BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

FELIX TORRES, Appellant, v. DEPARTMENT OF GENERAL ADMINISTRATION, Respondent.	)	Case No. RED-01-0035 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair. The hearing was held on August 7, 2002, in the Personnel Appeals Board hearing room in Olympia, Washington. GERALD L. MORGEN, Vice Chair, reviewed the record and participated in the decision in this matter. RENÉ EWING, Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Felix Torres was present and was represented by Joaquin M. Hernandez, Attorney at Law of Parr and Younglove, P.L.L.C. Janetta E. Sheehan, Assistant Attorney General, represented Respondent Department of General Administration.

1.3 **Nature of Appeal.** Appellant was given a reduction in salary for insubordination. Respondent alleged that Appellant violated a supervisory directive.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995).

II. FINDINGS OF FACT

2.1 Appellant Felix Torres is a Gardener 2 and a permanent employee of Respondent Department of General Administration (GA) in the Division of Capitol Facilities. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on September 25, 2001.

2.2 By letter dated August 15, 2001, Respondent notified Appellant of his four-step reduction in salary, effective September 1, 2001 through October 31, 2001. Respondent charged Appellant with insubordination. In summary, Respondent alleged that on May 7, 2001, Appellant violated the specific direction of his supervisor to maintain the Ethnobotanical Garden at the State Capitol Museum by keeping the garden paths clear of debris only.

2.3 Appellant has been employed by Respondent for over 25 years. Appellant is an experienced gardener and has received good performance evaluations.

2.4 Appellant has no history of formal disciplinary action, but he has received two letters of reprimand. He received a letter of reprimand in 1998 for failing to comply with a supervisory directive, and he received a letter of reprimand in 1999 for over-pruning wild rose bushes in the Ethnobotanical Garden at the State Capitol Museum. However, the letter addressing the rose bushes was removed from Appellant's personnel file prior to the incident giving rise to this appeal.

2.5 As a result of the rose incident, Appellant's supervisor, Larry Kessel, orally instructed Appellant not to work in the Ethnobotanical Garden. He directed Appellant to maintain the pathway areas by keeping the paths clear of debris and low hanging branches.

2.6 The State Capitol Museum is operated by the State Historical Society. The Historical Society has a contract with GA to maintain the museum grounds including mowing, weeding, trimming and general grounds maintenance work. The Ethnobotanical Garden is located on the museum grounds but is considered an exhibit rather than part of the grounds of the museum. The Ethnobotanical Garden contains plants and bushes native to Washington State.

2.7 Susan Wright (aka Susan Dolliver) is a gardener for the Historical Society in the Tacoma area. In the spring of 1999, Ms. Wright was assigned responsibility for the spring cleanup of the Ethnobotanical Garden at the State Capitol Museum. The garden had been neglected for a period of time and Ms. Wright worked during the spring and summer to reestablish the pathways, pull weeds, and plant and mulch plants. Her assignment ended in the fall of 1999.

2.8 Before Ms. Wright began her work in the Ethnobotanical Garden, two planning meetings were held. The second planning meeting was held on March 15, 1999. Ms. Wright, Mr. Kessel, Mark Robb of GA, and Appellant attended the second planning meeting. During the meeting, the participants agreed on a maintenance schedule and timelines for the work to be done in the garden. Ms. Wright summarized the results of the meeting in an e-mail dated March 16, 1999 to Madeline Binkley, a member of the museum staff. Ms. Wright indicated that the meeting participants agreed, in part:

> G.A. would provide gardener assistance in a complete spring clean up of the ethnobotanical garden that would require approximately two to three days work. Some of the tasks agreed to would be removing the leaf cover of the beds, weeding, trimming and removing weeds and other unwanted vegetation. Cleaning the path ways and applying additional bark-mulch and gravel that they will supply and deliver.
> . . .

G.A. also agreed to help on a one day a month basis for keeping the garden in shape throughout the growing season.

2.9 Appellant and Ken Connally, Gardener 2, were assigned to assist Ms. Wright in cleaning up the garden. However, Ms. Wright was not their supervisor. After Ms. Wright's assignment at the garden ended, Appellant and Mr. Connally continued to maintain the garden.

