STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL S. SNOW,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-4265
	)	
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, DIVISION OF LICENSING,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A hearing in the above-styled cause was held pursuant to notice on March 23, 2004, by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings in Jacksonville, Florida.

APPEARANCES

For Petitioner: Michael S. Snow, pro se
Post Office Box 1131
MacClenny, Florida 32063

For Respondent: Michael T. McGuckin, Esquire
Assistant General Counsel
Department of Agriculture
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Division of Licensing
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STATEMENT OF THE ISSUE

Whether the Respondent committed an act of violence or used force on any person except in the lawful protection of one's

self or another from physical harm and, therefore, should have his license renewal as a Class "D" Security Officer denied pursuant to Section 493.6118(1)(j) and (2), Florida Statutes.

PRELIMINARY STATEMENT

This case arose when the Petitioner, Michael S. Snow, filed an application to renew his license as a Class "D" Security Officer pursuant to Chapter 493, Florida Statutes. The Respondent, having considered the Petitioner's application, notified the Petitioner by letter dated August 14, 2003, of its intent to deny renewal of said license, and of his right to a hearing on that decision. The Petitioner timely requested a formal hearing on the denial, and the Respondent forwarded the case to the Division of Administrative Hearings on November 14, 2003.

An Initial Order was entered on November 17, 2003, requesting the parties to provide the Administrative Law Judge mutually agreeable hearing dates. The Petitioner's filed a Motion for Extension of Time to File Response to Initial Order on December 10, 2004. On January 1, 2004, the Petitioner's Counsel requested leave to withdraw as counsel, and the Petitioner filed a second Motion for Extension of Time to File Response to Initial Order. On January 12, 2004, an order was entered relieving the Petitioner's Counsel, and requiring that the Petitioner state the dates he would be available for hearing

by February 1, 2004. On February 2, 2004, the Petitioner responded as required, and the Notice of Hearing issued on February 3, 2004, setting the case for hearing on March 23, 2004. The case was heard as noticed.

At hearing the Respondent called Terry Cranford, Union County Deputy Sheriff; Charles Rogers, a state probation officer; Sara Howard; and Janice Joiner, Child Protective Investigator. The Respondent entered into evidence Exhibits numbered 1 through 5. The Petitioner testified in his own behalf. After the hearing, a transcript of the proceedings was ordered by the Respondent. The transcript was filed on April 19, 2004, and the Respondent's Proposed Recommended Order was filed on April 30, 2004. The Petitioner did not file post-hearing findings. The Respondent's proposed findings were read and considered.

FINDINGS OF FACT

1. The Petitioner, Michael S. Snow, was at all times relevant to these proceedings a licensed Class "D" Security Officer.

2. The Respondent is the agency that licenses and regulates security officers pursuant to Chapter 493, Florida Statutes.

3. On or about April 12, 2003, the Petitioner filed an application to renew his license as a Class "D" Security Officer. The Respondent advised the Petitioner by letter of its intent to deny his application; the Petitioner requested a hearing; and these proceedings ensued. Subsequently, the Respondent amended its letter of denial, and the letter of August 14, 2003, (Second Amended Administrative Denial of License), constitutes the charging document. That letter states that the application is denied because of the applicant's failure to qualify under Section 493.6118(1)(j), Florida Statutes, because the applicant committed an act of violence or used force on another person that was not for the lawful protection of himself or another.

4. At the hearing, Union County Deputy Sheriff Terry Cranford was called to testify. Deputy Cranford identified an affidavit that he had prepared on November 24, 2002, in relation to an investigation in which the Petitioner was the alleged perpetrator of abuse of an 18-month old child. The affidavit, Respondent's Exhibit numbered 1, was prepared by the deputy after he had interviewed various witnesses in the case; however, the deputy did not observe any of the alleged conduct.

5. The deputy did observe the child on November 22, 2002, during the course of his investigation. The alleged incident, which involved the Petitioner striking the child in the face,

took place on November 21, 2002, some 24 hours earlier. The deputy did not mention in his affidavit any injuries he observed. The deputy did not testify at hearing to any injuries to the child.

6. The deputy stated that the child was too young to provide any information on the incident. The deputy's investigative focus at the time he prepared the affidavit was on the mother of the child and another relative. He did not interview the Petitioner. All the information that he obtained about the Petitioner's involvement was through the Child Protective Investigator, Ms. Joiner.

7. The Respondent called Janice Joiner, an investigator with the Department of Children and Family Services (DCFS), who testified regarding her investigation of the incident. Like the deputy, above, Ms Joiner did not observe the incident. It is clear from her testimony and that of the child's mother, that the child's natural father reported the incident. He picked up the child from the daycare on the afternoon of November 21, 2002, and raised questions about the red handprint on the child's face.

