

Appendix A

20-761-cv
Salu v. Miranda

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT’S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of October, two thousand twenty.

PRESENT: DENNIS JACOBS,
PIERRE N. LEVAL,
JOSEPH F. BIANCO,
Circuit Judges.

ROTIMI SALU, GERARD M. LYNCH,
Plaintiffs-Appellants,

v.

No. 20-761

DENISE MIRANDA, NEW YORK STATE JUSTICE
CENTER, ELIZABETH M. DEVANE, DAVID MOLIK,
MARY B. ROCCO, LOUIS P. RENZI, WESTCHESTER
MEDICAL CENTER HEALTH NETWORK,
WESTCHESTER COUNTY HEALTH CARE
CORPORATION,

Defendants-Appellees,

DIAMOND HEALTHCARE CORPORATION, DENISE
DAVIS,

Defendants.

For Plaintiffs-Appellants:

MICHAEL D. DIEDERICH, JR., Diederich Law,
Stony Point, NY.

For Defendants-Appellees Denise Miranda,
New York State Justice Center, Elizabeth
M. Devane, David Molik, Mary B. Rocco,
and Louis P. Renzi:

MARK S. GRUBE, Assistant Solicitor (Barbara
D. Underwood, Solicitor General; Anisha S.
Dasgupta, Deputy Solicitor General; *on the
brief*), for Letitia James, Attorney General for
the State of New York, New York, NY.

For Defendants-Appellees Westchester
Medical Center Health Network and
Westchester County Health Care
Corporation:

BRIAN J. CLARK (Allison B. Gotfried, *on the
brief*), Venable LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of
New York (Karas, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND
DECREED** that the judgment of the District Court is **AFFIRMED**.

Plaintiffs-appellants Rotimi Salu and Gerard Lynch (collectively, “plaintiffs”) appeal from the February 5, 2020 judgment of the district court, dismissing their claims alleging employment discrimination based on race and due process and equal protection violations. Plaintiffs filed this lawsuit against Westchester Medical Center Health Network and Westchester County Health Care Corporation (collectively, “the WMC defendants”), as well as the New York State Justice Center for the Protection of People with Special Needs (“the Justice Center”), Denise Miranda, Elizabeth M. Devane, David Molik, Mary B. Rocco, and Louis P. Renzi (collectively, “the Justice Center defendants” and together with the WMC defendants, “defendants”), seeking declaratory and injunctive relief, monetary damages, and punitive damages under 42 U.S.C. §§ 1981, 1983, 1985, and 1986. Plaintiffs further requested that the district court exercise supplemental jurisdiction over certain state law claims and related proceedings pursuant to Article 78 of the New York Civil Practice Law and Rules, N.Y. C.P.L.R. § 7801 *et seq.* Because plaintiffs have waived many of

their originally pled claims on appeal (referenced in the margin below), we consider only: Salu's race discrimination claim against the WMC defendants, and Salu and Lynch's due process and equal protection claims against the Justice Center defendants.¹

We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6) or Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Smith v. Hogan*, 794 F.3d 249, 253 (2d Cir. 2015). In doing so, we accept all factual allegations in the complaint as true and "draw all reasonable inferences in favor of the plaintiff." *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). We review a district court's decision to exercise supplemental jurisdiction over state law claims for abuse of discretion. *See Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003). We assume the parties' familiarity with the facts and the procedural history, which we reference only as necessary to explain our decision to affirm.²

I. Salu's § 1981 Race Discrimination Claims Against the WMC Defendants

Salu is an African American who worked as a patient care technician in the adolescent psychiatric department of the WMC. He alleges that he was jointly employed by WMC and

¹ Plaintiffs raised a number of claims before the district court, many of which they waived on appeal. *See Littlejohn v. City of New York*, 795 F.3d 297, 313 n.12 (2d Cir. 2015) (declining to consider an issue addressed by the district court that was not argued on appeal). This includes Lynch's claims against the WMC defendants for race discrimination, as well as Salu's due process, equal protection, and conspiracy claims under 42 U.S.C. §§ 1983, 1985, and 1986 against the WMC defendants. *See Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 92 (2d Cir. 2013) (determining that "three sentences of unsupported argument regarding" the plaintiff's claim is insufficient to trigger our examination). Moreover, plaintiffs concede that they "are no longer pursuing a § 1985 conspiracy claim." Plaintiffs Reply Br. at 24 n.17. Thus, because "a § 1986 claim must be predicated on a valid § 1985 claim," *Brown v. City of Oneonta*, 221 F.3d 329, 341 (2d Cir. 2000) (quoting *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993)), plaintiffs' § 1986 claim is waived as well.

² As a threshold matter, defendants object to the Court's consideration of Addenda A and B that were attached to plaintiffs' brief on appeal. Addendum A is correspondence that Salu's attorney had with the Justice Center. Addendum B appears to be the attorney's self-created list of Justice Center decisions between 2016 and 2018. We need not address defendants' argument because consideration of plaintiffs' Addenda are immaterial to our conclusion that their amended complaint was properly dismissed by the district court.

Diamond Healthcare Corporation, which is a temporary staffing agency. As set forth in the amended complaint, on or about May 2, 2016, Salu was supervising a patient (“Patient 1”) in the adolescent psychiatric department when he encountered a second patient (“Patient 2”) with whom he then became embroiled in a physical altercation, causing him to leave Patient 1 unsupervised. The WMC defendants viewed Salu’s abandonment of Patient 1 to be a violation of their written “one-on-one supervision” policy because he negligently failed to keep Patient 1 in full view at all times. Am. Compl. ¶¶ 50–51. Salu concedes in the amended complaint that he left Patient 1 unsupervised when he was “enticed” into Patient 2’s hospital room, but claims his failure to return to supervise Patient 1 was a result of being “viciously attacked” when he went into Patient 2’s room. Am. Compl. ¶ 59. Patient 2 also accused Salu of assault.

New York State law requires staff members at healthcare facilities serving vulnerable individuals to report any conduct they become aware of that could constitute abuse or neglect of a patient to the Justice Center. N.Y. Soc. Serv. Law § 491. The Justice Center’s core duties include maintaining a statewide central register to track and investigate such allegations of abuse and neglect by individuals who are responsible for the care of vulnerable persons. N.Y. Exec. Law § 552(1); N.Y. Soc. Serv. Law § 492. The WMC defendants referred the allegation of neglect of Patient 1 and abuse with respect to Patient 2 to the Justice Center for investigation pursuant to a mandatory reporting requirement, and suspended Salu pending the investigation. The Justice Center determined the report of neglect of Patient 1 to be “substantiated,” and Salu’s employment at WMC was thereafter terminated. Am. Compl. ¶ 62.

Salu requested that the report be amended to reflect that he did not commit neglect. After a hearing before an Administrative Law Judge (“ALJ”), the Justice Center issued a final determination that the allegation of neglect of Patient 1 was substantiated against Salu based upon,

among other findings: (1) “[a]t the time of the alleged neglect, [Salu] was assigned 1:1 constant observation of [Patient 1] due to the risk of self-mutilation and verbalized suicidal ideation,” Joint App’x at 113; and (2) “[t]he record established, and [Salu] admitted in his police interview and in his testimony, that while assigned 1:1 constant observation of [Patient 1], [Salu] momentarily left [Patient 1] unsupervised in the hallway to address [Patient 2],” Joint App’x at 116.³

After the allegation of neglect of Patient 1 was substantiated, Salu alleges that Denise Davis, Director of Nursing at the WMC, informed Diamond Healthcare Corporation that she did not want Salu to continue to work at the WMC, and that Salu was subsequently terminated from employment by Diamond. Salu asserts that the WMC defendants terminated his assignment at WMC due to his race, and that the district court erred in concluding that he failed to establish a plausible claim for race discrimination against the WMC defendants.

As an initial matter, Salu improperly asserts a claim against the WMC defendants under 42 U.S.C. § 1981. “[T]he express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state [actors].” *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 733 (1989). Salu concedes that the WMC defendants are state actors, yet he has inexplicably abandoned his § 1983 claim by failing to raise it in his appellate brief. In any event, even assuming *arguendo* that we construe Salu’s § 1981 claim as a claim under § 1983, *see Duplan v. City of New York*, 888 F.3d 612, 621 (2d Cir. 2018), the district court correctly concluded that the allegations in the amended complaint fail to withstand a motion to dismiss.

Claims for race discrimination under § 1983 are analyzed under the burden-shifting framework outlined in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), which –

³ The allegation regarding Patient 2’s assault was determined to be unsubstantiated.

at step one – requires a plaintiff prove the following to establish a *prima facie* case: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) his treatment occurred under circumstances giving rise to an inference of discrimination. *See Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015) (explaining that the *McDonnell Douglas* framework applies to Title VII, § 1981, and § 1983 claims). At the first stage under *McDonnell Douglas* on a motion to dismiss, prior to the employer’s giving of its reason for its action, the plaintiff’s satisfaction of the *prima facie* requirements is facilitated by a temporary presumption in the plaintiff’s favor, so that the plaintiff “need only give plausible support to a minimal inference of discriminatory motivation.” *See Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 84 (2d Cir. 2015) (quoting *Littlejohn*, 795 F.3d at 311). Nonetheless, in attempting to satisfy this pleading standard, “[i]t is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6).” *Martin v. N.Y.S. Dep’t of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978).

