

**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 Elizabeth M. Devane, ALJ, of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: March 24, 2020
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Kristin Kopach, Esq.
[REDACTED], Subject
A. Andre Dalbec, 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:

John T. Nasci
Administrative Law Judge

Held at:

New York State Office Building
207 Genesee Street, Room 712
Utica, New York 13501
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: A. Andre Dalbec, Esq.
NYS Law Enforcement Officers Union
63 Colvin Avenue
Albany, New York 12206

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] 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 or about [REDACTED], while at [REDACTED], located at [REDACTED], you committed Physical Abuse against/to a Service Recipient.

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

The investigation revealed that the Subject pushed and/or shoved the Service Recipient's head down onto a restraint bed.

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

4. The facility, the [REDACTED], located at [REDACTED] provides, in pertinent part, inpatient mental health treatment for incarcerated adults. The [REDACTED] is operated by the New York State Office of Mental Health

(OMH), which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Investigator [REDACTED] (Investigator))

5. At the time of the alleged physical abuse, the Subject was employed by the OMH as a Senior Secure Hospital Treatment Aide (SSHTA) and had been employed by the OMH for twenty-one years. (Justice Center Exhibit 17: audio recording of Justice Center interrogation 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 physical abuse, the male Service Recipient was thirty-two years old, and had been a resident patient of ward [REDACTED] of the [REDACTED] since [REDACTED]. The Service Recipient had relevant diagnoses of bipolar 1 disorder, antisocial personality disorder and mild intellectual disability. The Service Recipient had a history of spitting, smearing feces on the walls of his room, throwing feces and eating feces. (Justice Center Exhibits 8 and 17: audio recording of Justice Center interrogation of the Subject)

7. On [REDACTED], after lunch, the Service Recipient started arguing with and threatening another service recipient. Ward [REDACTED] staff requested that the Service Recipient go to a side room to calm. The Service Recipient refused to comply with the request and threatened to smear feces in the side room. At approximately 12:45 p.m., when ward [REDACTED] staff attempted a two person escort of the Service Recipient to the side room, the Service Recipient became combative toward staff, who put him on the floor in the hallway and abandoned their attempts to escort him. Ward [REDACTED] staff then used the red dot emergency telephone system to request additional assistance. (Justice Center Exhibits 8 and 17: audio recording of Justice Center interrogation of the Subject)

8. The Subject, along with numerous other non-ward [REDACTED] staff, responded to the emergency call. The Service Recipient then became violent and attempted to bite, kick, strike and spit on staff. At approximately 1:00 p.m., the Service Recipient was secured in a five-point restraint in a supine position on a rolling restraint bed in the hallway. Once the Service Recipient

was secured, staff started rolling the restraint bed toward a side room. (Justice Center Exhibits 8 and 17: audio recording of Justice Center interrogation of the Subject)

9. While staff were moving the rolling bed with the Service Recipient in the five-point restraint, the Subject was walking along side the bed on the Service Recipient's left side near the Service Recipient's head, which was at the leading end of the bed. Because the Service Recipient was attempting to spit on staff, staff had placed the Service Recipient's sweatshirt over his head, so that the shirt covered the entirety of the Service Recipient's face. The Service Recipient was attempting to sit up by repeatedly pulling his head upward. (Justice Center Exhibit 17: facility surveillance video recording aspects 663 and 664)

10. Shortly after staff started moving the bed down the hallway, the Subject used his right hand to pull the Service Recipient's sweatshirt further over the Service Recipient's head and, with his right hand on the Service Recipient's forehead, while the Service Recipient's sweatshirt was covering his face and forehead, the Subject pushed the Service Recipient's head downward into the bed. (Justice Center Exhibit 17: facility surveillance video recording aspects 663 and 664)

11. Thereafter, the Service Recipient was taken to a side room and given medication. (Justice Center Exhibit 8)

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 report of physical abuse 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...” (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 follows:

- (a) "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 physical abuse 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 constitutes the category of physical abuse as set forth in the substantiated report. (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 14 NYCRR § 700.10(d), it must then be determined whether

the act of physical abuse cited in the substantiated report constitutes the category of physical abuse as set forth in the substantiated report.

