

**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]

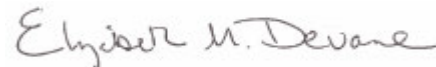
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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: September 16, 2020
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Ashley M. Emery, Esq.
Gary Kropkowski, Esq.
[REDACTED], Subject

**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:

Via Video Conference Hearing
New York State Justice Center for the Protection of
People With Special Needs
125 East Bethpage Road
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: Gary Kropkowski, Esq.

[REDACTED]

By: Ashley M. Emery, Esq.
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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 the Subject shoved the Service Recipient into a chair.

Allegation 2

It was alleged that on or about [REDACTED], while at the [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 the Subject slammed the door on the Service recipient's fingers causing injury.

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

was retained.

4. The facility, the [REDACTED], located at [REDACTED], is a secure adult psychiatric center that provides evaluations, treatment and rehabilitation for service recipients [REDACTED]. The facility is operated by the Office of Mental Health, which is a provider 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 had been employed by [REDACTED] for fourteen years, first as a recreational therapist and then as a Secure Hospital Treatment Assistant (SHTA). As an SHTA, the Subject's duties consisted of maintaining the safety and security of all service recipients, assisting with their daily activities and the building of life skills. In addition to his SHTA duties, the Subject was a mentor involved in the training of new staff as well as being a member of the facility's Trauma Response Team. The Subject worked a regular [REDACTED] evening shift in Unit [REDACTED]. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged physical abuse, the Service Recipient was a forty-seven year-old male with relevant diagnosis of bipolar disorder with psychotic features. The Service Recipient had a history of verbal and physical aggression, making false allegations against staff and agitating and manipulating fellow service recipients. (Justice Center Exhibits 9, 10, 11, 12 and 22; Hearing testimony of the Subject)

7. At approximately 7:30 p.m. on the date of the alleged physical abuse, the Service Recipient and twenty-nine other service recipients were all seated in the dayroom awaiting medication distribution. Present in the dayroom with the thirty service recipients were five SHTAs, including the Subject, and a Nurse who was dispensing the medication. During medication distribution, each service recipient was required to remain seated quietly at all times

until called by the Nurse. Service Recipient 1 was seated on the other side of the room from the Service Recipient. Service Recipient 1 was displaying unacceptable behavior by placing his feet on a chair for which staff reprimanded him. The Service Recipient stood up and walked across the room insisting that staff leave Service Recipient 1 alone. The Service Recipient starting yelling statements like “there are 30 of us and only 5 of them, we can take them” among other instigating remarks directed at the seated service recipients. The Service Recipient was instructed to return to his seat and attempts were made by staff to verbally deescalate and calm the Service Recipient who, upon returning to his seat, continued to vocalize. (Justice Center Exhibits 21 and 22; Hearing testimony of the Subject)

8. Moments later, Service Recipient 1 flipped over a metal table. Two SHTA’s immediately restrained Service Recipient 1 and escorted him from the dayroom. As Service Recipient 1 was being escorted from the dayroom, the Service Recipient again left his seat, disregarded verbal redirection from staff and attempted to physically interfere with the restraint of Service Recipient 1, yelling threats and continuing to encourage the other service recipients to challenge staff. The Subject immediately approached the Service Recipient and escorted him into the music room located off to the side of the dayroom. (Justice Center Exhibits 21 and 22; Hearing testimony of the Subject)

9. Upon entering the music room, and as the Service Recipient continued to curse and scream inciting statements, the Subject physically assisted the agitated Service Recipient into the chair next to the door while attempting to verbally calm the Service Recipient. The Subject opened the music room door and stood directly outside the door, facing his direct line of sight toward the dayroom and the nurse, the remaining two staff and the twenty-eight service recipients occupying it. The left side of his body was right next to the music room door, allowing him to keep a peripheral visual of the Service Recipient, while affording him space and time to calm. The music room door was a heavy metal door with a full glass window and hung on a swing hinge designed to

swing shut immediately upon opening. (Justice Center Exhibits 21 and 22; Hearing testimony of the Subject)

10. The Service Recipient, while still agitated and screaming provocative comments, immediately left his seat and pushed the music door open, which opened in toward the dayroom. The door hit the Subject's arm, bounced back on its swing hinge and caught the Service Recipient's left middle and pointer fingers as it closed. The Subject immediately responded to the Service Recipient's outcry. The Senior SHTA also arrived seconds later and addressed the Service Recipient's injury. The Service Recipient was treated for swelling, pain and a laceration to his middle finger. (Justice Center Exhibits 21 and 22; 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.
- Pursuant to Social Services Law § 493(4), the category of abuse 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) "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 acts of physical abuse alleged in the substantiated report that is the Subject of the proceeding and that such acts constitute 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 acts of physical abuse cited in the substantiated report constitute 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 not established by a preponderance of the evidence that the Subject committed the acts described as "Allegation 1" and "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 through 22) The investigation underlying the substantiated report was conducted by the Investigator, who was the only witness to testify on behalf of the Justice Center.