Here, the WMC defendants concede, for purposes of this appeal, that Salu has satisfied the first three prongs of a *prima facie* case of race discrimination. Thus, the issue on appeal is whether the amended complaint contains non-conclusory allegations sufficient to support a plausible inference of discriminatory motivation by the WMC defendants in Salu’s termination. We agree with the district court that the amended complaint fails to satisfy the plausibility requirement.

More specifically, Salu’s discrimination claim rests on his belief that Davis, as the Director of Nursing, harbored racial animus and was responsible for Diamond’s decision to terminate him after he “was determined to be guilty of statutory neglect by the Justice Center.” Am. Compl. ¶ 99. That critical allegation regarding Davis’s purported decision-making role, however, which

is necessary to render his race discrimination claim plausible against her and the WMC defendants, has no factual basis to support it, but rather is simply stated in a conclusory fashion based upon “information and belief.” *See* Am. Compl. ¶¶ 69–70 (“*Upon information and belief*, the racially biased decision-maker was the WMC Director of Nursing, Denise Davis, RN. *Upon information and belief*, Director Davis, as a WMC policy-maker and decision-maker, informed Diamond that she did not want Mr. Salu to continue working at WMC. Diamond had no choice but to carry out Director Davis’ command.” (emphases added)). As the district court correctly held, these conclusory assertions repeatedly made “upon information and belief” are insufficient to provide a basis to conclude that the race discrimination claim is plausible. *See Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018) (“A litigant cannot merely plop ‘upon information and belief’ in front of a conclusory allegation and thereby render it non-conclusory.”).

Moreover, the implausible nature of Salu’s central claim – namely, that the allegedly biased Davis was responsible for his termination – is demonstrated by Salu’s own concession in the amended complaint that he was not terminated until the Justice Center substantiated the report of neglect against him. *See* Am. Compl. ¶ 62 (“Mr. Salu was thereafter eventually terminated by his employer after the Justice Center ‘substantiated’ . . . that he took his eyes off the patient he was supervising, viewing this as amounting to a neglect under N.Y.S. statute.”); *see also* Am. Compl. ¶ 107 (“As a result, Mr. Salu was adjudicated by the Justice Center as being guilty of ‘category 3 neglect,’ which adjudication justified his job termination . . .”). His disagreement with the Justice Center’s conclusion does not substantiate, even to a minimal degree, his claims of discrimination against the WMC defendants.

In sum, the allegations fail to create a plausible inference that Salu was terminated based upon intentional race discrimination by Davis or anyone else at WMC. Accordingly, we conclude

that the district court properly dismissed Salu's race discrimination claims against the WMC defendants.

II. Plaintiffs' Claims Against the Justice Center Defendants

Both plaintiffs Salu and Lynch brought claims against the Justice Center defendants based upon their allegation that the Justice Center conspires with private employers to violate the rights of non-white healthcare workers. Like Salu, Lynch was terminated from his job at WMC. In particular, Lynch was found by the Justice Center to have committed sexual misconduct towards a female patient at WMC. Both plaintiffs assert that the Justice Center's determination that they had committed acts constituting neglect and/or abuse of patients entrusted to their care was based upon racial bias and unconstitutional procedures, and led to the wrongful termination of their employment at WMC. As set forth below, there are multiple grounds to affirm the district court's dismissal of all claims against the Justice Center defendants.

A. Eleventh Amendment Immunity

The district court concluded that the Eleventh Amendment barred plaintiffs from proceeding in federal court on their claims for damages against the Justice Center and its officers in their official capacities. *See V.A. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011) (finding that the Eleventh Amendment bars damages actions asserted against a State "absent waiver or valid abrogation" of the State's sovereign immunity). It is well settled that suits against state agencies and state officers acting in their official capacities are functionally equivalent to suits against the State. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-02 (1984).

Here, plaintiffs seek monetary relief from a state agency – the Justice Center, and its officers in their official capacities. But New York has not waived sovereign immunity in federal court for damages claims. *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 39-40 (2d

Cir. 1977). In addition, Congress did not abrogate state sovereign immunity when enacting the statutes that form the basis for the federal claims in plaintiffs' amended complaint. *See Quern v. Jordan*, 440 U.S. 332, 338–45 (1979) (§ 1983); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990) (§ 1983); *Keitt v. New York City*, 882 F. Supp. 2d 412, 424 (S.D.N.Y. 2011) (§§ 1983, 1985, and 1986).

Accordingly, we conclude that the district court correctly determined that the Eleventh Amendment bars plaintiffs from proceeding in federal court against the Justice Center and its officers in their official capacities for damages.⁴

B. Judicial Immunity

Judges generally receive absolute immunity from “suits for money damages for their judicial actions,” *Bliven v. Hunt*, 579 F.3d 204, 209 (2d Cir. 2009) and from suits for injunctive relief under § 1983 with certain exceptions not relevant here, *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999).

Judicial immunity applies if (1) “the relevant action is judicial in nature” and (2) the defendant “had jurisdiction over the subject matter before him.” *Huminski v. Corsones*, 396 F.3d

⁴ Plaintiffs also seek to remedy the “systemic and ongoing” violations of the Justice Center, Plaintiffs Br. at 57. Specifically, plaintiffs argue purported future harms to third parties, which would theoretically overcome the Eleventh Amendment hurdle, given that state officers may properly be sued in their official capacities for prospective relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). However, this argument raises another insurmountable hurdle for plaintiffs in this particular case – namely, the prudential standing requirements, which prohibit “plaintiffs from asserting the rights of third parties.” *Montesa v. Schwartz*, 836 F.3d 176, 195 (2d Cir. 2016). Here, plaintiffs are unable to establish that the relevant third parties, other African-American healthcare workers, are hindered or cannot assert their own rights. *See Keepers, Inc. v. City of Milford*, 807 F.3d 24, 39 (2d Cir. 2015) (plaintiff bears the burden of establishing prudential standing). Indeed, when the Justice Center makes a final determination that is unfavorable to a healthcare worker, that healthcare worker can pursue judicial review through an Article 78 proceeding. Thus, plaintiffs have no standing to seek injunctive relief to purportedly prevent future harm to third parties. Plaintiffs also argue that they have standing to seek injunctive relief because there is a “real possibility” that they may once again be accused of neglect or abuse and subjected to the Justice Center’s procedures. Plaintiffs Reply Br. at 19. But plaintiffs allege no probable threat that they will again face complaints of abuse or neglect and be subject to a Justice Center adjudication. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

53, 75 (2d Cir. 2005) (quotation marks omitted). Only allegations that a defendant acted “in the clear absence of all jurisdiction” will overcome the bar of judicial immunity. *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978) (quotation marks omitted).

Here, judicial immunity bars plaintiffs’ claims against the ALJ defendants, Elizabeth Devane, David Molik, Mary Rocco, and Louis Renzi. Plaintiffs’ only interactions with the ALJ defendants were in their judicial capacities, as set forth by New York law. For instance, New York law authorizes ALJs to “determine whether the findings of [a Justice Center] report should be amended on the grounds that [the findings] are inaccurate or inconsistent” with the law. N.Y. Soc. Serv. Law § 494(1)(a); 14 N.Y.C.R.R. § 700.6(a). ALJs Renzi and Rocco oversaw plaintiffs’ administrative hearings, and thereafter issued reports and recommendations as to whether the findings against plaintiffs should be amended. ALJs Devane and Molik reviewed those reports and recommendations and issued final determinations. We conclude that, for purposes of this appeal, such actions fall squarely within the core duties “normally performed by a judge.” *Bliven*, 579 F.3d at 209–10 (quotation marks omitted); *see also Butz v. Economou*, 438 U.S. 478, 513 (1978) (“[T]he role of the modern federal hearing examiner or administrative law judge . . . is ‘functionally comparable’ to that of a judge.”).

Therefore, the ALJ defendants are entitled to judicial immunity as their actions were judicial in nature, and they had jurisdiction over the subject matter before them pursuant to New York law. *See Stump*, 435 U.S. at 356–57 (quotation marks omitted). Plaintiffs’ allegations of bias or misconduct are not sufficient to strip these defendants of their immunity. *See Tucker v. Outwater*, 118 F.3d 930, 932 (2d Cir. 1997) (“The cloak of [judicial] immunity is not pierced by allegations of bad faith or malice.”).⁵

⁵ As to Denise Miranda, the Justice Center’s Executive Director, the district court held that she had no personal involvement in plaintiffs’ cases, and thus did not reach whether she was entitled to qualified

III. Plaintiffs' State Law Claims

Finally, we conclude that the district court did not abuse its discretion when it exercised supplemental jurisdiction to dismiss certain state law claims, and declined to exercise its supplemental jurisdiction over the Article 78 claim.

