

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

████████████████████

Pursuant to § 494 of the Social Services Law

**AMENDED FINAL
DETERMINATION
AFTER
HEARING**

Adjud. Case #:

██████████

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

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

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The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

ORDERED: The request of ██████████ that the report substantiated on ██████████
██████████ dated and received on ██████████
██████████ be amended and sealed is denied. The Subject has been shown
by a preponderance of the evidence to have committed abuse alleged.

The substantiated report is properly categorized as a Category 3.

NOW THEREFORE IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

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: October 22, 2015
Schenectady, New York



David Molik
Administrative Hearings Unit

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

████████████████████

Pursuant to § 494 of the Social Services Law

**AMENDED
RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before: John T. Nasci
Administrative Law Judge

Held at: Office of People With Developmental Disabilities
State Operations Office
2165 Brighton Henrietta Townline Road
Rochester, New York 14623
On: ██████████

Parties: Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or 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 report substantiated on [REDACTED], dated and received on [REDACTED] of abuse and/or neglect by the Subject of a Service Recipient.
2. On or about [REDACTED], 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 abuse (deliberate inappropriate use of restraints) and/or physical abuse when you grabbed a service recipient's arm and pushed him out of a room, during which time the service recipient fell.

These allegations have been SUBSTANTIATED as Category 3 abuse (deliberate inappropriate use of restraints) and 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 [REDACTED] (the Facility), located at [REDACTED], is a privately operated adult group home under the regulatory oversight of

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the New York State Department of Health (DOH), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (See testimony of Facility Administrator ██████████ ██████████)

5. At the time of the alleged abuse, the Subject was employed by the Facility as a Security Guard, and had been employed at the Facility since approximately 1976. The Subject's duties as a Security Guard were in part to monitor the home and maintain order by making rounds and making sure residents are not in stress. The Subject's employment duties required him to interact with Facility staff and residents. By virtue of the Subject's employment at the Facility, the Subject is deemed a custodian of the Service Recipient. (See testimony of Facility Administrator ██████████ and testimony of the Subject)

6. At the time of the alleged abuse, the Service Recipient, who was the object of the Subject's alleged abuse, was over sixty years of age, and had been a resident of the Facility for approximately two years preceding the ██████████ incident. At the time of the incident, the Service Recipient was diagnosed with borderline personality disorder and diabetes. (See testimony of Facility Administrator ██████████)

7. On or about ██████████ at approximately 12:20 a.m., the Service Recipient approached the Subject, told him that he was hungry and asked him to open the nourishment room. The Subject opened the door to the nourishment room for the Service Recipient who went to the refrigerator, opened the refrigerator door and searched it for something to eat. The Service Recipient then asked the Subject if he could have some cake which he found in the refrigerator. The Subject responded to the Service Recipient that he could not have some of the cake as it belonged to another resident. The Service Recipient then told the Subject that he was going to have some of the cake anyway, retrieved a spoon and returned to the refrigerator. Upon seeing this, the Subject told the Service Recipient to stop, grabbed the Service Recipient by his arm and

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pulled him away from the refrigerator. In reaction to being pulled from the refrigerator, the Service Recipient hit the Subject in his chest. The Subject then grabbed the Service Recipient by the Service Recipient's belt with one hand and by the Service Recipient's collar with his other hand, lifted the Service Recipient up onto his toes and pushed him toward the door of the nourishment room. The Service Recipient struggled against the Subject's hold on him and, before reaching the door, the Service Recipient fell into some lockers. The Service Recipient then exited the room without further incident. (See Justice Center Exhibit 2, pages 9, 10 and 11; Justice Center Exhibit 6; and Justice Center Exhibit 11)

8. The Service Recipient neither complained of nor received any injuries as a result of the ██████████ incident. (See Justice Center Exhibit 6; and testimony of Facility Administrator ██████████)

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 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))

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The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1)(a) and (d), to include:

- 1 "Reportable incident" shall mean the following conduct that a mandated reporter is required to report to the vulnerable persons' central register:

"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.

"Deliberate inappropriate use of restraints," which shall mean the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a service recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. For purposes of this subdivision, a "restraint" shall include the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 3 abuse or neglect, which means:

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 and/or 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/or neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

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

If the Justice Center did not prove the abuse and/or neglect by a preponderance of 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 the prohibited acts described in the substantiated report as Allegation 1. The acts committed by the Subject constitute abuse.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation (Justice Center Exhibits 1-14). The investigation underlying the substantiated report was conducted by Facility Administrator ██████████, who was the only witness who testified at the hearing on behalf of the Justice Center. The Subject presented no evidence on his own behalf, including his own testimony. A negative inference is hereby taken against the Subject for his failure to testify or otherwise present any evidence on his behalf. (See *Matter of Nassau County Dept. of Social Servs. v. Denise J.*, 87 NY2d 73, 79, NY COA 1995)

Abuse: Deliberate Inappropriate Use of Restraints

The Justice Center contends that the Subject deliberately used an inappropriate restraint on a Service Recipient by grabbing the Service Recipient and pushing him to the door of the nourishment room.

The facts are not in dispute and are for the most part established by the Subject's own statements which were not contested and which are contained in the record. (See Justice Center

██████████ Exhibits 2 and 11). From the record it is clear that the Subject grabbed the Service Recipient's arm and pulled him away from the refrigerator. The Subject then grabbed the Service Recipient's belt and collar and pushed him forcefully toward the door of the room, and while the Subject was pushing the Service Recipient in such a manner, the Service Recipient fell into some lockers in the room.

It is also clear from the record that the Subject was not authorized to use any physical force on the Service Recipient. New York State regulations governing the Facility provide that: "A resident shall not be restrained nor locked in a room at any time." [See 18 NYCRR § 487.5(a)(3)(x)] Additionally, there was no evidence in the record of any authorization given to the Subject by the Facility to restrain or otherwise use any physical force on the Service Recipient. A negative inference hereby is taken for the Subject's failure to present any such evidence.

Finally, New York State Social Services Law defines the term "restraint" as including: "the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body." [See NYS SSL § 488(1)(d)] By grabbing the Service Recipient by the belt and collar to the point of having the Service Recipient on his toes, the Subject is found to have manually immobilized or limited the Service Recipient's free movement within the meaning of the statute.

Therefore, the Justice Center has sufficiently established that the Subject deliberately used an inappropriate physical restraint on the Service Recipient in contravention of the Facility's policy, New York State regulations and New York State statutes.

Physical Abuse

The Justice Center contends that the Subject physically abused the Service Recipient when he grabbed the Service Recipient's arm and pushed him out of the room. In order to prove

physical abuse, the Justice Center must establish that the Subject “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.” [See NYS SSL §488(1)(a)]

The record reflects that the Subject intentionally made physical contact with the Service Recipient. The record also reflects that the Service Recipient neither sustained any injuries nor complained of any injuries, physical or otherwise. However, it is found that by grabbing the Service Recipient by the belt and collar to the point of having the Service Recipient on his toes and pushing the Service Recipient toward the room door with such force that the Service Recipient fell into some lockers, the Subject’s conduct was sufficient to cause a likelihood of physical injury to the Service Recipient.

Because the Subject did not testify or otherwise present evidence contesting the Justice Center’s evidence, a negative inference is taken against the Subject with regard to the allegation of physical abuse. Therefore, the Justice Center has sufficiently established that the Subject committed physical abuse against the Service Recipient.

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 abuse as alleged in Allegation 1. Having determined that the Justice Center has sufficiently proven abuse in Allegation 1, the substantiated report will not be amended or sealed.

Although Allegation 1 of 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. It is concluded that based upon the totality of the circumstances, the evidence and testimony presented, the category of the affirmed substantiated abuse (physical

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abuse and deliberate inappropriate use of restraints) that such act constitutes was properly substantiated as a Category 3 act.

A substantiated Category 3 finding of abuse or neglect will not result in the Subject being placed on the VPCR Staff Exclusion List and the fact that the Subject has a substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to NY SSL § 496 (2). This report will be sealed after five years.

DECISION: The request of ██████████ that the report substantiated on ██████████
██████████ ██████████ dated and received on ██████████
██████████ be amended and sealed is denied. The Subject has been shown
by a preponderance of the evidence to have committed abuse alleged.

The substantiated report is properly categorized as a Category 3.

This decision is recommended by John T. Nasci, Administrative Hearings
Unit.

DATED: September 4, 2015
Schenectady, New York



John T. Nasci, ALJ