

**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: November 16, 2020
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Kevin McGuckin, Esq.
[REDACTED], Subject
Lawrence Schaefer, 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:

Susanna Requets
Administrative Law Judge

Held at:

Video Conference Hearing
Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street – 3rd Floor
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: Kevin McGuckin, Esq.

[REDACTED]

By: Lawrence Schaefer, Esq.
Lippes Mathias Wexler Friedman LLP.
54 State Street, Suite 1001
Albany, New York 12207

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for physical abuse and abuse (deliberate inappropriate use of restraints). 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 and abuse (deliberate inappropriate use of restraints) 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 placed his knee/weight on the Service Recipient's back while the Service Recipient was on the floor.

Allegation 2

It was alleged that on or about [REDACTED], while at [REDACTED], located at [REDACTED], you committed Deliberate Inappropriate Restraint against/to a Service Recipient.

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

The investigation revealed that the Subject conducted a restraint with excessive force and/or improper technique, which included placing his knee/weight on the Service Recipient's back while the Service Recipient was on the floor.

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

4. The facility, [REDACTED], located at [REDACTED], provides a continuum of inpatient, outpatient and related psychiatric services and 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 Dennis Sang (Investigator); Justice Center Exhibit 5)

5. At the time of the alleged physical abuse and abuse (deliberate inappropriate use of restraints), the Subject had been employed by the facility as a Sergeant (also referred to as Safety & Security Officer 2 or SSO 2) and had been employed by the facility for three and one-half years. Under direction of Chief SSO, the Subject supervised SSO 1s on his assigned shift. (Hearing testimony of the Subject; Justice Center Exhibits 26 and 34: audio recording of Justice Center interview 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 and abuse (deliberate inappropriate use of restraints), the Service Recipient was thirty-four years old, and had resided in the [REDACTED] outpatient unit for approximately ten months. The Service Recipient was an adult male with

relevant diagnoses of schizoaffective disorder bipolar type and polysubstance dependence. (Justice Center Exhibits 5, 21, 22 and 23)

7. On [REDACTED], the Subject worked the evening shift from [REDACTED] [REDACTED] (Hearing testimony of the Subject; Justice Center Exhibit 34: audio recording of Justice Center interview of the Subject)

8. At approximately 4:50 p.m., SSO A¹ and Licensed Practical Nurse (LPN 1²) observed the Service Recipient agitated, slamming doors and complaining that money was missing from his room. LPN 1 called 911 and informed the Program Coordinator³ that she labeled the Service Recipient an Emotionally Disturbed Person (EDP) and would be referred to a local hospital for a psychiatric evaluation. SSO A informed Dispatch Officer SSO B⁴ and dispatch command and access control to not allow the Service Recipient to leave the building. SSO C⁵ responded upstairs. (Justice Center Exhibits 7 and 11)

9. In the meantime, the Service Recipient went downstairs to the outer lobby, was further agitated and punched the plexiglass window at access control. The SSOs, including SSO C, SSO D⁶ and SSO E⁷ attempted to verbally deescalate the Service Recipient. (Justice Center Exhibits 7, 18 and 34: audio recording of Justice Center interview of SSO F⁸)

10. Shortly thereafter, the Subject and SSO G⁹ were walking through the sally port. The Service Recipient attempted to enter the sally port and when SSO G and the Subject blocked his exit, the Service Recipient lunged at the Subject with both hands clenched in fists and punched

¹ SSO A was [REDACTED].

² LPN 1 was [REDACTED].

³ The Program Coordinator was [REDACTED].

⁴ SSO B was [REDACTED].

⁵ SSO C was [REDACTED].

⁶ SSO D was [REDACTED].

⁷ SSO E was [REDACTED].

⁸ SSO F was [REDACTED].

⁹ SSO G was [REDACTED].

the Subject in the face. (Hearing testimony of the Subject; Justice Center Exhibits 7, 12, 33 and 34: audio recording of Justice Center interview of SSO A)

11. SSO A, D, E and G took the Service Recipient down to the floor. SSO F joined and assisted in restraining the Service Recipient's legs and turning the Service Recipient to the prone position. The Service Recipient was handcuffed and SSO B relieved SSO F. (Justice Center Exhibits 7, 18, 33 and 34: audio recording of Justice Center interview of SSO F)

12. After approximately one minute on the floor, the Subject crouched down to check the tightness of the Service Recipient's handcuffs. The Subject moved to the side and the Service Recipient kicked out. SSO D helped the Subject get up so that he could assist the Service Recipient. The Service Recipient was flipped over on his back and the officers placed cuffs on the Service Recipient's legs. (Justice Center Exhibits 7, 13, 14, 33 and 34: audio recording of Justice Center interviews of SSO D, SSO E and the Subject)

13. The Service Recipient attempted to kick his feet and paramedics used additional straps to secure the Service Recipient's feet to the stretcher. The Service Recipient was then transferred to Long Island Jewish Hospital for an EDP evaluation. (Justice Center Exhibit 7)

14. Following the incident, the Service Recipient did not make any complaints and did not sustain any injuries, marks or bruises from the takedown and restraint. (Justice Center Exhibits 6, 7, 19 and 34: audio recording of Justice Center interview of the Service Recipient)

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the 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 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 and abuse (deliberate inappropriate use of restraints) 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 and abuse (deliberate inappropriate use of restraints) of a person in a facility or provider agency is defined by SSL § 488(1), 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.
- (d) "Deliberate inappropriate use of restraints," which shall mean the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a service recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. For purposes of this subdivision, a "restraint" shall include the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body.

Substantiated reports of 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 and abuse (deliberate inappropriate use of restraints) alleged in the substantiated report that is the subject of the proceeding and that such acts constitute the category of abuse as set forth in the substantiated report. (14 NYCRR § 700.10(d))

If the Justice Center proves the alleged physical abuse and abuse (deliberate inappropriate use of restraints), 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 and abuse (deliberate inappropriate use of restraints) cited in the substantiated report constitute the category of abuse as set forth in the substantiated report.

If the Justice Center did not prove the physical abuse and abuse (deliberate inappropriate use of restraints) 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 28 and 32) The Justice Center also presented audio recordings of the Investigator’s interviews of witnesses and the Subject, and

a video of the incident. (Justice Center Exhibits 33 and 34) The investigation underlying the substantiated report was conducted by the Investigator, who testified at the hearing on behalf of the Justice Center. The Subject testified in his own behalf and presented one document. (Subject Exhibit A)

In order to sustain an allegation of physical abuse in this matter, the Justice Center must show that the Subject 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. The statute allows, as an exception, the use of physical contact as a reasonable emergency intervention necessary to protect the safety of any person. (SSL § 488[1][a])

In order to prove abuse (deliberate inappropriate use of restraints) the Justice Center must establish that the Subject used a restraint on the Service Recipient in which the technique used, the amount of force used or the situation in which the restraint was used, was deliberately inconsistent with the Service Recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies. The term "restraint" is defined by statute as any manual, pharmacological or mechanical measure or device used to immobilize or limit the ability of a service recipient to freely move his or her arms, legs or body. The statute allows, as an exception, the use of an unauthorized restraint as a reasonable emergency intervention in order to prevent imminent risk of harm to the Service Recipient or to any other person. (SSL § 488(1)(d))

The Justice Center relied on video evidence to support its contention that the Subject used his knee and weight on the Service Recipient's back. The Justice Center argued that inferences

should be drawn as to the Subject's conduct because the Service Recipient, who was calm moments before, kicked out after the Subject bent over. The Justice Center further argued that the Subject had motive to "inflict street justice" after the Service Recipient punched him. The Investigator testified that the Subject placed his left knee on the Service Recipient's back for a split second (between 2:04 and 2:06 on the video) after the Service Recipient was handcuffed and in the prone position. (Hearing testimony of the Investigator; Justice Center Exhibits 13, 14, 33 and 34: audio recording of Justice Center interviews of SSO D, SSO E and the Subject)