2.10 On May 7, 2001, Appellant and Mr. Connally were assigned to do grounds maintenance at the State Capitol Museum in preparation for two upcoming garden tours. In addition, an employee named Phil worked with them. When Mr. Connally and Phil finished their work and prepared to leave the area, Appellant indicated that he would finish what he was doing and leave shortly. Appellant continued to work alone in the Ethnobotanical Garden and weeded the garden area with a weedeater.

2.11 After Appellant left, Derek Valley, Director of the museum, went into the garden to place some plant identification tags. He saw that several native plants, including rhododendrons, salmonberry bushes and elderberry trees, and a number of ethnobotanical plants, including cattails, camas, wild strawberries, trilliums and oxalis, were damaged. Mr. Valley had seen Appellant earlier in the day using a weedeater on the museum grounds. Mr. Valley was upset by the damage to the Ethnobotanical Garden, especially in light of the prior incident wherein Appellant over-pruned the rose bushes. He informed Mr. Kessel of the damage by e-mail dated May 8, 2001.

2.12 On May 9, 2001, Mr. Kessel initiated an Employee Conduct Report (ECR). Mr. Kessel stated: "Felix was weedeating at the Museum in the Ethobotanical (sic) Garden where native plants were cut down and or destroyed. This area has specific restrictions of maintenance which is to only keep the paths clear of any debris. Mr. Torres was aware of these restrictions."

2.13 Appellant did not provide any comments during the ECR process. The ECR and supporting information was forwarded to Bill Moore, Assistant Director. Mr. Moore determined that disciplinary action was warranted because Appellant had ignored his supervisor's directive and had willfully damaged the plants.

2.14 On July 20, 2001, Appellant and his representative met with Mr. Moore and Mr. Kessler. Appellant admitted performing maintenance tasks in the garden. Appellant did not deny damaging the plants.

2.15 Mr. Moore concluded that Appellant had been given specific directions to only keep the paths clear. Mr. Moore considered this direction to be a standing order that had not been rescinded. Mr. Moore found that this incident was similar to the incident involving the rose bushes and that a course of progressive discipline was warranted. Because Appellant had been given two prior letters of reprimand yet continued to be insubordinate, Mr. Moore decided that a reduction in salary was appropriate. Therefore, by letter dated August 15, 2001, Mr. Moore gave Appellant a reduction in salary from step K to step G of salary range 33 for a period of two months.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent contends that Appellant willfully damaged plants in the Ethnobotanical Garden with a weedeater and that in doing so, he willfully disregarded his supervisor's clear directive to do nothing but keep the pathways clear of debris and low-hanging limbs. Respondent further contends that the directive was never withdrawn or modified. Respondent argues that Appellant was aware of the chain of command and that he knew he was to take directions from his supervisor. Respondent contends that Appellant chose to disregard his supervisor and take direction from Ms.

Wright even though she was not his supervisor. Based on Appellant's history of corrective actions for insubordination and considering that Appellant's misconduct involved service to a client, Respondent contends that the reduction in salary was necessary to help Appellant understand the seriousness of his misconduct and to change his behavior.

3.2 Appellant acknowledges that after the rose incident, he was given an oral directive to keep the paths clear. However, Appellant contends that his subsequent assignment to assist Ms. Wright in the garden and provide maintenance in the garden demonstrates that the directive was not enforced. Appellant argues that at best, the directive was ambiguous. Appellant argues that he is being used as a scapegoat and that the damage to the garden was tangential and irrelevant to the issue before the Board. Appellant asserts that prior to this incident, he had been working in the garden for two years and that his supervisor knew or should have known that he was working beyond the restrictions in the directive. Appellant contends that in light of the agreements made during the planning meeting and his subsequent 2 years of continued maintenance of the garden, his actions on May 7, 2001 did not violate the directive, and therefore, he was not insubordinate.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Insubordination is the refusal to comply with a lawful order or directive given by a superior and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995).

4.4 Respondent has failed to meet its burden of proof. Considering the agreements made during the planning meeting and Appellant's assignment to work in the garden with Ms. Wright and to continue maintaining the garden after Ms. Wright's assignment ended, Respondent has failed to establish that Appellant acted with willful disregard of his supervisor's oral directive. Furthermore, Appellant's supervisor took no steps to formalize his oral directive. Respondent has failed to show that Appellant violated the directive prior to his assignment to work with Ms. Wright or to show that the directive was enforced at anytime prior to May 7, 2001.

4.5 The appeal should be granted.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Felix Torres is granted.

DATED this _____ day of _____, 2002.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair