5-20-04

STATE OF FLORIDA
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

FILED
2004 AUG 17 PM 1:03

MICHAEL S. SNOW,

PETITIONER,

V.

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, DIVISION OF LICENSING,

RESPONDENT.

_____/

FILED
AUG 11 2004
Cynthia Bordeaux
Clerk
Division of Licensing
Department of Agriculture
and Consumer Services

AP

CASE NO.: D 2111682

SFD-CWS

FINAL ORDER

This cause came before the Department of Agriculture and Consumer Services, Division of Licensing, for consideration and final agency action. An formal administrative hearing was conducted pursuant to Sections 120.569 and 120.57(2), Florida Statutes, on March 23, 2004, before Stephen F. Dean, a duly assigned Hearing Officer for the State of Florida, Division of Administrative Hearings. The Hearing Officer submitted a Recommended Order on May 20, 2004, a copy of which is attached.

RULINGS ON EXCEPTIONS FILED BY RESPONDENT

The Respondent takes exception to the portion of the Administrative Law Judge's Conclusion of Law 12, which concluded that the Respondent has the burden to go forward and the burden of proof under Sections 493.6118(1)(j), and (2), Florida Statutes. The Department rejects this exception. Respondent has the burden to prove by clear and convincing evidence the

grounds to deny a renewal license. *Department of Banking and Finance v. Osborne Stern and Company*, 670 So.2d 932, 934 (Fla. 1996); *Coke v. Department of Children and Family Services*, 704 So.2d 726 (Fla. 5th DCA 1998).

The Respondent also takes exception to those portions of the Administrative Law Judge's Conclusions of Law 14 through 21, which concluded that "the subject provision means 'committing an act of the exertion of physical force so as to injure or abuse.' The proof required is evidence of injury or abuse," and that Respondent is required to prove that the child was injured or abused by excessive force. The Department accepts this exception.

It is well established that a battery is an act of violence as it is the unlawful use of force against another. *See § 784.03, Fla. Stat.* A battery occurs when a person "actually and intentionally touches or strikes another person against the will of the other;" or "intentionally causes bodily harm to another person." In the instant case at Finding of Fact 9, the Administrative Law Judge found that Petitioner admitted to an investigator with the Department of Children and Family Services that "he struck the child while putting the child in his car seat, when the child grabbed his uniform epaulet and would not let go."(Also, see transcript at pages 88 through 90 for Petitioner's sworn testimony that he struck the child.) The Administrative Law Judge's Conclusion of Law 20, in pertinent part, states: "There is no question that the Petitioner hit the 18-month old child and that this left the child's face red on day one and a mark faintly visible on day two."

The issue in this case is based on the letter that Respondent sent to Petitioner informing him that his application for renewal of his license was denied because he "committed an act of violence or used force on another person which was not for the lawful protection of yourself or another." Thus, it must be shown that either:

1. Respondent committed an act of violence, or

2. Respondent used force on another person which was not for the lawful protection of himself or another.

As previously stated, battery is an act of violence as it is the unlawful use of force against another. One method of proving that the Petitioner committed a battery under the facts of the instant case, is to show that Petitioner actually and intentionally touched or struck the child against the child's will.

Intent is a necessary element of battery, and must be determined by surrounding circumstances. *Beard v. State*, 842 So.2d 174 (Fla. 2nd DCA 2003), rehearing denied. In addition, battery does not necessarily involve premeditated intent to harm a victim, but could involve only actual and intentional touching of the victim. *Byrd v. State*, 789 So.2d 1169 (Fla. 3rd DCA 2001).

Any analogy of the instant facts to a situation of discipline by a person acting in a parental role appears to be inapplicable and assumes facts not in evidence. Petitioner did not have permission to discipline the child. (See transcript page 48.) Despite this lack of parental authority, Petitioner struck the child and admitted to the child's mother "that the child had been bad and he'd gotten disciplined." (See transcript page 47.)

The Administrative Law Judge stated, "When disciplining of children corporally, the use of force is intentional" (Conclusion of Law 16), and that "There is no question that the Petitioner hit the 18-month old child" (Conclusion of Law 18). Petitioner's intent to strike the child is further corroborated by his own sworn testimony: "So I popped him on the cheek...harder than what I'd intended. Like I said, the act itself was intended, but not the result." (See transcript page 88.)

Neither harm nor injury is required to prove a battery. The degree of injury caused by the intentional touching is not relevant to determine whether battery has been committed; rather, any intentional touching of another against such person's will is technically a criminal battery. *D.C. v. State*, 436 So.2d 203 (Fla. 1st DCA 1983). In addition, the force used in a criminal battery does not have to be sufficient to injure. *L. D. v. State*, 355 So.2d 816 (Fla. 3rd DCA 1978).

As to whether the force used by Petitioner against the child was for his lawful protection, Petitioner has always admitted that he struck the toddler across the face with his hand because the toddler had grabbed the epaulet on his uniform shirt and would not let go; Petitioner has never suggested that his use of force at that time was for the lawful protection of himself or another from physical harm. (See transcript pages 36, 61, 67, 75, 85, 86, and 93.) That Petitioner was not acting to lawfully protect himself is corroborated by the fact that at the time of the incident Petitioner was a 33 year old male, who stood approximately 5' 11" tall and weighed 190 pounds (See transcript pages 15, 46, and 90), while the child he struck was an 18 month old toddler, who weighed approximately 33 pounds (See transcript pages 46, 60, and 90.)

FINDINGS OF FACT

The Division hereby adopts and incorporates by reference the Findings of Fact and in the Recommended Order.

CONCLUSIONS OF LAW

Conclusions of Law 1 through 13 are adopted and incorporated by reference. Conclusions of Law 14 through 19 and 21 are rejected by the Division as set forth above. The Department makes an addition conclusion of law that section 493.6118(2) authorizes Respondent

to deny a license based upon a violation of section 493.6118(1)(j), Florida Statutes. See *Department of State v. Shadwell,* Case No. 95-3552 (DOAH October 19, 1995); *Ballard v. Department of State,* Case NO. D95-15008 (October 11, 1996). Respondent provided clear and convincing evidence that Petitioner committed an act of violence not in the defense of himself or another.

WHEREFORE, based on the foregoing, and a complete review of the record, it is ORDERED that Petitioner's application for Class "D" License is DENIED. Petitioner shall CEASE AND DESIST engaging in activities regulated by Chapter 493, Florida Statutes, until such time as Petitioner has met the licensure requirements of Chapter 493, Florida Statutes.

DONE AND ORDERED at Tallahassee, Florida, this 11th day of August 2004.

Gene Bryan, Director
Division of Licensing

NOTICE OF RIGHTS

This Order constitutes final agency action. Any party who is adversely affected by the Order may seek judicial review under Section 120.68, Florida Statutes. Such proceedings are commenced by filing a Notice of Appeal, pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Deputy Clerk of the Department of Agriculture and Consumer Services, Division of Licensing, P.O. Box 3168, Tallahassee, Florida 32315-3168; and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the First District Court of Appeal, or with the District Court of Appeal in the appellate district where the party resides. The

Notice of Appeal must be filed within 30 days of the date this Order is filed with the Deputy Clerk of the Division.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order was sent by U.S. Mail this 11th day of August 2004 to Michael S. Snow, Post Office Box 1131, MacClenny, Florida 32063.

Kristi Reid Bronson

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Filed with Agency Clerk

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