Section 1367(a) of Title 28 grants federal courts supplemental jurisdiction over state law claims that are part of the same case or controversy as the asserted federal claims. *See* 28 U.S.C. § 1367(a). We review a district court's decision to exercise supplemental jurisdiction over state-law claims for abuse of discretion, *see Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006), "considering whether judicial economy, convenience, fairness and comity require a different result," *Finz v. Schlesinger*, 957 F.2d 78, 84 (2d Cir. 1992) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

Plaintiffs' state law causes of action, such as the New York State Human Rights Law ("NYSHRL") claim, are analytically identical to some of Salu's federal claims (namely his § 1981 claim – which we construe as a § 1983 claim – and his equal protection claim), and feature the same allegations of discriminatory conduct as those underlying his federal discrimination, constitutional, and due process claims. *See Spiegel v. Schulmann*, 604 F.3d 72, 80 (2d Cir. 2010) (holding that discrimination claims under the NYSHRL are subject to the same framework as the related federal claims). Thus, the district court did not err by exercising supplemental jurisdiction and dismissing these claims.⁶

immunity. We agree with the district court's dismissal of plaintiffs' claims against Miranda based upon a failure to allege any non-conclusory allegations of Miranda's personal involvement in the final determination of plaintiffs' cases at the Justice Center, and we therefore also decline to address the qualified immunity issue. *See Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir. 1997) (requiring allegation of direct personal involvement to state a § 1983 claim against a supervisory official).

⁶ To the extent that plaintiffs raised their claims arising under the New York State Constitution on appeal, we conclude that the district court properly exercised supplemental jurisdiction over those claims as well,

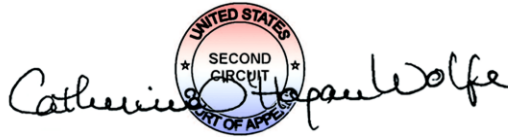
Finally, as to the Article 78 claim, the district court did not abuse its discretion by declining to exercise jurisdiction. *See* N.Y. C.P.L.R. §§ 7801, 7804(b); *see also* *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 121 (2d Cir. 2020).

In sum, the district court did not abuse its discretion by dismissing some state law claims and declining to exercise supplemental jurisdiction over the Article 78 claim.

* * *

We have considered all of plaintiffs' remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal has a red outer ring with the words "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the ring, the words "SECOND CIRCUIT" are written in blue. There are small stars on either side of the text inside the seal.

and plaintiffs have waived any arguments regarding the merits of those claims that are different from their arguments based on § 1983. *See Allen v. Antal*, 665 F. App'x 9, 13 (2d Cir. 2016) ("The New York State Constitution provides a private right of action where remedies are otherwise unavailable at common law or under § 1983.").

Appendix B

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

Gerard Lynch

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

**Adjud. Case #:
521052865, 521050899**

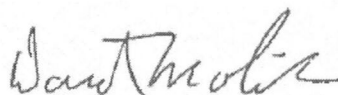
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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: June 29, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
Gerard Lynch, Subject
Gwynne A. Wilcox, Esq.

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

Gerard Lynch

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

**Adjud. Case #:
521052865, 521050899**

Before:

Louis P. Renzi
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
Eleanor Roosevelt State Office Bldg.
4 Burnett Blvd., 2nd Fl.
Poughkeepsie, New York 12601
On: January 17-18, 2018

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.

Gerard Lynch, Subject
127 Fulton Avenue, Apt. H-3
Poughkeepsie, New York 12603
By: Gwynne A. Wilcox, Esq.
Levy Ratner, P.C.
80 Eighth Avenue, 8th Fl.
New York, New York 10011-7175

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains two reports substantiating Gerard Lynch (the Subject) for sexual abuse and neglect. The Subject requested that the VPCR amend the reports to reflect that the Subject is not a subject of the substantiated reports. 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 two "substantiated" reports (VPCR Master Case # 551036959, dated April 18, 2016, and VPCR Master Case # 551037826, dated April 18, 2016, of sexual abuse and neglect by the Subject of two separate Service Recipients.
2. The Justice Center substantiated the reports against the Subject. The Justice Center concluded that:

VPCR Report # 551036959 ("Case 1")

Allegation 1 – Sexual Abuse

It was alleged that on undetermined dates on or about and between February 3, 2014, and February 26, 2014, at the Turning Point Chemical Dependency Inpatient Unit, located at 241 North Road, Poughkeepsie, New York, while a custodian, you committed sexual abuse when you engaged in sexual contact and/or conduct with a service recipient in violation of Penal Law Article 130.

This allegation has been SUBSTANTIATED as Category 1 sexual abuse pursuant to Social Services Law § 493(4)(a).

Allegation 2 - Neglect

It was alleged that on undetermined dates on or about and between February 3, 2014, and February 26, 2014, at the Turning Point Chemical Dependency Inpatient Unit, located at 241 North Road, Poughkeepsie, New York, while a custodian, you

committed neglect when you breached a duty by failing to maintain a professional relationship and/or boundaries, during time you touched a service recipient, including rubbing her back, and/or shoulders, and/or buttocks, and/or directed sexually harassing comments towards her.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Services Law § 493(4)(b).

VPCR Report # 551037826 ("Case 2")

Allegation 1 – Sexual Abuse

It was alleged that on undetermined dates on or about and between January 28, 2014, and February 25, 2014, at the Turning Point Chemical Dependency Inpatient Unit, located at 241 North Road, Poughkeepsie, New York, while a custodian, you committed sexual abuse when you engaged in sexual contact and/or conduct with a service recipient in violation of Penal Law Article 130.

This allegation has been SUBSTANTIATED as Category 1 sexual abuse pursuant to Social Services Law § 493(4)(a).

Allegation 2 – Neglect

It was alleged that on undetermined dates on or about and between January 28, 2014, and February 25, 2014, at the Turning Point Chemical Dependency Inpatient Unit, located at 241 North Road, Poughkeepsie, New York, while a custodian, you committed neglect when you breached a duty by failing to maintain a professional relationship and/or boundaries, during time you touched a service recipient, including placing your arm around her shoulders and/or back, and/or touching her buttocks.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Services Law § 493(4)(b).

3. An Administrative Review was conducted and the substantiated reports were retained.

4. At all times relevant to the reports of alleged abuse and neglect herein ("the incidents"), January and February, 2014, Turning Point Chemical Dependency Inpatient Unit ("the facility"), located at 241 North Road, Poughkeepsie, New York, was an alcohol and drug detoxification unit with an associated rehabilitation unit operated by and within St. Francis

Hospital¹, and was licensed by the NYS Office of Alcoholism and Substance Abuse Services (OASAS), a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the incidents, the Subject had been employed by the facility since June, 2011, and since 2012 as a Chemical Dependency Counselor (CDC). (Testimony of the Subject)

6. At the time of the incidents, the Service Recipient involved in Case #1 ("Service Recipient RP") was a resident of the facility between February 3 and February 26, 2014. Service Recipient RP was a female, 35 years of age, and with diagnoses of opiate and benzodiazepine dependence, anxiety disorder, Bechet Syndrome (Axis III), inability to maintain sobriety (Axis IV) and social concerns. According to her medical records, her mental status in February, 2014 was very anxious and dramatic, but stable. (Justice Center Exhibits 10, 27 at pages 167,169)

7. At the time of the incidents, the Service Recipient involved in Case #2 ("Service Recipient TP") was a resident of the facility between January 27 and February 26, 2014. Service Recipient TP was a female, 38 years of age, and with diagnoses of opiate, cannabis and nicotine dependence. According to her medical records, her mental status in February, 2014 was historically anxious, but alert. (Justice Center Exhibit 10, 24 at page 094).

8. The Subject worked on the detoxification/rehabilitation units during the period January 28, 2014 through and including February 26, 2014. He was not on duty on February 24, 2014. (Subject Exhibit B)

9. Service Recipient RP lodged a written complaint in Case #1 against the Subject in February, 2014, alleging that the Subject inappropriately played with her hair, touched her buttocks on several occasions, entered her room alone, and made inappropriate comments of a sexual nature

¹ Prior to the commencement of the investigation herein, St. Francis was absorbed by the Mid-Hudson Valley Division of Westchester Medical Center.

towards her on other occasions during her residency that month. Those comments involved the Service Recipient taking a shower and performing sexual acts upon herself, including shaving her genital region "bald". Two days prior to her discharge, she was instructed by an administrator, Staff GW, to write a statement describing her experience with the Subject. Service Recipient RP did submit the written statement prior to being discharged. (Justice Center Exhibit 10, 12, 28)

10. Service Recipient RP was readmitted to the facility on June 28, 2014. She signed herself out against medical advice on July 11, 2014. She made no allegations of sexual misconduct against the Subject, but claimed his presence frightened her. She claimed to have written another letter of complaint against the Subject, but no such letter was presented at the hearing and Justice Center Investigator Joseph J. Mazzone III (Investigator Mazzone) testified that it had not been found. Upon being readmitted a third time on July 6, 2015, Service Recipient RP again saw that the Subject was still on duty and became upset. She wrote a letter of complaint dated July 8, 2015, reiterating her complaints from February, 2014 and her negative reaction to his presence in July, 2014, and further indicating that on the first evening of this third admission, the Subject came to her room at approximately 11:15 p.m. while she was having her vitals taken. Service Recipient RP described becoming very upset at the Subject's arrival and "screaming" for staff to call her counselor to the scene. (Justice Center Exhibit 13) The counselor did arrive and made a record of her findings, including that Service Recipient RP was shaking, and that the Subject was subsequently very interested in whatever the Service Recipient had said to the counselor after he left. (Justice Center Exhibit 16) No new allegations of misconduct were made as a result of this incident.

11. The evidence proved that the first letter, undated but presumed to have been written in February 2014, was located by Staff MAG, Patient Representative, in the administrator's office

among other papers (Justice Center Exhibits 12, 17). No disciplinary action of note was taken by management at the time it was submitted. Upon being readmitted to the facility in July, 2015, and recognizing that the Subject was still on staff, Service Recipient RP renewed her complaint, again in writing, at which point the matter was reported to the Justice Center. (Justice Center Exhibit 13)

12. On July 14, 2015, Service Recipient RP described her abuser to the police as an African-American man 6'6" tall and weighing 220 lbs. The police officer or sergeant later located the Subject and determined that the Subject "fit" that description, despite the six-inch discrepancy in height, as the Subject is actually 6'0" tall. (Subject Exhibit F) During her interview with the Justice Center investigator, which took place on July 23, 2015, Service Recipient RP identified her abuser as an African-American male, 6'6" to 6'8" tall, weighing approximately 300 lbs. The Subject is an African-American male. He is 6'0" tall and weighs approximately 230 lbs. (Hearing testimony of Investigator Mazzone; Subject Exhibit F; Subject's hearing appearance and testimony; Justice Center Exhibits 15, 17, 28) The record contains no evidence that a further identification via photo array or personal appearance was made by Service Recipient RP, except that Service Recipient RP further recounts an event that took place on February 22 or 23, 2014 at approximately 11:45 PM, while she was in the office of Staff RG (who had clocked out at 11:29 or 11:34 PM, depending upon which date it was) (Subject Exhibit A) with Service Recipient TP (Case #2) and another service recipient. The Subject entered the unit, walked to Service Recipient RP's room, and entered the empty room, closing the door behind him. In a moment, he emerged. Both Service Recipient RP and Service Recipient TP saw the same individual and recognized him as the Subject, despite later describing him differently. The statements of both Service Recipients are credited with respect to their identification of the Subject. The record is conflicted whether

Staff RG had remained and witnessed the event, or whether it took place in her absence. The police report states February 24; Subject Exhibits A and B (Staff RG and Subject time detail) indicates neither worked on February 24 but were on duty the 22nd and 23rd.

13. Service Recipient RP expressed significant concern over this conduct by the Subject. (Justice Center Exhibits 12, 13)

14. Service Recipient TP's allegations against the Subject are contained in a written statement dated February 24, 2014 and her interview with Investigator Mazzone. (Justice Center Exhibits 14 and 28, audio record of interview with Service Recipient TP) During her interview, she alleged that during the week after her admission on January 28, 2014, he had placed his hand on her back, started rubbing her back and his hand ... "slid down my back way past my waistband." At that point a nurse and/or other female service recipients appeared and the Subject then disengaged from Service Recipient TP and walked quickly away. Service Recipient TP further alleges that on or about the same date, he again approached her, put his arm around her and said "If you have any trouble sleeping, come see me, baby."

15. Service Recipient TP identified the Subject by specific reference to his gender, race, 6'0" in height, and his clothing, specifically citing certain gold jewelry, grey slacks, grey v-neck sweater, maroon button down collared shirt and black wing-tip shoes. This identification was made in connection with the incident described in paragraph number 12 above. (Justice Center Exhibit 28)

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 sexual abuse and/or neglect.

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

(b) "Sexual abuse," which shall mean any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law; or any conduct or communication by such custodian that allows, permits, uses or encourages a service recipient to engage in any act described in articles two hundred thirty or two hundred sixty-three of the penal law. For purposes of this paragraph only, a person with a developmental disability who is or was receiving services and is also an employee or volunteer of a service provider shall not be considered a custodian if he or she has sexual contact with another service recipient who is a consenting adult who has consented to such contact.

(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.

In relevant part:

§ 130.05 Sex offenses; lack of consent. 3. A person is deemed incapable of consent when he or she is:

* (i) a resident or inpatient of a residential facility operated, licensed or certified by (i) the office of mental health; (ii) the office for people with developmental disabilities; or (iii) the office of alcoholism and substance abuse services, and the actor is an employee of the facility not married to such resident or inpatient. For purposes of this paragraph, "employee" means either: an employee of the agency operating the residential facility, who knows or reasonably should know that such person is a resident or inpatient of such facility and who provides direct care services, case management services, medical or other clinical services, habilitative services or direct supervision of the residents in the facility in which the resident resides;

* NB Effective until May 12, 2018

§ 130.52 Forcible touching. A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose: 1. forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor's sexual desire; or 2. subjects another person to sexual contact for the purpose of gratifying the actor's sexual desire and with intent to degrade or abuse such other person while such other person is a passenger on a bus, train, or subway car operated by any transit agency, authority or company, public or private, whose operation is authorized by New York state or any of its political subdivisions. For the purposes of this section, forcible touching includes squeezing, grabbing or pinching.

§ 130.55 Sexual abuse in the third degree. A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent;

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 1 and Category 2, which, as relevant here, are defined as follows:

(a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:

(v) engaging in or encouraging others to engage in any conduct in violation of article one hundred thirty of the penal law with a service recipient;

(b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one 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 sexual abuse and neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the categories of sexual abuse and neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged sexual abuse and neglect, the report will not be amended or sealed. Pursuant to SSL § 493(4) and Title 14 NYCRR 700.10(d), it must then be determined whether the act or acts of sexual abuse and neglect cited in the substantiated report constitute the categories of sexual abuse and neglect as set forth in the substantiated report.

If the Justice Center does not prove the sexual abuse and/or neglect by a preponderance of the evidence, the substantiated report must be amended and sealed.

DISCUSSION

VPCR Report # 551036959 ("Case 1")

Allegation 1 – Sexual Abuse

The Justice Center has established by a preponderance of the evidence that the Subject committed sexual abuse against Service Recipient RP as set forth in "Allegation 1" of the substantiated report.

In order to sustain the allegation of sexual abuse in violation of SSL § 488(1)(b), the Justice

Center must prove that the Subject was a custodian as that term is defined by SSL § 488(2) and that by his conduct he subjected the Service Recipient to an offense described in Article 130 of the Penal Law. At the hearing, the Justice Center specified Penal Law (PL) §130.05(3) (lack of consent), § 130.52(1) (forcible touching) and PL § 130.55 (sexual abuse in the third degree) as being the sections of Article 130 relied upon here. The relevant elements of section 130.52(1) are the intentional touching of another person's sexual or other intimate body parts, for no legitimate purpose, and for the purpose of degrading or abusing the victim, or to gratify the actor's sexual desire. "Forcible touching" includes squeezing, grabbing, and pinching. Section 130.55 requires proof that the actor subjected another person to sexual contact without the latter's consent.

It is well-settled that the buttocks are an intimate and sexual part of the body within the meaning of PL § 130; *Matter of Jessica C. (Jose Y.)*, 51 Misc. 3d 1211(A), 36 N.Y.S.3d 407 (Family Court, Kings County, 2016); *People v. Rivera*, 138 Misc. 2d 570, 525 N.Y.S.2d 118 (1988); *People v. Victor P.*, 120 Misc. 2d 770, 466 N.Y.S.2d 572, (1983); and that sexual gratification may be inferred from the acts themselves; *Matter of Shaquan A.*, 137 A.D.3d 1119, 27 N.Y.S.3d 692 (2nd Dep't 2016); *Matter of Shannon K.*, 222 AD2d 905, 635 N.Y.S.2d 751 (3rd Dep't 1995).

In support of its substantiated findings, the Justice Center presented twenty-seven exhibits: documents and audio recordings of statements by the Subject and other witnesses, obtained during the investigation. The Subject's objections to Exhibits 1, 3, 5, 22, 26 and 28 were overruled. (Justice Center Exhibits 1-22 and 24-28²) The investigation underlying the substantiated report was conducted by Investigator Mazzone, who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and called three witnesses on his behalf: Kathleen

² Justice Center Exhibit 23 was withdrawn at the hearing.

Gibbons, R.N., Nancy Kelly, R.N. and Sandra Chislom, Patient Care Technician (PCT). The Subject offered Exhibits A-G, which were received without objection.

It is uncontested that Service Recipients RP and TP were both residents or inpatients of a program licensed by the NYS Office of Alcoholism and Substance Abuse Services (OASAS), and the Subject was an employee of the facility not married to either Service Recipient. Therefore, pursuant to PL § 130.05(3)(iii) it would have been legally impossible for either Service Recipient to have given her consent to the alleged conduct complained of.

Specifically, the evidence establishes that the Subject was an employee of the facility and therefore was a custodian, as defined by SSL § 488(2). The preponderance of the evidence presented at the hearing leaves little doubt that Service Recipient RP was likely the victim of sexual abuse. She was consistent in her written and verbal statements beginning in February, 2014, ending with her interview on July 23, 2015 conducted by Investigator Mazzone. (Justice Center Exhibits 10, 12, 13, 15) She described in sufficient detail what had happened to her – she was spoken to in inappropriate sexual terms with respect to taking a shower and requesting a razor, and the abuser had placed his hand on her buttocks while escorting her back to her room on several occasions. She told the police on July 14, 2015 (Justice Center Exhibit 15) that her abuser was six feet six inches tall and weighed 220 lbs. However, when Investigator Mazzone asked her to describe the individual who had abused her, she described a man six feet six inches to six feet eight inches tall, weighing at least 290-300 lbs. At first glance, it would seem that the discrepancy is very significant and casts doubt upon the actual identity of the actor being the Subject. Nevertheless, upon review of all the facts and circumstances in this record, including the fact that the police investigator apparently found a six-inch discrepancy in height not material (Justice Center Exhibit 15), and the corroborating information provided by a fifteen-month series of

communications by staff and the Service Recipients (Justice Center Exhibits 12 through 28), it is concluded that both Service Recipient RP and Service Recipient TP were clear as to which staff member they were complaining about, and that individual is the Subject.

