

**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: March 8, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
Amanda Gayle, 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:

Louis P. Renzi
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street, 3rd Fl.
Brooklyn, New York 11201
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: Laurie Cummings, Esq.

[REDACTED]

By: Amanda Gayle, Esq.
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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for 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 "substantiated" report dated [REDACTED], [REDACTED] of neglect 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], at the [REDACTED], located at [REDACTED], and/or while in the community, while a custodian, you committed neglect when you directed inappropriate language at a service recipient.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c).

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

4. The facility, located at [REDACTED], is an individualized residential alternative (IRA) home for adults with developmental disabilities,

¹ Allegation 1 was previously unsubstantiated by the Justice Center.

operated by the NYS Office for People With Developmental Disabilities (OPWDD), a provider agency that is subject to the jurisdiction of the Justice Center. The IRA housed five adult male service recipients. (Hearing testimony of Justice Center Investigator [REDACTED])

5. At the time of the alleged neglect (the incident), the Subject had been employed by OPWDD for approximately fifteen years at this IRA. She was the Assistant House Manager. Her shift on the day of the incident began at 8:00 a.m. (Hearing testimony of the Subject)

6. At the time of the incident, the Service Recipient was a 60-year-old male, and had been a resident of the facility for over ten years. The Service Recipient had diagnoses of mild intellectual disability, bipolar disorder and anti-social personality disorder. He was highly verbal and ambulatory. As is relevant here, he had a history of being physically and verbally aggressive, as well as being sensitive to criticism or provocation by others. He had no documented history of fabrication, nor was there a fabrication protocol in place for him. (Hearing testimony of Justice Center Investigator [REDACTED]; hearing testimony of the Subject; Justice Center Exhibits 8, 9, 10, 11, 12)

7. At approximately 7:30 a.m. on [REDACTED] (the day of the incident), the Service Recipient got into a verbal and physical altercation with Staff [REDACTED], and fell or was pushed to the floor. The record is unclear as to the role played by Staff [REDACTED] in the altercation, if any, although Staff [REDACTED] was present at the time. The Service Recipient was taken to the hospital by ambulance for a psychiatric evaluation. The Subject was not present or on duty at the time of the altercation, but that event was the precursor of the incident complained of here. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibits 6, 7, 16)

8. On the day of the incident, the Subject reported for work at approximately 8:00 a.m. Shortly thereafter, the Subject and Staff [REDACTED] went to the hospital to check on and transport the

Service Recipient (along with Staff [REDACTED]) back to the facility in an agency van. The transport took place at approximately 11:00 a.m. During that transport, the Subject cursed at the Service Recipient in a threatening manner numerous times, using the “f-word”. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibit 16 (audio recording of two statements by the Service Recipient))

9. The Service Recipient’s “Behavior Plan/Human Rights Committee – Review” defines verbally abusive behavior as, among other things, “yelling” and “cursing at others”. (Justice Center Exhibit 11 at pg. 036).

10. An OPWDD Form 147 report was completed on [REDACTED] containing allegations made by the Service Recipient. Verbal statements were given to Justice Center Investigator [REDACTED] by the Service Recipient on [REDACTED] and [REDACTED]. (Justice Center Exhibits 7, 16)

11. The Service Recipient displayed signs of mental and/or emotional impairment related to this incident six weeks after it occurred. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibit 16 (audio recording of two statements by the Service Recipient))

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 neglect.
- Pursuant to Social Services Law § 493(4), the category of 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 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 neglect of a person in a facility or provider agency is defined by SSL § 488(1):

(h) "Neglect," which shall mean any action, inaction or lack of attention that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient. Neglect shall include, but is not limited to: (i) failure to provide proper supervision, including a lack of proper supervision that results in conduct between persons receiving services that would constitute abuse as described in paragraphs (a) through (g) of this subdivision if committed by a custodian; (ii) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with the rules or regulations promulgated by the state agency operating, certifying or supervising the facility or provider agency, provided that the facility or provider agency has reasonable access to the provision of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or (iii) failure to provide access to educational instruction, by a custodian with a duty to ensure that an individual receives access to such instruction in accordance with the provisions of part one of article sixty-five of the education law and/or the individual's individualized education program.

Substantiated reports of 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 neglect alleged in the substantiated report

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

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

If the Justice Center did not prove the neglect by a preponderance of the evidence, the substantiated report must be amended and sealed.

