BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

CHRISTINE HARRIS, Appellant, v. DEPARTMENT OF GENERAL ADMINISTRATION, Respondent.	Case No. RED-04-0034 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on July 6, 2005.

1.2 **Appearances.** Appellant Christine Harris appeared *pro se*. Assistant Attorney General David LaRaus represented Respondent Department of General Administration.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a ten-percent reduction in salary for a period of two months for neglect of duty, incompetence, and insubordination for Appellant's failure to obtain a Pesticide Operator's License.

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II. FINDINGS OF FACT

2.1 Appellant is a Gardener 1 and permanent employee for Respondent Department of General Administration. 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 July 23, 2004.

2.2 Appellant began her employment with the Department of General Administration as a Gardner 2 in the Division of Capitol Facilities (DCF) on July 21, 1992. Gardner 2's independently perform their assigned duties and are required to obtain a Pesticide Operator's License within the first six months of employment. Appellant's performance evaluations, beginning with her first evaluation in September 1992 and her subsequent evaluations through August 2003, indicated the need for Appellant to obtain her Pesticide Operator's License. In addition, a January 24, 2000, email from Appellant's supervisor summarized the goals discussed for her evaluation, including attending a pesticide class to obtain her license.

2.3 The Department of Agriculture administers the testing for pesticide operators to obtain their licenses. RCW17.21.220 states, in relevant part, "[i]t shall be unlawful for any employee of a state agency . . . to use or to supervise the use of any restricted use pesticide . . .without having obtained a public operator license from the director." Further, RCW 17.21.020 states that direct supervision "means direct on-the-job supervision" and requires the certified individual to be physically present and within voice and visual contact of the person applying pesticides.

2.4 In February 2003, Appellant took the test to obtain her license, but she did not submit the Department of Agriculture's application fee to the agency for payment. As a result, Appellant's test

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scores were not released, and she did not receive her license. Without the proper certification, Appellant was unable to independently spray pesticides, and she could only perform that duty in the presence of a licensed Gardner 2.

2.5 Appellant's personnel file reflects the following:

- On April 24, 2003, Appellant's supervisor, Zone 4 Service Coordinator Stewart Tucker, issued Appellant a letter of expectations for failing to keep her area of responsibility on the Capitol Campus grounds up to expected standards. Mr. Tucker wrote that Appellant's area "continues to have major weed problems in the beds, as well as the lawns." As one of his expectations, Mr. Tucker directed Appellant to obtain a pesticide license so she could maintain a spray schedule to control the weed problems in her assigned area.

- On April 29, 2003, Mr. Tucker issued Appellant a letter of reprimand for refusing to take or read a letter of expectations he presented to her in a meeting on April 28, 2003. Consequently, Mr. Tucker read the letter to Appellant and discussed his specific expectations. Appellant then became angry and defensive and walked out of the meeting. Mr. Tucker wrote the letter of reprimand to make it clear to Appellant that failure to do the work he requested may be considered insubordination.

- On August 13, 2003, Appellant's supervisor, Zone 4 Service Coordinator Roger Muncy, issued Appellant a letter of expectations, in which he instructed her to complete items addressed in Mr. Tucker's April 24, 2003, letter, including obtaining a pesticide operator's license. Mr. Muncy directed Appellant to obtain her pesticide operator's license by September 30, 2003.

2.6 On September 18, 2003, Mr. Muncy asked Appellant about the status of obtaining her license, and she indicated that she had been working on obtaining it.

2.7 On October 28, 2003, Assistant Director Bill Moore, Appellant's appointing authority, met with Appellant to discuss the allegation that she had not yet obtained her pesticide operator's license and to allow her an opportunity to respond. Appellant stated that she was unable to obtain her license because she had an outstanding fine related to a previous license she shared with her ex-

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husband. However, the department checked with the Department of Agriculture and did not find any record of a fine that would prevent Appellant from obtaining her license.

2.8 During the October 28, 2003, meeting, Appellant also mentioned that she had been under a lot of stress. Mr. Moore decided not to take disciplinary action at that time; however, he emphasized the importance of Appellant obtaining her license. The department offered to appoint a person to assist Appellant in studying for the pesticide exam, but Appellant declined. In addition, the department consulted with DOA regarding testing procedures and learned that DOA could accommodate Appellant by allowing her to individually take the test instead of taking it in a group setting.