Although the Subject protested that both the timeline (particularly February 24, 2014) and the identification of the Subject were fundamentally flawed, there was no convincing evidence offered at the hearing which support those arguments to a preponderance. Service Recipient RP's statements are credited evidence.

The Subject's conduct meets the elements of Penal Law § 130.52, forcible touching; he acted with intent in placing his hand on the Service Recipient's buttocks. His actions were forcible in that she neither consented to nor asked him to touch her. The Subject had no legitimate purpose for doing so, and he did it for his own sexual gratification and/or to degrade the Service Recipient.

Accordingly, it is concluded that the Subject did commit sexual abuse of Service Recipient RP as alleged.

Allegation 2 – Neglect

In order to prove neglect, the Justice Center must prove that the Subject, while a custodian, breached a duty of care owed to the Service Recipients and that breach caused, or was likely to cause, physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

The Subject at all times owed a duty of care to Service Recipient RP, including abstaining from any conduct which would or could cause a patient's recovery to be negatively impacted, particularly considering her mental and emotional status as a service recipient in a detox/rehab unit. Clearly, unwanted and unconsented-to sexual banter and touching of intimate body areas, including the touching of her buttocks, is included in the behavior that must be avoided at all costs

due to the risk of mental and/or emotional harm to the Service Recipient. Thus, the Subject's conduct represents a breach of the duty owed to the Service Recipient by the Subject. The mental and emotional impairment suffered by Service Recipient RP is evidenced by the continued state of upset she demonstrated over many months after having interacted with the Subject. It is thus concluded that the Subject committed neglect against Service Recipient RP.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed sexual abuse and neglect against Service Recipient RP, as alleged in Case 1, substantiated report #551036959. The report will not be amended or sealed.

VPCR Report # 551037826 ("Case 2")

Allegation 1 – Sexual Abuse

The Justice Center has established by a preponderance of the evidence that the Subject committed sexual abuse against Service Recipient TP as set forth in "Allegation 1" of the substantiated report.

Service Recipient TP emerged as a witness and victim during the investigation of Case #1 herein. The evidence produced at the hearing discussed in that case above also proved and/or corroborated that during the period January 28, 2014 through February 3, 2014, while Service Recipient TP was a resident of the facility, on one or more occasions the Subject subjected the Service Recipient to unwanted sexual banter by placing his arm around her and saying "If you have any trouble sleeping, come see me, baby." (Justice Center Exhibit 14) and forcible sexual touching of her buttocks (described by the Service Recipient TP as "His hand slid down way past my waistband". (Justice Center Exhibit 28, interview of Service Recipient TP). Service Recipient TP complained and gave a written statement to Staff GW, dated February 24, 2014, which was shortly before she was discharged. She further gave consistent statements during the Justice Center

investigation which began in July, 2015. Her statements are credited evidence.

Again, the Subject's conduct meets the elements of Penal Law § 130.52, forcible touching; he acted with intent in placing his hand on the Service Recipient's buttocks. His actions were forcible in that she neither consented to nor asked him to touch her. The Subject had no legitimate purpose for doing so, and he did it for his own sexual gratification and/or to degrade the Service Recipient.

Accordingly, it is concluded that the Subject committed sexual abuse against Service Recipient TP as alleged.

Allegation 2 – Neglect

As noted above in Case 1, the Subject at all times owed a duty of care to Service Recipient TP, including abstaining from any conduct which would or could cause her recovery to be negatively impacted, particularly considering her mental and emotional status as a service recipient in a detox/rehab unit. Clearly, unwanted and unconsented-to sexual banter and touching of intimate or private areas, including the touching of her buttocks, is included in the behavior that must be avoided at all costs due to the risk of mental and/or emotional harm to the Service Recipient. Such conduct represents a breach of the duty owed by the Subject. Service Recipient TP described her loud and instantaneous reaction to the Subject's conduct, an indicator that she was likely to sustain such harm. (Justice Center Exhibit 28) Therefore, it is concluded that the Subject breached his duty and thereby committed neglect against Service Recipient TP.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed sexual abuse and neglect against Service Recipient TP as alleged in Case 2, substantiated report #551037826. The substantiated report will not be amended or sealed.

Although the reports will remain substantiated, the next question to be decided is whether each substantiated report constitutes the category of abuse or 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 two substantiated reports as to sexual abuse are each properly categorized as Category 1 conduct.

Similarly, based upon the totality of the evidence, the two substantiated reports as to neglect are each properly categorized as Category 2 conduct; it has been shown that the Subject's conduct created the likelihood or actuality of serious impairment of the mental and emotional condition of both Service Recipient RP and Service Recipient TP.

Reports that result in a Category 1 finding shall cause the Subject's name to be permanently placed on the staff exclusion list and the Vulnerable Persons' Central Register (VPCR) report to be permanently retained in accordance with SSL § 495. Thus, the record of this report for Sexual Abuse shall be retained by the VPCR, and the Subject's name will be placed permanently on the staff exclusion list, pursuant to SSL § 495(5).

Category 2 conduct shall be elevated to Category 1 conduct when such conduct occurs within three years of a previous finding that such custodian engaged in Category 2 conduct. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

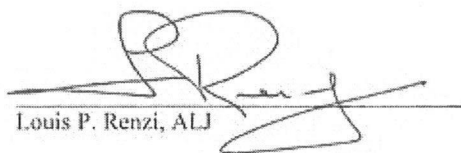
DECISION:

The request of Gerard Lynch that the substantiated reports dated April 18, 2016, (VPCR Master Case # 551036959 and 551037826) be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed sexual abuse and neglect.

The substantiated reports are properly categorized as Category 1 sexual abuse and Category 2 neglect.

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

DATED: May 15, 2018
Schenectady, New York



Louis P. Renzi, ALJ

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF
PEOPLE WITH SPECIAL NEEDS**

In the Matter of the Appeal of

GERARD LYNCH

Pursuant to § 494 of the Social Services Law

EXHIBIT LIST

Master Case # 551036959

551037826

Adj. Case # 521052865

521050899

ALJ: Louis P. Renzi

Date: 1/17-18/2018

Poughkeepsie, NY

PARTY	Exhibit	DESCRIPTION	PAGES	ACCEPTED	Witness
Agency	1	Report of Substantiated Finding 551036959	2	Yes	
Agency	2	Request for Amendment 551036959	5	Yes	
Agency	3	AAU Determination Letter 551036959/ 521052865	2	Yes	
Agency	4	QPO 521052865	2	Yes	
Agency	5	Report of Substantiated Finding 551037826	2	Yes	
Agency	6	Request for Amendment 551037826	5	Yes	
Agency	7	AAU Determination Letter 551037826/ 521050899	2	Yes	
Agency	8	QPO 521050899	2	Yes	
Agency	9	Hearing Notice	2	Yes	
Agency	10	JC Case Summary Report 551036959	13	Yes	
Agency	11	JC Case Summary Report 551037826	10	Yes	
Agency	12	Handwritten Letter from Service Recipient R.P., undated	2	Yes	
Agency	13	Handwritten Letter from SR R.P., dated 7/8/15	4	Yes	
Agency	14	Handwritten Letter from Service Recipient T.P., dated 2/24/14	2	Yes	
Agency	15	Town of Poughkeepsie Police Department documents	8	Yes	
Agency	16	Report from Susan Tobin, Counselor	1	Yes	
Agency	17	Patient Information Notes from July 2015	2	Yes	
Agency	18	Email from Richard Santiago, dated 7/14/2015	1	Yes	

Lynch, Gerard

PARTY	Exhibit	DESCRIPTION	PAGES	ACCEPTED	Witness
Agency	19	Email from Carole Rumble, dated 7/3/2014	1	Yes	
Agency	20	Email Correspondence re: Patient Complaint, dated 7/3/2014	3	Yes	
Agency	21	St. Francis Hospital Customer Service Issue, dated 9/23/12	2	Yes	
Agency	22	Hierarchy Chart	1	Yes	
Agency	23	Exhibit Withdrawn by Justice Center	n/a	No	
Agency	24	Clinical Documentation for Service Recipient T.P.	24	Yes	
Agency	25	JC Code of Conduct and OMH Mandated Reporter Documentation for Gerard Lynch	2	Yes	
Agency	26	Employment Records for Gerard Lynch	37	Yes	
Agency	27	Clinical Documentation for Service Recipient R.P.	58	Yes	
Agency	28	CD containing the following audio files: 1. Interview-Carole Rumble 2. Interview-George Weldon 3. Interview-Gerard Lynch 4. Interview-Margaret Greenly 5. Interview-Nancy Magliocca 6. Interview-Service Recipient R.P. 7. Interview-Robin Granata 8. Interview-Service Recipient T.P.	n/a	Yes	
Subject	A	Time Detail for Robin Granata	2	Yes	
Subject	B	Time Detail for Gerard Lynch	2	Yes	
Subject	C	Diagram of Detox/Rehab Unit created by Subject	1	Yes	
Subject	D	Subject's B.S. Diploma - Marist	1	Yes	
Subject	E	Subject's MSW Diploma - Fordham	1	Yes	
Subject	F	Copy of Subject's NYS Driver License	1	Yes	
Subject	G	List of African-American male staff	5	Yes	

Appendix C

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 7, 2021

530536

In the Matter of GERARD M.
LYNCH,
Petitioner,

v

MEMORANDUM AND JUDGMENT

NYS JUSTICE CENTER FOR THE
PROTECTION OF PEOPLE WITH
SPECIAL NEEDS,
Respondent.

Calendar Date: November 23, 2020

Before: Garry, P.J., Egan Jr., Mulvey and Colangelo, JJ.

Michael D. Diederich Jr., Stony Point, for petitioner.

Letitia James, Attorney General, Albany (Beezly J. Kiernan
of counsel), for respondent.

Egan Jr., J.

Combined proceeding pursuant to CPLR article 78 and action
for declaratory judgment (transferred to this Court by order of
the Supreme Court, entered in Albany County) to, among other
things, review a determination of respondent denying
petitioner's request to amend and seal a report of sexual abuse
and neglect.

Petitioner worked as a chemical dependency counselor for a
state-licensed substance abuse treatment program. After a
report was made to the Vulnerable Persons' Central Register that

petitioner had groped and sexually harassed one of the patients on the program's inpatient unit in 2014 and that several mandated reporters had failed to report that conduct earlier (see Social Services Law §§ 488, 491), respondent commenced an investigation in 2015. In the course of that investigation, which included a review of program records, as well as interviews with petitioner, past and current program employees and the patient involved in the reported incidents, proof was uncovered regarding petitioner's sexual harassment and abuse of a second patient. The result of the investigation, as is relevant here, was that the allegations regarding petitioner's sexual abuse and neglect of the two service recipients were deemed substantiated.

Petitioner was notified of those findings and advised that, because sexual abuse was "[c]ategory one" conduct, he would be permanently placed on the Vulnerable Persons' Central Register's staff exclusion list and barred from caring for any vulnerable persons (Social Services Law § 493 [5] [a]; see Social Services Law §§ 493 [4] [a]; 495 [3]). His request that the reports be amended to unsubstantiated was rejected, and the matter proceeded to an administrative hearing. Following the hearing, an Administrative Law Judge (hereinafter ALJ) issued a recommended decision finding that a preponderance of the evidence established that petitioner had committed the alleged conduct. Respondent adopted the recommended decision in its entirety, prompting petitioner to commence this combined CPLR article 78 proceeding and declaratory judgment action. Supreme Court transferred the matter to this Court (see CPLR 7804 [g]), and we confirm.

Initially, although petitioner styled some of his requests as ones for declaratory relief, a review of the petition/complaint reveals that they are challenges to the procedures underlying respondent's determination that are "properly the subject of a CPLR article 78 proceeding" (Dolce-Richard v New York City Health & Hosps. Corp., 149 AD3d 903, 904 [2017]; see CPLR 7803 [3]; Matter of Shore Winds, LLC v Zucker, 179 AD3d 1208, 1211 [2020], lv denied 35 NY3d 914 [2020]; Matter of Adirondack Med. Ctr.-Uihlein v Daines, 119 AD3d 1175, 1176

[2014]). Petitioner accordingly had an adequate remedy in the form of a CPLR article 78 proceeding and is not entitled to any declaratory relief (see Greystone Mgt. Corp. v Conciliation & Appeals Bd. of City of N.Y., 62 NY2d 763, 765 [1984]; Matter of Shore Winds, LLC v Zucker, 179 AD3d at 1211).¹

Turning to the merits, "[a]n administrative determination following an evidentiary hearing required by law must be supported by substantial evidence" and, if that evidence is present in the record, this Court cannot substitute its judgment for that of respondent (Matter of Taylor v Justice Ctr. for the Protection of People with Special Needs, 182 AD3d 815, 817 [2020]; see CPLR 7803 [4]; Matter of Perez v New York State Justice Ctr. for the Protection of People with Special Needs, 170 AD3d 1290, 1291 [2019], lv denied 34 NY3d 903 [2019]). Respondent here presented the testimony of its investigator, through which it placed into evidence exhibits such as petitioner's employment records documenting prior issues with his conduct, letters from the two service recipients complaining of his behavior toward them, and recordings of interviews with the two service recipients and several program employees. In her written and oral statements, the first service recipient described how petitioner had, among other things, groped her buttocks and made lewd comments to her while she was a patient on the unit. The second service recipient, in turn, made statements in which she corroborated some of the first service recipient's account and described how petitioner had also made sexually charged comments to her and tried to rub her buttocks. Contrary to petitioner's contention, the hearsay accounts of the two service recipients were admissible and, "if sufficiently relevant and probative," could "constitute substantial evidence even if contradicted by live testimony on credibility grounds" (Matter of Haug v State Univ. of N.Y. at Potsdam, 32 NY3d 1044, 1046 [2018]; accord Matter of Perez v New York State Justice Ctr. for Protection of People with Special Needs, 170 AD3d at

¹ Given our holding, as petitioner's claims only pertain to a CPLR article 78 proceeding, Supreme Court appropriately transferred the entire matter to this Court (see CPLR 7804 [g]; compare Matter of Paladino v Board of Educ. for the City of Buffalo, Pub. Sch. Dist., 183 AD3d 1043, 1052 [2020]).

1291; Matter of Watson v New York State Justice Ctr. for the Protection of People with Special Needs, 152 AD3d 1025, 1027 [2017]).

Petitioner did present proof that challenged those accounts and called the adequacy of respondent's investigation into question, including his own testimony that he had done nothing wrong and the testimony of other employees on the unit that they were unaware of his alleged misbehavior. Nevertheless, that proof only raised a credibility issue that respondent was free to, and did, resolve against petitioner (see Matter of Roberts v New York State Justice Ctr. for the Protection of People with Special Needs, 152 AD3d 1021, 1024 [2017]). In view of the similar and partially corroborating hearsay accounts of the service recipients, their prompt complaints about petitioner's conduct, and the proof reflecting that petitioner had previously engaged in inappropriate, if not overtly sexual, behavior toward both patients and staff, we are satisfied that "the hearsay evidence in the record was sufficiently reliable to provide substantial evidence to support [respondent]'s determination" (Matter of Watson v New York State Justice Ctr. for the Protection of People with Special Needs, 152 AD3d at 1027; see Matter of Perez v New York State Justice Ctr. for Protection of People with Special Needs, 170 AD3d at 1291; Matter of Roberts v New York State Justice Ctr. for the Protection of People with Special Needs, 152 AD3d at 1024-1025).

Finally, petitioner argued at the administrative level that he had not received adequate notice of the charges against him as a matter of due process, then objected to the testimony of respondent's investigator regarding his conversation with one of the service recipients on hearsay grounds. However, he did not attack the conduct of the investigator or subsequent administrative hearing on due process grounds, nor did he make any effort at the hearing to either call the service recipients to testify or claim the right to cross-examine them. Thus, having failed to raise those issues at a time when they could have been addressed, his present attempts to do so are unpreserved for our review (see Matter of Khan v New York State Dept. of Health, 96 NY2d 879, 880 [2001]; Matter of Haug v State

-5-


530536

Univ. of N.Y. at Potsdam, 166 AD3d 1404, 1405 [2018]; Matter of Currie v New York State Bd. of Parole, 298 AD2d 805, 806 [2002]). To the extent not specifically addressed, petitioner's remaining contentions have been reviewed and found to be without merit.

Garry, P.J., Mulvey and Colangelo, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

A handwritten signature in black ink, reading "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large, stylized "R" and "M".

Robert D. Mayberger
Clerk of the Court

Appendix D

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

Rotimi Salu

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

**Adjud. Case #:
521064797**

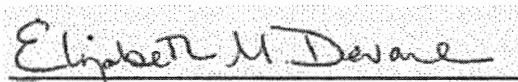
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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: September 24, 2018
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
Rotimi Salu, Subject
Michael Diederich, Jr., Esq.

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

Rotimi Salu

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

**Adjud. Case #
521064797**

Before:

Mary B. Rocco
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
Eleanor Roosevelt State Office Building
4 Burnett Blvd., 2nd Floor
Poughkeepsie, New York 12601
On: August 23, 2018

Parties:

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Alliah Rozan, Esq.

Rotimi Salu, Subject
2 Alexander Avenue
Spring Valley, New York 10977-2340
By: Michael Diederich, Jr., Esq.
Diederich Law Office
361 Route 210
Stony Point, New York 10980

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating Rotimi Salu (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 March 28, 2017 (VPCR Master Case # 551049808) 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 May 2, 2016, at the Westchester Medical Center, located at 100 Woods Road, Valhalla, New York, while a custodian, you committed neglect when you failed to provide proper supervision to 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 in-patient adolescent psychiatric unit B1 at the facility, Westchester Medical Center, located at 100 Woods Road, Valhalla, New York, provides inpatient psychiatric treatment to adolescents with varying psychiatric diagnoses, and as such, is licensed by the New York State

¹ Allegation 1 was unsubstantiated.