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

The Justice Center submitted visual only videos of the incidents, which was extremely helpful and illuminating evidence with respect to the substantiated allegations. (Justice Center Exhibit 21)

In order to sustain an allegation of physical abuse in this matter, the Justice Center must show that the Subject was a custodian who had physical contact with the Service Recipient; that such contact was either intentional or reckless; and that such contact caused either physical injury or serious or protracted impairment of a Service Recipient's physical, mental or emotional condition; or caused the likelihood of such injury or impairment. (SSL § 488(1)(a))

The Justice Center argued that the Subject acted in a reckless and neglectful manner in the forcible placement of the Service Recipient into a chair which, although it did not, was likely to cause physical injury. The Justice Center further asserted that the Subject again acted recklessly and neglectfully when he slammed the door on the Service Recipient's fingers. In support of these contentions, the Justice Center relied solely on two short videos of the incidents in the dayroom and the music room. (Justice Center 21) The Justice Center's arguments were found unconvincing as each overlooked the preponderance of evidence offered by the Justice Center itself, as well as the fundamental elements of physical abuse as defined by SSL § 488(1)(a).

Specifically, not only does the video evidence corroborate the Subject's version of events, but the five interviews conducted by the Investigator, including that of the Service Recipient, all consistently parallel the Subject's descriptions of the incident in the dayroom leading into the music room and the accidental injury to the Service Recipient's fingers in the music room. (Justice Center Exhibits 21 and 22; Hearing testimony of the Subject)

The Subject consistently and credibly testified, and the video evidence showed, that the Subject manually escorted the Service Recipient from the dayroom following his interference with an ongoing restraint in order to protect the Service Recipient, the other service recipients and staff

during a volatile situation. The Subject sincerely testified that the Service Recipient was well known to him, that they had a good rapport and that he was aware of the Service Recipient's history. The Subject stated that he quickly escorted the Service Recipient out of the dayroom with considerable mounting concern for the remaining staff and service recipients. The Subject testified that once in the music room he released one arm and transitioned the Service Recipient from the manual hold into a seated position in the chair, with the Service Recipient's agitation escalating. The Subject testified that the Service Recipient "plopped" into the cushioned chair exasperated. Acknowledging from the Service Recipient's behavior that the Subject's presence was only adding to the Service Recipient's agitation, the Subject testified that he removed himself and stood directly outside the glass door to provide the Service Recipient with some space to calm down. Additionally, the Subject testified that he was growing increasingly concerned about the twenty-eight other service recipients sitting in the dayroom without full staff supervision level. (Justice Center Exhibits 22; Hearing testimony of the Subject)

The Subject further testified that he positioned himself in the most advantageous spot outside the music room door to continue to monitor the Service Recipient as well as to maintain constant visual of the understaffed dayroom. The Subject testified that seconds later, and still visibly irate, the Service Recipient pushed the music room door open hitting the Subject's left arm. The Subject testified that he moved his arm instinctively when the door made contact with his arm and the door bounced back quickly shutting and catching the Service Recipient's fingers. Of importance to note, the Subject, along with every other individual interviewed including the Service Recipient, described the incident as accidental and the injuries to his fingers as accidental. (Justice Center Exhibits 21 and 22; Hearing testimony of the Subject)

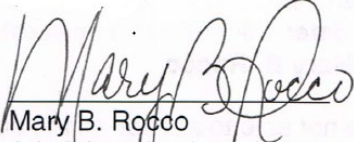
There was no evidence in the record establishing intentional or reckless conduct on behalf of the Subject that caused physical injury or the likelihood thereof as required by statute. (SSL § 488(1)(a))

Accordingly, after considering all of the evidence, testimony, and arguments presented, 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 acts of physical abuse alleged. The substantiated report will be amended and sealed.

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

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

DATED: September 2, 2020
Plainview, New York



Mary B. Rocco
Administrative Law Judge