

**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
AND ORDER
AFTER HEARING**

Adjud. Case #:

██████████


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, Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: October 30, 2018
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge

CC. Vulnerable Persons' Central Register
Amanda Smith, Esq.
██████████, 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:

Mary B. Rocco
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
125 E. Bethpage Road, Suite 104
Plainview, New York 11803
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: Amanda Smith, Esq.

[REDACTED]

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] 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 1

It was alleged that between [REDACTED] at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you made inappropriate comments in the presence of and/or toward 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, as a result, the substantiated report was retained.
4. The chemical dependency unit at the facility, [REDACTED], located at [REDACTED], provides short-term in-patient treatment to adults with varying psychological and substance dependency issues and, as such, is licensed by

the New York State Office of Alcoholism and Substance Abuse Services (OASAS), which is an agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibit 6; Hearing testimony of Justice Center Investigator [REDACTED] [Investigator [REDACTED]])

5. At the time of the alleged neglect, the Subject had been employed by the facility as a Primary Counselor (PC), also known as Alcohol Counselor II, for approximately eleven years. The Subject was assigned to the [REDACTED] unit which was a twenty-eight-day in-patient program. As a PC, the Subject provided rehabilitative services consisting of conducting daily group therapy sessions, dependency education lessons and individual therapy. (Hearing testimony of the Subject) The Subject was a custodian as that term is defined in Social Services Law § 488(2).

6. At the time of the alleged neglect, the Service Recipient was a twenty-three-year-old female program resident with relevant diagnoses of schizoaffective disorder and alcohol and cannabis use disorder. (Justice Center Exhibits 6, 7, 8, 9 and 10)

7. On [REDACTED], the Subject escorted a group of service recipients outside in front of the facility for recreational time. (Hearing testimony of the Subject). The group consisted of the Subject, the Service Recipient, Service Recipient [REDACTED] and Service Recipient [REDACTED]. As the group engaged in conversation, the Subject made a comment about the large size of a women's backside who was walking past the facility and the group laughed. (Justice Center Exhibits 6, 16, 19, 20 and 21: audio of Service Recipient's interview and Service Recipient [REDACTED] interview)

8. On [REDACTED], the Service Recipient stated to Service Recipient [REDACTED] and Service Recipient [REDACTED] that, during group session the preceding day, the Subject compared the Service Recipient's backside size to a woman who was passing by. Service Recipient [REDACTED] and Service Recipient [REDACTED] encouraged the Service Recipient to report the matter to the Unit Director. Service Recipient [REDACTED] informed a staff member of the disclosure who, in turn, informed the Unit Director.

(Justice Center Exhibits 6, 15, 16, 17, 18 and 21: audio of Service Recipient's interview)

9. On [REDACTED], the Subject was notified by the Unit Director that there was an allegation made against him. The Subject informed the Service Recipient's treatment team that the Service Recipient had made an allegation and the team agreed that the Service Recipient should be transferred to another counselor's therapy group. The Subject then proceeded to the Service Recipient's room, informed her that she was being moved to another group and inquired as to why she lied about him. The Service Recipient did not respond. (Justice Center Exhibits 6, 11, 15 and 21 audios of the Service Recipient's interview and of the Subject's interrogation; Hearing testimony of the Subject)

10. On [REDACTED], the Subject was reassigned to the detox unit pending the Service Recipient's discharge days later. (Justice Center 6 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 neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h) as:

"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 of neglect alleged in the substantiated report that is the subject of the proceeding and that such act constitutes 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

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 1-21) The investigation underlying the substantiated report was conducted by Justice Center Investigator, [REDACTED], who was not available on the date of the hearing. Justice Center Investigator [REDACTED] was the only witness to testify at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and presented no other evidence.

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that he breached that duty, and that his breach either 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. (SSL § 488(1)(h))

There is no dispute that the Subject was a custodian as that term is defined in Social Services Law § 488(2) and that, as a Primary Counselor, the Subject owed a duty to maintain the highest standard in the therapeutic services he provided, as well as protecting and ensuring the welfare of the service recipients to whom he was assigned. (Justice Center Exhibit 12 and Hearing testimony of the Subject)

The Subject has been alleged to have breached that duty on two separate occasions; first,

when he made an inappropriate comment comparing the size of a woman's backside to that of the Service Recipient's and, again, when he asked the Service Recipient why she had lied. The Subject denied making any comment about or in comparison to anyone's backside, but admitted to asking the Service Recipient why she lied and informing her that she was being transferred to another therapy group. (Justice Center Exhibit 21: audio of Subject's interrogation; Hearing testimony of the Subject)

In her interview, the Service Recipient stated that during a group conversation the Subject compared the large size of a woman's backside to her own. In his interview, Service Recipient ■, however, denied hearing such a comparison, stating that the Subject commented on a woman walking by saying she had a "fat ass," which elicited laughter from the group, including the Service Recipient. Service Recipient ■ described the group's conversation, before and after the Subject made the comment, as joking and informal and expressed how surprised he was that the Service Recipient made the allegation. Service Recipient ■ stated that the Service Recipient gave no indication that she was offended. (Justice Center Exhibits 6, 16, 19 and 21: audio of interviews of the Service Recipient and Service Recipient ■) Without question, any comment referencing the size of a woman's backside, whether drawing a comparison to the Service Recipient's or not, clearly falls short of the appropriate professional standards the Subject, as a PC, was obligated to uphold. Moreover, confronting the Service Recipient to inquire why she had lied lacked the professional integrity the Subject was required to maintain. (Justice Center Exhibit 12)

Whereas the Justice Center proved by a preponderance of the evidence that the Subject breached his duty, which is an element of neglect under SSL § 488(1)(h), there was no evidence 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, which is

another, and no less essential, element of neglect.

In her interview, the Service Recipient stated that she felt uncomfortable and awkward by the comment made by the Subject. However, the Service Recipient also stated that she did not inform anyone following the Subject's comment because she did not think it was necessary. It was not until she spoke with Service Recipient [REDACTED] and Service Recipient [REDACTED], who both expressed their opinions that the Subject's comment was inappropriate, that she decided to say anything to facility staff. In fact, it was Service Recipient [REDACTED] who initiated the conversation with a staff member that led to the Unit Director speaking to the Service Recipient. (Justice Center Exhibits 6, 11, 15, 16 and 21: audio of interview of the Service Recipient) The Service Recipient then stated that she felt harassed and, again, uncomfortable when the Subject asked her why she had lied while giving her a "frustrated look." (Justice Center Exhibit 21: audio of interview of the Service Recipient)

The Justice Center argued that the Subject's breach of his ethical obligation negatively affected the emotional and psychological well-being of the Service Recipient and that the Subject's actions potentially placed the Service Recipient in a vulnerable position to trigger her dependency issue. There is no evidence in the record to support either of these tenuous arguments. An expression of feeling "uncomfortable" in response to the Subject's comments, however unprofessional as they may have been, does not translate into either physical injury or serious or protracted impairment of the Service Recipient's physical, mental or emotional condition or that the Subject's conduct was likely to result in physical injury or serious or protracted impairment of the Service Recipient's physical, mental or emotional condition, which is the standard that must be established under SSL § 488(1)(h).

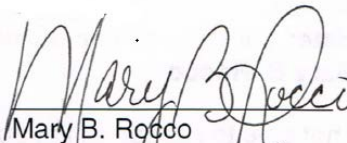
Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged. The substantiated

report will be amended and sealed.

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

This decision is recommended by Mary B. Rocco, Administrative Hearings Unit.

DATED: October 16, 2018
Plainview, New York


Mary B. Rocco
Administrative Law Judge