BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

CHRISTINE HARRIS, Appellant, v. DEPARTMENT OF GENERAL ADMINISTRATION, Respondent.	Case No. DEMO-04-0038 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, WALTER T. HUBBARD, Chair; 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 November 8, 2005.

1.2 **Appearances.** Appellant Christine Harris was present and was represented by Edward E. Younglove III, of Parr, Younglove, Lyman & Coker, P.L.L.C. David LaRaus, Assistant Attorney General, represented Respondent Department of General Administration.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion from a Gardener 2 to a Gardener 1 for neglect of duty, incompetence, and insubordination. Respondent

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alleges Appellant failed to obtain a Pesticide Operator's License, failed to attend a meeting with the Assistant Director to address the status of her license, and failed to notify her supervisor prior to leaving her scheduled shift for the day. In addition, Respondent alleges Appellant failed to maintain expected standards in her assigned work area.

II. FINDINGS OF FACT

2.1 Appellant is a 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 December 13, 2004.

2.2 Appellant began her employment with the Department of General Administration as a Gardener 2 in the Division of Capitol Facilities (DCF) in July 1992. In approximately November 2003, Appellant was assigned to work in Zone 6, located at the Department of Labor and Industries (L&I).

2.3 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 further 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. 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

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a pesticide operator's license. Mr. Muncy directed Appellant to obtain her pesticide operator's license by September 30, 2003.

- On July 9, 2004, Appellant received a reduction in salary for failing to obtain her pesticide operator's license. At that time, Assistant Director Bill Moore directed Appellant to obtain her license by no later than September 30, 2004.

2.4 By letter dated November 30, 2004, Assistant Director Bill Moore notified Appellant of her demotion from her Gardener 2 position to a Gardener 1 position. Mr. Moore charged Appellant with neglect of duty, incompetence, and insubordination for failing to obtain her license, failing to meet with him to discuss the status of her license, failing to notify her supervisor prior to leaving her shift for the day, and failure to maintain expected work standards.

Failure to obtain Pesticide Operator's License

2.5 RCW 17.21.220 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." In Appellant's appeal of her reduction in salary, the Board previously determined that state law requires that an employee working in a Gardener 2 position must have a pesticide operator's license. Harris v. Dep't of General Administration, PAB No. RED-04-0034 (2005).

2.6 It is undisputed that Appellant has made several attempts to obtain her license by attending recertification classes and going through the examination process. Despite Appellant's efforts, however, she was unable to pass the examination required for certification, and she did not obtain her pesticide operator's license by September 30, 2004, as directed by Mr. Moore.

Failure to attend meeting and report absence

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2.7 On October 5, 2004, Mr. Moore's administrative assistant, Kelli Parks, sent an email to Appellant informing her that Mr. Moore wanted to meet with her at 8:30 a.m. on October 12, 2004, to discuss the status of her pesticide operator's license. At approximately 6:00 a.m. on October 12, Appellant left a voice message for Ms. Parks indicating that she would not be attending the meeting and that she wished to reschedule the meeting after she had a chance to meet with her doctor.

2.8 Ms. Parks then contacted Appellant's supervisor, Building Manager Stephen Sloan, on the morning of October 12 to find out whether or not Appellant would be attending the meeting. Mr. Sloan located Appellant working on the grounds of the Labor and Industries Building and told her Mr. Moore still wanted to meet with her. After speaking with Appellant, Mr. Sloan believed she was going to attend the meeting with Mr. Moore. Appellant, however, went home and left a subsequent message for Mr. Sloan, stating that she did not feel well.

2.9 The Division of Capitol Facilities has adopted an Employee Absenteeism Notification Policy to ensure that absentee notifications are made directly to supervisors and/or managers. The policy states that "personnel who will be absent from work shall notify their appropriate supervisor as early as possible." The policy further states that employees can contact the Customer Service Center between 7:00 a.m. and 5:00 p.m., if the supervisor cannot be immediately contacted.

Failure to meet work standards

2.10 Appellant was assigned to the L&I grounds in Zone 6 in approximately November 2003. In February 2004, an inspection report pertaining to the entire Zone 6 area identified significant maintenance concerns. At that time, Appellant shared the maintenance responsibilities of Zone 6 with other employees. In May 2004, Zone 6 was divided into three sections, one of which was Appellant's responsibility, another her co-worker's, and the third a shared responsibility. In June 2004, an inspection report, again pertaining to all of Zone 6, continued to identify areas of concern.

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In August 2004, Appellant's designated area, section B of Zone 6, was independently inspected, and a subsequent report indicated problems still existed.

2.11 Gardener 4 Mark Robb performed the grounds inspections and prepared the reports. Mr. Robb identified several concerns, including overgrown weeds, tree trunk wounds from mowing equipment, and tree branches hanging over walkways and parking areas. In October 2004, DCF Management Analyst Tim Swenson and Zone Service Coordinator Larry Kessel each performed inspections of Appellant's area and concurred with Mr. Robb's assessments.

2.12 The evidence supports the maintenance in Zone 6 had been deferred for several years, that the weeds were problematic and too complex to have been easily fixed within the timeframe Appellant worked there, and that the level of maintenance expected in that area had been recently elevated. Therefore, we find that many factors contributed to the maintenance problems on the L&I grounds.

2.13 On October 15, 2004, Assistant Director Bill Moore, Appellant's appointing authority, notified Appellant of the allegations. Mr. Moore then met with Appellant and her representative on October 29, 2004, to allow her an opportunity to respond to the allegations. Appellant requested a postponement until spraying duties resumed in the spring. Mr. Moore, however, felt Appellant had received numerous directives and ample opportunities to obtain her license, as well as repeated efforts by the department to assist her in successfully completing the pesticide examination. In addition, he was not persuaded by Appellant's reasons for not attending the October 12 meeting and not being forthright with her supervisor. Finally, Mr. Moore felt Appellant had demonstrated a sub-standard level of performance in Zone 6. Therefore, Mr. Moore determined that a demotion was the only possible sanction.

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III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that an employee working in a Gardener 2 position must have a Pesticide Operator's License. Respondent asserts the department has given Appellant numerous opportunities to attain her license and has made efforts to assist her in preparing for the required examination. Respondent asserts, however, that Appellant has been unable to obtain her license and as a result cannot be employed in the Gardener 2 position. In addition, Respondent argues Appellant was insubordinate when she did not attend the meeting to discuss her license with Mr. Moore and when she failed to notify her supervisor she was leaving her scheduled shift. Respondent further argues Appellant neglected her duty and was incompetent when she failed to maintain her assigned work area and meet department standards, despite being put on notice of her work deficiencies. Therefore, Respondent contends demotion to a Gardener 1 position is the only appropriate sanction.

3.2 Appellant asserts she has been making sincere efforts to obtain her Pesticide Operator's License and has made several attempts to pass the examination. Appellant asserts that stress has affected her ability to deal with the licensing issues and contends she was not feeling well on the day she was scheduled to meet with Mr. Moore. Appellant further asserts she contacted Mr. Moore's office about her inability to attend the meeting and told a co-worker she was going home sick. Additionally, Appellant disagrees with the department's assessment of her assigned work area, and she argues the undisputed evidence revealed long term maintenance problems at the Department of Labor and Industries, which were not entirely her responsibility. Appellant contends she has been a long term employee with satisfactory performance, despite not having a pesticide license, and she argues a permanent demotion is too severe.

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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).

Failure to obtain Pesticide Operator's License

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 Appellant continues to make sincere efforts toward obtaining her pesticide operator's license. Nevertheless, state law requires her to possess the license to perform Gardener 2 duties. Consequently, Respondent has proven the charges of neglect of duty and incompetence with regard to Appellant's failure to obtain her pesticide operator's license.

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Failure to attend meeting and report absence

4.6 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).

4.7 Appellant's refusal to meet with Mr. Moore and inform her supervisor she was leaving prior to the end of her scheduled shift constitutes insubordination.

Failure to meet work standards

4.8 Respondent has not proven the allegations regarding Appellant's work performance in Zone 6 on the L&I grounds. A preponderance of the evidence suggests there were long standing problems and time consuming difficulties in maintaining particular areas of the L&I grounds. In addition, Zone 6 was a shared responsibility for a significant portion of the time Appellant worked there. As a result, Appellant was not totally responsible for the poor condition of the grounds during the time period she had sole responsibility for area B of Zone 6.

4.9 Although it is not appropriate to initiate discipline based on prior formal and informal disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No. D93-163 (1995).

4.10 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness of the offenses. The penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the program. An action

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does not necessarily fail if one cause is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.11 The primary issue here is the requirement to have a pesticide operator's license to qualify for the Gardener 2 position. The other causes for discipline do not alone warrant demotion. Appellant is clearly aware of the requirement to obtain her pesticide operator's license, and her numerous attempts to take the examination demonstrate her willingness to meet that requirement. We encourage Appellant to pursue the steps necessary to obtain her license and direct the department to reinstate her to the position of Gardener 2 upon obtaining her pesticide operator's license. Under the proven facts and circumstances, demotion is appropriate until Appellant receives her pesticide operator's license, at which time she should be reinstated as a Gardener 2.

V. ORDER

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

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Busse Nutley, Vice Chair

_____
Gerald L. Morgen, Member

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