DISCUSSION

In order to prove neglect, the Justice Center must prove by a preponderance of the evidence that the Subject was a custodian who owed a duty to the Service Recipient, breached that duty by any action, inaction or lack of attention, and that the breach resulted in, or was likely to result in, physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

The Justice Center has established by a preponderance of the evidence that the Subject was a custodian and breached a duty owed to the Service Recipient, described as “Allegation 2” in the substantiated report. Further, the Justice Center has established by a preponderance of the evidence that protracted mental or emotional harm was sustained by the Service Recipient. Therefore, it is concluded that the Subject committed neglect as that offense is defined in section 488(1)(h) of the Social Services Law.

In support of its substantiated findings, the Justice Center presented several documents obtained during the investigation. (Justice Center Exhibits 1-16) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED] (Investigator

██████████), 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.

The instant matter involves an allegation of inappropriate speech by the Subject towards the Service Recipient while riding in an agency vehicle (the van). There were two other Staff in the van at the time. The evidence presented at the hearing distills to two directly conflicting stories; the accusation by the Service Recipient, and the absolute denials by all three staff present. In order to decipher this evidence, it is necessary to review and analyze an event which took place earlier in the day: a verbal and physical altercation involving the Service Recipient and staff, but not involving the Subject.

Specifically, the evidence establishes that the Subject was an employee of the facility and at the time of the alleged incident here was on duty, and was therefore was a custodian as that term is defined by SSL § 488(2). The Subject testified that her shift had started at 8:00 a.m. on the day in question. (Hearing testimony of the Subject) The preponderance of the credible evidence further establishes that the Service Recipient had experienced a rather upsetting morning on the day in question due to an altercation which occurred at approximately 7:30 a.m. in the facility, but did not involve the Subject. (Justice Center Exhibit 7) The Service Recipient was transported by ambulance to the ██████████ Hospital for a psychological evaluation (Justice Center Exhibit 14 at pg. 043), and the Subject went to the hospital after beginning her shift. Along with two other staff (Staff ██████████ and Staff ██████████), the Subject transported the Service Recipient back to the facility at approximately 11:00 a.m. (Hearing testimony of the Subject) While transporting the Service Recipient, the Subject directed threatening comments toward the Service Recipient which included her use of the so-called “f-word”. (Hearing testimony of Investigator ██████████; Justice Center Exhibits 7, 16)

During her interrogation and her hearing testimony, the Subject flatly denied this verbal conduct, as did Staff [REDACTED] and Staff [REDACTED] during their interviews by Investigator [REDACTED]. The Subject and the other staff denied that there was any conversation whatsoever during the ride back to the facility. This directly contradicts the statements given by the Service Recipient, who is the sole accuser in this matter. (Justice Center Exhibits 7, 16)

A witness' motive to be less than truthful about a matter is a legitimate inquiry. Here, the Subject and other involved staff were all potential targets of the investigation which stemmed from the morning occurrence and included the incident complained of here. They are thus clearly self-interested. In her own defense, the Subject testified consistently that there had been no conversation among any of the occupants of the transport van, and further testified that she had no knowledge of any reason why the Service Recipient would make false allegations against her. Indeed, the Subject testified that she had enjoyed a "cordial" relationship with him for over ten years. These statements were corroborated by the statements of the other staff present. (Hearing testimony of the Subject; Justice Center Exhibit 16 (audio recording of statements by Staff [REDACTED] and Staff [REDACTED]))

Other factors to be considered are the Service Recipient's verbal ability, the absence of any history of fabrication by the Service Recipient, and the lack of a fabrication protocol in his service plans. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 8, 10, 11, 12, 16)

Review of the two recorded statements given by the Service Recipient to Investigator [REDACTED] (Justice Center Exhibit 16), and his initial report to facility management (Justice Center Exhibit 7), all of which were given approximately six weeks after the incident, reveal that the Service Recipient could still recall the incident clearly and express himself well enough that his allegations against the Subject are also clear, in that the Subject directed the "f-word" towards him

numerous times during the transport from the hospital and subsequently at the facility. Specifically, the Service Recipient stated that the Subject threatened him by saying that she would "...take your ass down", "...you'll be on the floor hurting...", and/or "I'm going to [f***] you up". The Service Recipient further alleged that the Subject later told him to "...get his [f***ing] story straight" about her own conduct while in the van. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibit 16 (audio recordings of interviews with Service Recipient))