Office of Mental Health (OMH), which is an agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibit 6)

5. At the time of the alleged neglect, the Subject had been employed by the facility as a Patient Care Technician (PCT) for approximately 3 years and worked a regular 7:00 a.m. to 7:30 p.m. shift four days a week. The Subject's duties as a PCT included the care, support and safety of the service recipients. (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 sixteen-year old male with relevant diagnoses of unspecified psychotic disorder, unspecified anxiety disorder, major depressive disorder with a history of self-injurious behavior and suicidal ideations. At the time of the alleged neglect, the Subject was assigned 1:1 constant observation of the Service Recipient due to the risk of self-mutilation and verbalized suicidal ideation. (Justice Center Exhibits 8, 9 and 10)

7. Westchester Medical Center policy regarding constant observation provided for continual oversight to ensure the safety and security of the facility's vulnerable service recipients. The facility policy dictated that staff assigned to constant observation were required to maintain an "eyes on at all times" unobstructed view of the assigned service recipient. Additionally, the policy prohibited a staff member from relinquishing a constant observation assignment unless relieved by another staff member. (Justice Center Exhibit 11)

8. At approximately 7:30 p.m. on the date of the alleged neglect, approaching the end of his shift, the Subject was walking down the hallway towards the nurse's station with the Service Recipient following a few feet behind him. As the Subject passed Service Recipient T's bedroom, Service Recipient T requested the Subject enter his room for a discussion. The Subject reluctantly stepped into the room in response to Service Recipient T's pleading, wherein a physical

altercation ensued. The Service Recipient remained alone in the hallway until other staff responded to the commotion coming from Service Recipient T's bedroom. (Justice Center Exhibits 6, 23, 24 and 30; Hearing testimony of the Subject)

9. The Westchester County Police Department investigated an allegation of assault regarding the altercation inside Service Recipient T's room, which resulted in no criminal charges being pursued; however, the instant neglect allegation followed. (Justice Center Exhibit 31)

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 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) as follows:

- (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 abuse and/or 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 established by a preponderance of the evidence that the Subject

committed an act, described as “Allegation 2” in the substantiated report.

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))

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-31) The investigation underlying the substantiated report was conducted by Justice Center Investigator William McKay, who was the only witness who testified at the hearing on behalf of the Justice Center.

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

On the day of the alleged neglect, the Subject was employed by the facility as a PCT and was therefore acting as a custodian as that term is defined in Social Services Law § 488(2).

The facts are not in dispute. The record established, and the Subject admitted in his police interview and in his testimony, that while assigned 1:1 constant observation of the Service Recipient, the Subject momentarily left the Service Recipient unsupervised in the hallway to address Service Recipient T. The Subject testified that, as he walked down the unit hallway with the Service Recipient in tow, he was briefly diverted, responding to Service Recipient T’s request to enter his room to converse. (Justice Center Exhibits 6, 7, 13, 17, 23, 24 and 30; Hearing testimony of the Subject)

Counsel for the Subject argued that there was no evidence from “any medical authority” to prove an allegation of neglect. Counsel for the Subject argued that the Subject was in the presence and proximity of the Service Recipient at all times and did not expect to get assaulted by Service

Recipient T. Counsel for the Subject asserted that the Subject was lured into Service Recipient T's bedroom where he was violently attacked. Counsel for the Subject argued that the Subject did not abandon the Service Recipient but rather attended to his other duties as a PCT by responding to Service Recipient T's request to talk. Counsel for the Subject further argued that the facility policy regarding levels of observation was merely guidance and that it would have been ridiculous to strictly construe the terms in practice. Counsel for the Subject insisted that 1:1 observation was implausible here because once the Subject was assaulted by Service Recipient T, the Subject's duty to maintain eyes on visual supervision of the Service Recipient was superseded by his need to defend himself. Counsel's arguments were not convincing, as each conspicuously overlooked the uncontroverted facts in this matter as well as the fundamental elements of neglect as defined by SSL § 488(1)(h).

The principal objective of the facility's observation policy is to provide the necessary level of supervision required by the service recipient's condition with the safety and well-being of the service recipient being paramount. The facility policy is precise in its definition of constant observation as maintaining an unobstructed, eyes on at all times visual observation of the service recipient. Additionally, the policy unambiguously dictates that a staff member assigned to constant observation should not attend to anything other than their assigned service recipient at all times. (Justice Center Exhibit 11)

The evidence clearly established that the Service Recipient required 1:1 constant observation at all times because of his proclivity to self-mutilate, as well as his history of suicidal ideation. The Service Recipient's Comprehensive Treatment Plan specifically addressed his concerning behaviors by requiring staff to maintain constant visual supervision for his welfare. (Justice Center Exhibit 10) Additionally, Inpatient Progress Notes and the Discharge Summary

similarly emphasized the nature of the Service Recipient's dangerous behaviors and the requirement for constant visual supervision as a proactive safety measure. (Justice Center Exhibits 8 and 9) Furthermore, the Subject testified that he was familiar with the Service Recipient's history of self-injurious behavior and suicidal ideation, and acknowledged the need for and understanding of the Service Recipient's required supervision level. (Hearing testimony of the Subject)

The Subject testified that, as a PCT, he owed a duty to all of the service recipients on the unit and that he was attempting to assist Service Recipient T by engaging in a conversation initiated by him. The Subject explained that the unit's service recipients were vulnerable adolescents and, as a PCT, his duty was to support each of them, regardless if he was assigned 1:1 with another service recipient. The Subject testified that Service Recipient T had experienced some difficulties earlier that day and the Subject believed that he was aiding in the therapeutic support of Service Recipient T when he responded to his request to talk. (Hearing testimony of the Subject) Conversely, the Subject admitted during his testimony that he was warned earlier in the day that Service Recipient T was exhibiting aggressive behavior targeted towards the Subject and that the Subject was instructed by a supervisor to avoid interaction with Service Recipient T. (Justice Center Exhibits 6, 20, 21 and 30; Hearing testimony of the Subject)

Although the Subject's testimony regarding his dedication to and concern for each individual service recipient was credible and commendable, it did not abrogate the duty he owed to the Service Recipient to maintain constant, unobstructed visual supervision, which he admittedly did not do. Not only did the Subject breach his duty by failing to maintain eyes on supervision of the Service Recipient when he walked down the hallway as the Service Recipient followed behind him, (Justice Center Exhibits 17 and 28 at page 073; Hearing testimony of the Subject) but the Subject further breached his duty when he left the Service Recipient in the hallway

unsupervised upon entering Service Recipient T's room. (Justice Center Exhibit 28 at pages 075 – 077; Hearing testimony of the Subject) Moreover, the Subject acknowledged during testimony, that once inside Service Recipient T's room, his focus was exclusively on Service Recipient T not the Service Recipient. (Hearing testimony of the Subject)

It is not necessary for the Justice Center to prove that the Subject's conduct caused actual physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipients, if a preponderance of the evidence supports a conclusion that such injury or impairment was likely. (SSL § 488(1)(h)) The fact that the Service Recipient was placed on a 1:1 supervision level for self-injurious behavior and suicidal ideations emphatically underscores the significant likelihood of potential harm or death to the Service Recipient if left unsupervised.

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 neglect 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. A substantiated Category 3 finding of 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 NY SSL § 496(2). This report will be sealed after five years.

DECISION:

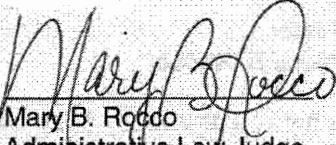
The request of Rotimi Salu that the substantiated report dated March 28, 2017 (VPCR Master Case # 551049808) be amended and sealed is denied.

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 Mary B. Rocco, Administrative Hearings Unit.

DATED: September 7, 2018
Plainview, New York



Mary B. Rocco
Administrative Law Judge

Appendix E

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 7, 2021

530535

In the Matter of ROTIMI SALU,
Petitioner,

v

MEMORANDUM AND JUDGMENT

NYS JUSTICE CENTER FOR THE
PROTECTION OF PEOPLE WITH
SPECIAL NEEDS,
Respondent.

Calendar Date: November 23, 2020

Before: Garry, P.J., Egan Jr., Mulvey and Colangelo, JJ.

Michael D. Diederich Jr., Stony Point, for petitioner.

Letitia James, Attorney General, Albany (Beezly J. Kiernan
of counsel), for respondent.

Egan Jr., J.

Combined proceeding pursuant to CPLR article 78 and action for declaratory judgment (transferred to this Court by order of the Supreme Court, entered in Albany County) to, among other things, review a determination of respondent denying petitioner's request to amend and seal a report of neglect.

Petitioner was employed as a patient care technician in the adolescent psychiatric department of the Westchester Medical Center (hereinafter the facility), a facility licensed by the Office of Mental Health. In May 2015, petitioner was assigned to supervise G.G., a service recipient who suffered from certain

mental health diagnoses and presented a risk of self-mutilation and verbalized suicidal ideation. As petitioner was walking the hallway of the facility with G.G., he left G.G. alone in the hallway and entered the room of T.S., another service recipient, whereupon a physical altercation ensued between petitioner and T.S. As a result of this altercation, respondent received a report alleging that petitioner had (1) physically abused T.S. and (2) neglected G.G. by failing to provide proper supervision. Following an investigation,¹ in March 2017, respondent issued a report finding that the allegation of physical abuse against T.S. was unsubstantiated but determining that petitioner's conduct with respect to G.G. constituted category three neglect (see Social Services Law § 493 [4] [c]).² Petitioner's subsequent request to amend the report to an unsubstantiated finding of neglect was denied and the matter was referred for an administrative hearing. Following the hearing, an

¹ The local police also investigated the incident and no criminal charges were filed.

