

## **Appendix A**

Decided and Entered: January 7, 2021

530536

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In the Matter of GERARD M.  
LYNCH,  
Petitioner,  
v  
NYS JUSTICE CENTER FOR THE  
PROTECTION OF PEOPLE WITH  
SPECIAL NEEDS,  
Respondent.

MEMORANDUM AND JUDGMENT

Calendar Date: November 23, 2020

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

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

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

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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).<sup>1</sup>

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

<sup>1</sup> 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

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:



Robert D. Mayberger  
Clerk of the Court

## **Appendix B**

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

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In the Matter of the Appeal of

**Gerard Lynch**

Pursuant to § 494 of the Social Services Law

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**FINAL  
DETERMINATION  
AND ORDER  
AFTER HEARING**

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

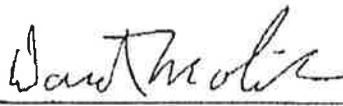
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

**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

  
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**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., 2<sup>nd</sup> 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, 8<sup>th</sup> 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

Hospital<sup>1</sup>, 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

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<sup>1</sup> 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 22<sup>nd</sup> and 23<sup>rd</sup>.

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 24-28<sup>2</sup>) 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

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<sup>2</sup> 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).

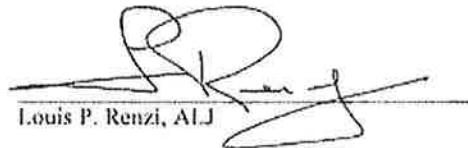
Category 2 conduct shall be elevated to Category 1 conduct when such conduct occurs within three years of a previous finding that such custodian engaged in Category 2 conduct. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

**DECISION:** The request of Gerard Lynch that the substantiated reports dated April 18, 2016, (VPCR Master Casc # 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

  
A handwritten signature in black ink, appearing to read "Renzi" above "AIJ".

Louis P. Renzi, AIJ

**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***  
***Court of Appeals***

*Decided and Entered on the  
third day of June, 2021*

**Present**, Hon. Jenny Rivera, *Senior Associate Judge, presiding.*

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Mo. No. 2021-220

In the Matter of Gerard M. Lynch,  
Appellant,

v.

NYS Justice Center for the Protection of  
People with Special Needs,  
Respondent.

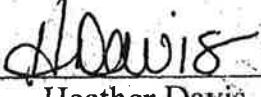
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Appellant having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied with one hundred dollars costs and necessary reproduction disbursements.

Chief Judge DiFiore took no part.

  
Heather Davis  
Deputy Clerk of the Court