In contrast, the statements given by the Subject and staff during the investigation are inconsistent in their descriptions of some of the details of the earlier altercation, such as where a physical blow landed: on the face, arm or back of Staff [REDACTED]. Nevertheless, all staff witnesses consistently placed the fault of the morning altercation squarely upon the Service Recipient and described him as the sole aggressor. They claimed he slipped on magazines which he had thrown on the floor. In contrast, the Service Recipient claimed his bag of magazines were taken from him and thrown to the floor, and that he was pushed by staff and fell to the floor and was hurt. He acknowledged that he acted aggressively towards staff because he was angry, and apologized. (Justice Center Exhibit 16) The Subject further claimed that she never questioned or discussed the altercation with staff upon her arrival at the facility. (Hearing testimony of the Subject) Her reasoning was that since staff had written a note in the communication log about the altercation (Justice Center Exhibit 14), she had no need to discuss the matter with any of the staff who had been present, and did not do so. The Subject was the Assistant House Manager; her statement is neither logical nor credible for one in her position, especially given the small size of the facility, housing only five service recipients. These inconsistencies cast significant doubt upon the overall truthfulness of the statements by facility staff, and thus the purportedly corroborating statements by Staff [REDACTED] and Staff [REDACTED] attesting to the lack of any conversation whatsoever, proper or otherwise,

while riding in the van, are not credited evidence.

The Subject's defense at the hearing involved a further claim that persons who suffer from intellectual disabilities have a general tendency to fabricate. This is an overbroad and highly prejudicial assertion; moreover, there is no proof or support in the record for the assertion with respect to the Service Recipient here, and it is likewise not credited.

The Service Recipient appeared to be slightly limited in his ability to verbally describe events, but his consistent descriptions of the morning altercation and the transport incident complained of here also included a fair approximation of the relative chronology of events.

After giving due consideration to the evidence in the record, it is determined that substantial weight must be assigned to the three consistent statements of the Service Recipient. (Justice Center Exhibits 7, 16) His statements support a conclusion that the Subject did curse at him numerous times in the van. It is further concluded that the Subject had a motive, which was to "protect" staff who had been involved in the morning altercation. There is simply no other rational explanation for the Subject's conduct.

A custodian has at all times a duty of care towards all service recipients under his or her supervision. That duty includes, among other things, interacting with service recipients in a manner that is consistent with their care plan or behavior improvement plan, or such other guidance document or policy that directs the conduct of staff towards service recipients.

Specifically, the Subject owed that duty to the Service Recipient on the day in question. The Service Recipient's "Behavior Plan/Human Rights Committee – Review" defines verbally abusive behavior as, among other things, "yelling" and "cursing at others". Although this document relates to behaviors by the Service Recipient, there is no reason to believe that this guidance is not also applicable to behavior by staff towards service recipients. (Justice Center

Exhibit 11 at pg. 036) It is thus concluded that the Subject was acting as a custodian and breached a duty owed to the Service Recipient, satisfying all but the last statutory element of the offense charged.

The last element required to prove neglect is whether any of the statutorily-defined harm to the Service Recipient did result, or was likely to result, from the Subject's breach. It is significant that, six weeks after the incident, the Service Recipient was fully capable of describing the conduct of the Subject and its effect upon him. He emphatically and emotionally stated to Investigator [REDACTED] on [REDACTED] that he had to cover his ears to protect himself from the Subject's inappropriate language and threat of physical harm. It is clear from his audio statements, particularly the tone of his voice, that he was made fearful at the time of the incident, and was still very upset about it. Therefore, it is concluded that because of the Subject's inappropriate verbal comments, the Service Recipient did sustain a protracted impairment of his mental or emotional condition, thus satisfying the final element of the offense. (Justice Center Exhibit 16 (audio recordings of the Service Recipient); SSL § 488(1)(h))

Even if the administrative law judge had not found that the Service Recipient sustained a protracted impairment of his mental or emotional condition, the preponderance of the credible evidence supports a conclusion that it was likely that such impairment would have been sustained by the Service Recipient because of the Subject's conduct. This finding alone would satisfy the statutory requirement noted above.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed neglect, as 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 neglect 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], [REDACTED] be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed neglect.

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

This decision is recommended by Louis P. Renzi, Administrative Hearings Unit.

DATED: March 1, 2018
Schenectady, New York



Louis P. Renzi, ALJ