² Substantiated reports of abuse or neglect must be categorized into one or more of four categories. "Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians" (Social Services Law § 493 [4] [a]). "Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect" (Social Services Law § 493 [4] [b]). Category three conduct "is abuse or neglect by custodians that is not otherwise described in categories one and two"; if such a finding is made, the report of such "shall be sealed after five years" (Social Services Law § 493 [4] [c]). Category four conduct involves "conditions at a facility or provider agency that expose service recipients to harm or risk of harm where staff culpability is mitigated by systemic problems such as inadequate management, staffing, training or supervision" and also includes "instances in which it has been substantiated that a service recipient has been abused or neglected, but the perpetrator of such abuse or neglect cannot be identified" (Social Services Law § 493 [4] [d]).

Administrative Law Judge (hereinafter ALJ) issued a recommended decision finding that a preponderance of the evidence established that petitioner had committed category three neglect against G.G. Respondent adopted the recommended decision in its entirety. Petitioner thereafter commenced this combined CPLR article 78 and action for declaratory judgment, which was subsequently transferred to this Court.

Initially, although petitioner styled certain of his requests as ones seeking declaratory relief, a review of the petition/complaint demonstrates that they are challenges to the procedures underlying respondent's determinations and, therefore, are "properly the subject of a CPLR article 78 proceeding" (Dolce-Richard v New York City Health & Hosps. Corp., 149 AD3d 903, 904 [2017]; see CPLR 7803 [3]; Matter of Shore Winds, LLC v Zucker, 179 AD3d 1208, 1211 [2020], lv denied 35 NY3d 914 [2020]; Matter of Adirondack Med. Ctr.-Uihlein v Daines, 119 AD3d 1175, 1176 [2014]). Petitioner accordingly has an adequate remedy in the form of a CPLR article 78 proceeding and is not entitled to declaratory relief (see Greystone Mgt. Corp. v Conciliation & Appeals Bd. of City of N.Y., 62 NY2d 763, 765 [1984]; Matter of Shore Winds, LLC v Zucker, 179 AD3d at 1211).³

Turning to the merits, "[a]n administrative determination following an evidentiary hearing required by law must be supported by substantial evidence" and, if that evidence is present in the record, this Court cannot substitute its judgment for that of respondent (Matter of Taylor v Justice Ctr. for the Protection of People with Special Needs, 182 AD3d 815, 817 [2020]; see CPLR 7803 [4]; Matter of Perez v New York State Justice Ctr. for the Protection of People with Special Needs, 170 AD3d 1290, 1291 [2019], lv denied 34 NY3d 903 [2019]). Here, respondent proffered the testimony of its investigator, through whom it admitted into evidence 31 exhibits, including,

³ Given our holding, as petitioner's claims only pertain to a CPLR article 78 proceeding, Supreme Court appropriately transferred the entire matter to this Court (see CPLR 7804 [g]; compare Matter of Paladino v Board of Educ. for the City of Buffalo Pub. Sch. Dist., 183 AD3d 1043, 1052 [2020]).

among other things, a copy of the facility's "constant observation" policy, still photographs depicting the incident, supporting depositions of the subject service recipients and 11 staff members of the facility, and a video of petitioner's police interrogation.

The hearing evidence established that, on the day in question, petitioner was assigned to provide one-to-one constant observation of G.G. Under the facility's constant observation policy, a patient care technician who is assigned to one-to-one constant observation of a service recipient is required to have "eyes on" the service recipient at all times when he or she is awake or outside of his or her room, meaning that the patient care technician "must be able to see an unobstructed view of the [service recipient's] body length, not just a part of [his or her] body." Petitioner was walking in the hallway of the facility a few feet in front of G.G. such that he did not have direct observation of him. As petitioner passed the room of T.S., he paused, looked into the room and then entered it, leaving G.G. alone in the hallway and out of his view. The unit chief of the adolescent inpatient psychiatric unit, a doctor, indicated in her supporting deposition that she viewed the video of the incident and observed petitioner leaving his one-to-one service recipient alone in the hallway "in violation of protocol."

Contrary to petitioner's contention, administrative hearings are not bound by the traditional rules of evidence, and an administrative determination may be based entirely on hearsay testimony, which "if sufficiently relevant and probative [could] constitute substantial evidence even if contradicted by live testimony on credibility grounds" (Matter of Haug v State Univ. of N.Y. at Potsdam, 32 NY3d 1044, 1046 [2018]; accord Matter of Perez v New York State Justice Ctr. for Protection of People with Special Needs, 170 AD3d at 1291; see Matter of Watson v New York State Justice Ctr. for the Protection of People with Special Needs, 152 AD3d 1025, 1027 [2017]). Here, although petitioner testified in his own defense, his account did not contradict or challenge the account set forth by the investigator in his report and his testimony at the hearing, and

petitioner admitted during his police interview that he exercised "bad judgment" and violated protocol by leaving G.G. alone in the hallway. Petitioner also acknowledged that, inasmuch as G.G. had exhibited self-injurious behavior and verbalized suicidal ideations, his conduct placed G.G. in potential danger. Based on the foregoing, we are satisfied that the investigator's hearsay account of the incident, which was corroborated by still photographs and numerous supporting depositions from facility staff, coupled with petitioner's admissions, provided the requisite substantial evidence to support respondent's finding that petitioner neglected a service recipient and that such neglect constituted category three neglect (see Social Services Law §§ 488 [1] [h]; 493 [4] [c]; Matter of Perez v New York State Justice Ctr. for Protection of People with Special Needs, 170 AD3d at 1292; Matter of Watson v New York State Justice Ctr. for the Protection of People with Special Needs, 152 AD3d at 1027; Matter of Roberts v New York State Justice Ctr. for the Protection of People with Special Needs, 152 AD3d 1021, 1024-1025 [2017]).

Finally, although petitioner argued at the administrative level that he had not received adequate notice of the charges against him as a matter of due process and objected to the testimony of respondent's investigator on hearsay grounds, he did not attack the conduct of the investigator or subsequent administrative hearing on due process grounds, nor did he make any effort to subpoena or call the service recipients or any other facility staff to testify at the hearing or claim the right to cross-examine them. Thus, having failed to raise these issues at a time when they could have been addressed, his present attempts to do so are unpreserved for our review (see Matter of Khan v New York State Dept. of Health, 96 NY2d 879, 880 [2001]; Matter of Haug v State Univ. of N.Y. at Potsdam, 166 AD3d 1404, 1405 [2018]; Matter of Currie v New York State Bd. of Parole, 298 AD2d 805, 806 [2002]). To the extent not specifically addressed, petitioner's remaining contentions have been reviewed and found to be without merit.

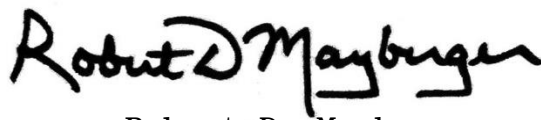
Garry, P.J., Mulvey and Colangelo, JJ., concur.

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ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

A handwritten signature in black ink, reading "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large, stylized "R" and "M".

Robert D. Mayberger
Clerk of the Court

Appendix F

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of November, two thousand twenty.

Rotimi Salu, Gerard M. Lynch,

Plaintiffs - Appellants,

v.

ORDER

Docket No: 20-761

Denise Miranda, New York State Justice Center, Elizabeth M.
Devane, David Molik, Mary B. Rocco, Louis P. Renzi,
Westchester Medical Center Health Network, Westchester
County Health Care Corporation,

Defendants - Appellees,

Diamond Healthcare Corporation, Denise Davis,



Defendants.

Appellants, Rotimi Salu and Gerard M. Lynch, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

Appendix G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROTIMI SALU; GERARD M LYNCH,

Plaintiffs,

v.

DENISE MIRANDA, *et al.*,

Defendants.

No. 18-CV-10399 (KMK)


ORDER

KENNETH M. KARAS, United States District Judge:

For the reasons discussed on the record at the Oral Argument on February 4, 2020, the Court grants Defendants' Motions To Dismiss and dismisses all of Plaintiffs' claims with prejudice. The Clerk is respectfully requested to terminate the pending Motions, (Dkt. Nos. 56, 59), and close this case.

SO ORDERED.

DATED: February 4, 2020
White Plains, New York



KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
ROTIMI SALU; GERARD M. LYNCH,
Plaintiffs,

-against-

DENISE MIRANDA, et al.,
Defendants.
-----X

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 2/5/2020

18 CIVIL 10399 (KMK)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons
stated in the Court's Order dated February 4, 2020, Defendants' Motions To Dismiss and dismisses
all of Plaintiffs' claims with prejudice; accordingly, the case is closed.

Dated: New York, New York
February 5, 2020

RUBY J. KRAJICK

Clerk of Court

BY:

**mango*
Deputy Clerk