8. As a result of the investigation, DCFS initiated a dependency action, which precluded with the right of the child's mother to have custody of the child during the investigation, legal proceedings, and subsequent mediation between attorneys

representing the child's mother and father. As a result of the investigation initiated by the child's father, his ex-wife, the child's mother, had to agree to end her relationship with the Petitioner.

9. Ms. Joiner testified regarding what the Petitioner told her. He admitted he struck the child while putting the child in his car seat, when the child grabbed his uniform epaulet and would not let go. Ms. Joiner opined that this was abusive, and stated that the doctor who examined the child said it was abusive. Ms. Joiner did not state upon what information she based this opinion. She mentioned the handprint she saw on the day following the incident, which she described as faint.

10. The Petitioner entered pretrial intervention on the charges brought against him, and successfully completed the program which called for him, to among other things, attend parenting and anger management classes. He was never tried; has never plead or been found guilt of any offense related to this incident; and his civil rights were never affected.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Section 120.57, Florida Statutes.

12. The Petitioner seeks to renew his license; therefore, the Respondent has the burden to go forward and the burden of

proof. The Respondent denied licensure on the basis of Section 493.6118(1)(j), Florida Statutes, which provides in pertinent part as follows:

> (1) The following constitute grounds for which disciplinary action specified in subsection (2) may be taken by the department against any licensee, agency, or applicant regulated by this chapter, or any unlicensed person engaged in activities regulated under this chapter.
>
> * * *
>
> (j) Commission of an act of violence or the use of force on any person except in the lawful protection of one's self or another from physical.

13. It is important to note that the Petitioner is not denied for child abuse, for pretrial diversion, making false statements or encouraging anyone else to make a false statement. He is charged with violation of Section 493.6118(1)(j), Florida Statutes, as quoted above.

14. A search of the annotated statutes does not reveal any case law interpreting "commission of an act of violence or use of force." Webster's New Collegiate Dictionary defines "commission" as a noun meaning "the act of committing something, i.e., charged with the commission of a felony." "Act" is defined by Webster's as "a thing done: deed;" and "violence" is defined as "exertion of physical force so as to injure or abuse." Given the nature of the license regulated, one might generally consider the prescribed conduct to be related to

security work, although, it admittedly is not limited in its scope.

15. In its broadest sense, 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.

16. When disciplining of children corporally, the use of force is intentional. Disciplining of children is one of those uses of force which society permits and is outside normal breaches of the peace. That is not to say that the use of corporal punishment on children is uncontrolled. To the contrary, it has developed its own body of law. When looking at the discipline of a child in light of Section 493.6118(1)(j), Florida Statutes, that case law is instructive.

17. In the case of B.R. and W.C. v. Department of Health and Rehabilitative Services, 558 So. 2d 1027, (Fla. 2DCA 1989), the court stated regarding the evidence to prove child abuse where discipline by a teacher was at issue that "whether corporal punishment is excessive must be proved in each case by competent, substantial evidence, and all relevant issues presented may be considered without resort to arbitrary presumptions fixed by the passage of time." It is necessary for the Respondent to show that the child was injured or abused by substantial and competent evidence.

18. In the case of B.L. and R.W.H. v Department of Health and Rehabilitative Services, 545 So. 2d 289 (Fla. 1DCA 1989), the court stated with regard to proving abuse that to conclude that the existence of a bruise or red mark lasting more than one hour can be proof of excessive force is an arbitrary and capricious presumption. The court goes on to state that the decision must be based upon evidence of excessive force.

19. In this case, there is no credible, admissible evidence concerning whether the child was injured or whether the force was excessive. Ms. Joiner mentioned no injury. She said that on the day after the incident, the marks were faint. The deputy did not testify concerning any injury or marks he observed. The only "evidence" on abuse was Ms. Joiner's statement that the examining doctor concluded that the slap was abusive. The doctor's report was not entered in the record, and Ms. Joiner did not indicate that the doctor found any injury. Ms. Joiner's statement regarding the doctor's finding was hearsay; it is not substantial and competent evidence; and a finding based upon inadmissible hearsay evidence is specifically precluded by Section 120.57(1)(c), Florida Statutes. The wording of the statute would indicate that this is without regard to whether the hearsay actually was objected to.

20. 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. However, there is no evidence that the child was injured. The only opinion presented regarding whether the slap was excessive was that of Ms. Joiner, who apparently based it upon the marks, and reports she received which were not offered into evidence. Her qualifications to offer this opinion based upon medical, social or other criteria were not established by counsel. Her qualifications as an investigator do not qualify her to offer such an opinion. The slapping of a child is not per se abusive, and must be proved.

21. The burden is on the agency to prove each aspect of its case. This includes proof that the force used caused injury or was abusive. This proof is not forthcoming in this case.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED:

That the Department issue the Petitioner a Class D Security Officer's license.

DONE AND ENTERED this 20th day of May, 2004, in Tallahassee, Leon County, Florida.

S

STEPHEN F. DEAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of May, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.