In this case, the video evidence shows that throughout the takedown and restraint, for nearly one minute after the Subject was punched, the Subject appeared calm and continued in his supervisory role of ensuring the safety of his officers and the Service Recipient. After the Service Recipient was laid in the prone position and handcuffed, the Subject crouched down toward the Service Recipient. The Subject's position vis-à-vis the Service Recipient cannot be determined from the video. It is not clear whether the Subject placed any of his body parts on the Service Recipient, was on top of the Service Recipient or was immediately beside him or whether he was touching the Service Recipient. A rectangular rug on the floor, the Subject's gloves and pants all appear to be the same color, and at least two SSOs obstruct the view of the camera at the time of the alleged incident. After the Subject moved away from the Service Recipient, the Service Recipient squirmed and kicked. (Justice Center Exhibit 33: from 2:04 – 2:06)

The video does not support the Justice Center's contentions by a preponderance of the evidence. The Assistant Director of Quality Improvement (ADQI¹⁰) observed that "it is unclear from the video footage" whether the Subject placed his knee on the Service Recipient's back. (Justice Center Exhibits 5, 6, 7 and 33) The anonymous staff who reported the incident to the

¹⁰ The ADQI was [REDACTED].

ADQI stated that he was concerned about the use of inappropriate force but did not further elaborate. (Justice Center Exhibits 5 and 6) Five SSOs were interviewed by the Justice Center and none of them recalled the Subject placing his knee on the Service Recipient's back. SSO A, SSO D and SSO E told the Investigator that they did not observe the Subject's knee on the Service Recipient's back at the time of the restraint. SSO A, SSO D and SSO E said that they observed the Subject's knee on the Service Recipient's back only after watching the video with the Investigator. SSO C was adamant that he did not see anything, that there were four other officers who had better vantage points to view the incident than he did, and that the video appeared to show the Subject losing his balance and landing on the Service Recipient. (Justice Center Exhibits 12, 13, 14, 17, 33 and 34: audio recording of Justice Center interviews of SSO A, SSO C, SSO D and SSO E) Other than the video, there is no evidence to support the Justice Center's contentions that the Subject placed his knee/weight on the Service Recipient's back.

The Subject testified that he crouched down to lock the handcuffs and denied that his knee touched or put any weight on the Service Recipient's back. SSO E surmised that the Subject bent down to lock the handcuffs and the Subject, as a supervisor, must make sure that the handcuffs are not too tight and that they are double locked. (Hearing testimony of the Subject; Justice Center Exhibits 13 and 34: audio recording of Justice Center interviews of SSO E and the Subject) Double locking the handcuffs reduces the possibility of inflicting injury to the individual, or the position of the individual picking or slipping the locking mechanism. (Justice Center Exhibit 27, p. 123) An officer can check the "fit" of the handcuffs by noting that if the tip of the finger fits between the cuff and the wrist, the handcuffs are neither too tight nor too loose. (Justice Center Exhibit 27, p. 123) Based on the evidence presented, the Subject's defense that he took reasonable actions to ensure the safety of the Service Recipient by crouching down and ensuring that the handcuffs were

not too tight around the Service Recipient's hands is credited weight.

Without evidence to support the Subject's knee on the Service Recipient's back, any reason could support the Service Recipient kicking out after the Subject crouched down, including his volatile behavior immediately preceding the restraint. Therefore, the Justice Center has not established by a preponderance of the evidence that the Subject placed his knee or weight on the Service Recipient's back while the Service Recipient was restrained and on the floor.

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 physical abuse and abuse (deliberate inappropriate use of restraints) 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 physical abuse and abuse (deliberate inappropriate use of restraints).

This decision is recommended by Susanna Requets, Administrative Hearings Unit.

DATED: November 9, 2020
Brooklyn, New York



Susanna Requets, ALJ