If the Justice Center did not prove the physical 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 the 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 through 15¹) The Justice Center also presented audio recordings of the Justice Center Investigator’s interview of witnesses and interrogation of the Subject and surveillance video of the incident. (Justice Center Exhibit 17) The investigation underlying the substantiated report was conducted by the Investigator who testified at the hearing on behalf of the Justice Center. The Subject did not testify at the hearing and offered no other evidence.²

In order to prove physical abuse, the Justice Center must establish that the Subject intentionally or recklessly caused, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient or caused the likelihood of such injury or impairment. (SSL § 488(1)(a)) The term "intentionally" is defined by Social Services Law as having the same meaning as provided in New York State Penal Law. (SSL § 488(16)) New York State Penal Law states that “A person acts intentionally with respect to a result or to conduct ... when his conscious objective is to cause such result or to engage in such

¹ The Justice Center did not offer Exhibit 16.

² The Subject and the Justice Center submitted post-hearing briefs on the issues of the Administrative Law Judge taking a negative inference for the Subject’s failure to testify and the weight to be given to hearsay evidence. Because the findings of this decision are based on the Subject’s interrogation statements and the video evidence, the Subject’s post-hearing arguments are moot.

conduct.” (PL § 15.05(1))

The Justice Center contends that the Subject committed physical abuse by intentionally pushing or shoving the Service Recipient’s head into the restraint bed causing the likelihood of physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

The Subject argues that he pushed the Service Recipient’s head down in order to maintain the Service Recipient’s sweatshirt over the Service Recipient’s head so that the Service Recipient could not spit on him and the other staff. The Subject also argues that his conduct was a reasonable emergency intervention necessary to protect the safety of himself and other staff from being spat on by the Service Recipient and, therefore, justified under the statute.³

Because the Subject did not testify, the only evidence in the record of his conduct are the audio recording of his Justice Center interrogation and the surveillance video recordings. In his interrogation, the Subject stated that he pushed the Service Recipient’s head down to prevent the Service Recipient’s face from coming out of his sweatshirt and spitting on staff. (Justice Center Exhibit 17: audio recording of Justice Center interrogation of the Subject) From the video evidence and the Subject’s interrogation, it is clear that the Subject made physical contact with the Service Recipient by using his hand to push the Service Recipient’s head into the restraint bed. Because the Subject admitted in his interrogation that he acted affirmatively when he pushed the Service Recipient’s head down, it is found that the Subject acted intentionally.

There is no evidence in the record that the Service Recipient was injured as a result of the

³ The Subject submitted a post-hearing letter to the Administrative Law Judge containing the decision of an Arbitrator in an employment disciplinary proceeding concerning the Subject and the same incident that is subject of this hearing. Although not explicitly stated, it is inferred from the Subject’s letter that the Subject is requesting a collateral estoppel ruling based upon the Arbitrator’s decision. After reviewing the Arbitrator’s decision, the only issue in that proceeding which is relevant in this proceeding is the issue of the Subject pushing the Serviced Recipient’s head down onto the bed, which the Arbitrator found that the Subject did. The Arbitrator did not make findings concerning the Subject’s intent or recklessness, the likelihood of impairment, whether or not the Subject’s conduct was a necessary or reasonable emergency intervention and the proper category level of physical abuse.

Subject pushing his head into the restraint bed. However, actual impairment is not required for the Justice Center to prove physical abuse. Even though the Justice Center presented no direct evidence of the likelihood of impairment, it is concluded from a review of the video evidence that the force used by the Subject, the Subject's physical size and the angle of his arm when he pushed the Service Recipient's head down caused the likelihood of physical injury to the Service Recipient.

It is clear from a review of the video evidence that, at the time that the Subject pushed the Service Recipient's head into the restraint bed, the Service Recipient's sweatshirt was completely covering his face to the extent that only a small portion of his forehead was exposed. Consequently, pushing the Service Recipient's head down into the restraint bed was not necessary or reasonable as an emergency intervention in order to maintain the sweatshirt over his head and prevent the Service Recipient from spitting. The Subject offered no explanation as to why he could not have achieved the same goal by using his hand to hold the sweatshirt in place. Consequently, the Subject's argument, claiming that his actions constituted a reasonable emergency intervention, are without merit.

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 physical abuse 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 physical 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.

Substantiated Category 3 findings of abuse and/or neglect will not result in the Subject's name 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 SSL § 496(2). The report will be sealed after five years.

DECISION:

The request of [REDACTED], that the substantiated report dated [REDACTED] be amended and sealed, is denied.

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

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

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

DATED: March 16, 2020
Schenectady, New York



John T. Nasci, ALJ