2.9 On January 8, 2004, Mr. Moore met with Appellant to inform her that he was taking formal disciplinary action against her for non-compliance with the clear directive to obtain her pesticide operator's license. Appellant responded that a reduction in salary would cause significant hardship and requested additional time to offer an alternative to discipline. Mr. Moore granted Appellant an extension and met with her again on January 30, 2004. At that time, he delayed taking disciplinary action and gave Appellant an opportunity to develop a plan with her doctor to alleviate stress. Appellant also met with a counselor at the Employee Advisory Service (EAS).

2.10 On March 9, 2004, Appellant's union representative updated Human Resources Consultant Cyndy Putscher on Appellant's progress in taking steps to reduce anxiety, including the EAS counselor's recommendation to practice relaxation techniques for approximately a month prior to taking the pesticide exam.

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2.11 On May 19, 2004, Ms. Putscher arranged for Appellant to individually take the pesticide exam outside of the normal testing schedule. Appellant did not pass the exam and did not obtain her pesticide operator's license.

2.12 By letter dated July 9, 2004, Mr. Moore notified Appellant of her ten-percent reduction in pay for a period of two months, effective August 1, 2004, through September 30, 2004, inclusive. Mr. Moore charged Appellant with neglect of duty, incompetence, and insubordination for failing to obtain her Pesticide Operator's License as directed.

2.13 In determining the level of discipline, Mr. Moore fully reviewed Appellant's personnel file, including at least seven performance evaluations that directed her to obtain her pesticide operator's license. Mr. Moore also considered Appellant's prior counseling and directive to become educated with pesticides, including taking a class and accepting the assistance of a person who would help her prepare for the pesticide exam. Since Appellant failed to obtain her pesticide operator's license, she was unable to apply pesticides without a co-worker observing her, which limited the times she was able to spray, causing her work to fall below standards. Mr. Moore believed the absence of Appellant's license not only affected her own work but also impacted her co-workers because they had to leave their own work zones to observe Appellant at times when she needed to spray pesticides. Therefore, Mr. Moore concluded that a reduction in salary would prompt Appellant to better prepare for the pesticide examination and complete the process for obtaining her license.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues Appellant neglected her duty and was incompetent when she failed to obtain her pesticide operator's license, a key requirement of her position. Respondent further argues that Appellant's failure to obtain her license constitutes insubordination because her

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supervisors directed her on numerous occasions to obtain her license and documented the requirement in her evaluations, as well as counseling memos and letters of expectation. Respondent asserts the department has made every effort to assist Appellant in preparing for her pesticide exam but contends Appellant has been unable to pass the test and attain her license. Therefore, Respondent argues a reduction in salary is the appropriate level of discipline to impress upon Appellant how serious it is for her to complete the steps necessary to obtain her pesticide operator's license to adequately perform the duties of her position.

3.2 Appellant argues that she has the ability to perform the duties of her job and is knowledgeable about the application of pesticides even though she does not have a pesticide operator's license. Appellant asserts that at the time she was hired, she was unaware of the requirement to obtain her pesticide operator's license and contends a former supervisor authorized her to work without a license because he knew she was knowledgeable in the application of pesticides and understood the issues surrounding the previous license she shared with her ex-husband. Appellant argues she has been studying for the pesticide exam and asserts her goal is to pass the test and obtain her license. Therefore, Appellant argues discipline is unwarranted.

IV. CONCLUSIONS OF LAW

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

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).

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4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Incompetence presumes a lack of ability, capacity, means, or qualification to perform a given duty. Plaisance v. Dep't of Social and Health Services, PAB No. D86-75 (Kent, Hrg. Exam.), aff'd by Board (1987).

4.5 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 & Health Services, PAB No. D94-025 (1995).

4.6 Appellant's supervisors repeatedly directed her to obtain her pesticide operator's license, and they clearly documented their expectations of Appellant in numerous performance evaluations spanning several years. As a result, Appellant had a duty to obtain her license, which was a primary requirement of her Gardner 2 position and mandated by state law. Respondent has proven by a preponderance of the credible evidence that Appellant's failure to obtain her pesticide operator's license, as directed, constitutes neglect of duty, incompetence, and insubordination. Although Appellant has attempted the examination required to obtain her license, she has not provided any mitigating reasons for her inability to successfully complete the test and obtain her license.

4.7 Under the proven facts and circumstances, a reduction in salary is warranted, and the appeal should be denied.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Christine Harris is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Busse Nutley, Vice Chair

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Gerald L. Morgen, Member

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