pushed the Service Recipient.

As such, the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed physical abuse as alleged in Allegation 1. 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 physical abuse.

This decision is recommended by Elizabeth M. Devane, Administrative Hearings Unit.

DATED: October 30, 2017
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge