

**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

**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: Juliane O'Brien, Esq.

████████████████████

████████████████

██

By: Elizabeth A. Monachino, Esq.
Levene, Gouldin & Thompson, LLP
P.O. Box F-1706
Binghamton, New York 13902-0106

██████████

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 substantiated report dated ██████████, ██████████, ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (obstruction of reports of reportable incidents).

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

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: March 8, 2016
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

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

John T. Nasci
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Office Building
333 East Washington Street
Hearing Room A
Syracuse, New York 13202
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.

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

██████████

██████████

████████████████████

By: Elizabeth A. Monachino, Esq.
Levene, Gouldin & Thompson, LLP
P.O. Box F-1706
Binghamton, New York 13902-0106

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], [REDACTED] [REDACTED] of abuse by the Subject of a Service Recipient.

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

Allegation 2¹

It was alleged that on [REDACTED], and on [REDACTED], at the [REDACTED] [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you gave inconsistent and misleading descriptions of the circumstances surrounding the Service Recipient's takedown and restraint on [REDACTED].

This allegation has been SUBSTANTIATED as Category 3 abuse (obstruction of reports of reportable incidents), pursuant to Social Services Law § 493(4)(c).

3. An Administrative Review was conducted and as a result the substantiated report was retained.

4. [REDACTED] (the Facility), located at [REDACTED] [REDACTED], is an [REDACTED] which is operated by

¹ Allegation 1 was unsubstantiated prior to the hearing.

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

5. At the time of the alleged abuse, the Subject was employed by the OPWDD as a Developmental Disability Secure Care Treatment Aide 1 (DDSCTA1) and had been employed by the Facility for fourteen years. (See Hearing testimony of the Subject)

6. At the time of the alleged abuse, the Service Recipient was twenty-five years of age, a resident of the Facility's [REDACTED] House, and recently transferred to the Facility from the [REDACTED] in order to be closer to his family. The Service Recipient is an adult with diagnoses of bipolar disorder, NOS; pervasive developmental disorder, NOS; mild mental retardation; and intrauterine cocaine and alcohol exposure, among other diagnoses. (See Justice Center Exhibit 20)

7. The Service Recipient has a history of aggressive and assaultive behavior which includes self-injurious behavior, verbal abuse of others and making threats to kill himself and others. The Service Recipient's aggressive and assaultive behavior is often directed toward Facility staff. (See Justice Center Exhibits 20 and 21)

8. At the time of the alleged abuse, the Service Recipient possessed a stature of approximately six feet, eight inches and a weight of 250 pounds or more. (See Justice Center Exhibit 23: audio interrogations of [REDACTED] and the Subject; and Hearing testimony of the OPWDD Internal Affairs Investigator [REDACTED])

9. On [REDACTED], the Service Recipient was placed on one-to-one supervision for his own safety after he put staples in his penis and anus. (See Hearing testimony of the OPWDD Internal Affairs Investigator [REDACTED])

10. On [REDACTED], at approximately 3:00 p.m., upon the Subject's arrival at the Facility to start his shift, he was assigned to the [REDACTED] House where he was further assigned to duties including living room monitor and medication monitor. Upon returning from medication administration with another [REDACTED] House resident, the Subject was assigned to one-to-one supervision of the Service Recipient. The Subject assumed the assignment in the [REDACTED] House kitchen where he found the Service Recipient. (See Justice Center Exhibit 23: audio interrogation of the Subject; and Hearing testimony of the Subject)

11. Upon assuming one-to-one supervision of the Service Recipient, Service Recipient A noticed that the Service Recipient had been placed on one-to-one supervision and started taunting him. In response to the taunting, the Service Recipient went from the kitchen to the dining room and punched Service Recipient A in the face, knocking him to the floor. As a result, the Subject and other Facility staff employed proximity control (by positioning themselves between the Service Recipient and Service Recipient A) to separate the two Service Recipients. As Service Recipient A continued to taunt and provoke the Service Recipient, the Service Recipient became more agitated and more aggressive toward Service Recipient A and Facility staff. The Service Recipient's escalating behavior prompted the Subject and another Facility staff to use arm control (by facing the opposite direction as the Service Recipient and each grabbing an arm of the Service Recipient) in an effort to move the Service Recipient away from Service Recipient A. (See Justice Center Exhibit 23: audio interrogations of [REDACTED] and the Subject; and Hearing testimony of the Subject)

12. At this point, more Facility staff arrived on the scene at [REDACTED] House as a result of a call for assistance. The Service Recipient then broke away from the Subject and the other Facility staff, and went toward the dining room where Service Recipient A was still on the floor.

While other Facility staff were attempting to contain the Service Recipient, the Service Recipient punched the Subject in his face and the Subject fell to the floor. The Service Recipient then ran to the foyer, which was an area in ■ House that was approximately seven feet by seven feet with lockers on one side. The Service Recipient continued his belligerency by threatening to kill Facility staff and Service Recipient A, and by flailing his arms, throwing punches, kicking and biting two other Facility staff who were attempting arm control. (See Justice Center Exhibit 23: audio interrogations of ■ and the Subject; and Hearing testimony of the Subject)

13. While the Subject and another Facility staff were once again attempting arm control (the Subject on the Service Recipient's right and the other Facility staff on the Service Recipient's left), the Service Recipient bit the Subject's arm drawing the Subject's blood and leaving it all over the Service Recipient's mouth. The Service Recipient then dragged the Subject and other Facility staff back with him (the Service Recipient facing backward and the Subject and other Facility staff facing forward) and they fell together over another Facility staff (who had fallen in the struggle) onto the floor near the lockers. Once on the floor, the Subject and other Facility staff placed the Service Recipient into a three person supine hold, and then a four person supine hold. The Subject was relieved from the hold by another Facility staff as the result of an accusation made by the Service Recipient that the Subject abused him. (See Justice Center Exhibit 23: audio interrogations of ■ and the Subject; and Hearing testimony of the Subject)

14. Thereafter, the Service Recipient calmed and was gradually released from the hold. The Service Recipient was later arrested for violation of New York State Penal Law § 120.00(1) Assault in the Third Degree With Intent to Cause Physical Injury to Another Person.

(See Justice Center Exhibit 23: audio interrogations of [REDACTED] and the Subject; Subject Exhibit C; and Hearing testimony of the Subject)

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))

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488. Obstruction of reports of reportable incidents is defined by SSL § 488 (1)(f) to include:

"Obstruction of reports of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state agency regulations, policies or procedures; or, for a mandated reporter

who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.

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

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(s) 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 established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 2” 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 1-23) The investigation underlying the substantiated report was conducted by [REDACTED], the OPWDD Internal Affairs Investigator, who was the only witness who testified at the hearing on behalf of the

Justice Center.

The Subject testified in his own behalf and presented three documents. (See Subject Exhibits A, B and C)

The Justice Center alleges that, as a custodian, the Subject intentionally made false statements which impeded the OPWDD Internal Affairs Investigator's investigation of a report of abuse by the Service Recipient against the Subject and other Facility staff. Specifically, the Justice Center contends that the Subject made false written statements in the Intervention Report (see Justice Center Exhibit 10), and in his oral interrogation (see Justice Center Exhibit 23), and that both the written and oral statements were inconsistent with the statements of the other Facility staff who participated in or witnessed the [REDACTED] incident.

The Subject contends that his statements were not false. The Subject maintained this contention in his hearing testimony, which was consistent with his previous statements.

To prove abuse (obstruction of reports of reportable incidents), the Justice Center must first establish that the Subject is a custodian as that term is defined in the statute. (See Social Services Law § 488(2)) Because the Subject was acting in his capacity as a DDSCTA1 at the time of the alleged abuse, the Justice Center has sufficiently established that the Subject was a custodian.

The Justice Center must next establish that there was a suspected reportable incident which was alleged to have been obstructed. The record reflects that the statements of the Subject that are at issue in this proceeding were made during an OPWDD investigation of a report that was based on an allegation made by the Service Recipient of abuse that he alleged took place during the [REDACTED] incident. Consequently, the Justice Center has sufficiently established that there was a reportable incident.

██████████

The Justice Center must next establish that the Subject intentionally made false statements. The Justice Center contends that the statements of other participants in and witnesses to the ██████████ incident described a chaotic and uncontrolled takedown of the Service Recipient, while the Subject described a takedown that happened, as it should have happened, in accordance with his training. The record reflects that the other witnesses used words to describe the takedown of the Service Recipient such as impromptu, attempted, overpowered, tangled, and not very controlled. The other witnesses also described the takedown as a fall rather than a controlled placement of the Service Recipient on the floor. (See Justice Center Exhibit 23: audio interrogations of ██████████)

In the Intervention Report, the Subject described the takedown as “a two person takedown utilized into a 3 person supine ...” with no mention of any lack of control of the Service Recipient during the takedown. (See Justice Center Exhibit 10). In his oral interrogation, the Subject said that the Service Recipient was “taken down like he should have been” and “went to the floor like he should have.” (See Justice Center Exhibit 23: audio interrogation of the Subject) In his testimony, the Subject stated that a two person takedown was utilized, that he took the Service Recipient down according to his training, that he placed the Service Recipient down, and that the takedown went smooth on his side. (See Hearing testimony of the Subject) While the Subject also used words like “discontrolled” and “disorganized” in his oral interrogation and hearing testimony (See Justice Center Exhibit 23: audio interrogation of the Subject and Hearing testimony of the Subject), the clear impression that can logically be taken from the Subject’s prehearing statements and hearing testimony is that while the situation was chaotic, he and the other Facility staff did not fall but instead performed a takedown in the manner in which they were trained. This impression is in contradiction to the statements of the

other witnesses who recount an incident in which the Facility staff and the Service Recipient fell to the floor in a disorganized manner. Consequently, it is determined that the Subject's written statements and hearing testimony are false to the extent that they describe the takedown of the Service Recipient. Furthermore, because the Subject's sworn hearing testimony was consistent with his prior statements, the prior statements and the hearing testimony are deemed to be intentionally made.

Finally, the Justice Center must establish that the false statements made by the Subject impeded the OPWDD's investigation. The OPWDD Internal Affairs Investigator testified that the Subject's statements inhibited his ability to better explain how the Service Recipient sustained his injuries and whether or not the correct gradient was used. (See Hearing testimony of ██████████, the OPWDD Internal Affairs Investigator) The Subject offered no evidence in rebuttal of the Investigator's testimony. Consequently, the Justice Center has sufficiently established that the Subject's statements impeded the OPWDD's investigation.

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 (obstruction of reports of reportable incidents) 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.

DECISION:

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

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

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

DATED: March 3, 2016
Schenectady, New York



John T. Nasci, ALJ