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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0556

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for a disqualifying act (decision # 134908). Claimant filed a timely request for hearing. On May 5, 2017, ALJ Buckley conducted a hearing and issued Hearing Decision 17-UI-82704, concluding claimant's discharge was not for a disqualifying act. On May 9, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) City of Salem employed claimant as a firefighter/paramedic from May 12, 2008 to December 9, 2016.

(2) The employer published a drug and alcohol policy that prohibited employees from working under the influence of drugs and made it available to claimant online. A collective bargaining agreement applicable to claimant provided the employer with the right to subject employees to reasonable suspicion drug testing if a workplace accident had occurred, but only if there were other factors that supported the suspicion that testing was required.

(3) At all relevant times hereto, claimant's wife used marijuana for medical purposes. Claimant was a permitted medical marijuana grower and distributor.

(4) In September 2016, claimant and his ex-wife began a "major custody battle." Transcript at 18. Claimant also filed a report with the Department of Human Services accusing his ex-wife of neglect and abuse. Claimant's ex-wife threatened to report claimant's involvement with marijuana to the employer.

(5) Later in September 2016, the employer received an anonymous email suggesting that claimant used, grew and distributed marijuana, and that he carried synthetic urine. The employer's assistant chief met with claimant about the email. Claimant said that his ex-wife had sent the email and explained why he thought she had done so. When the meeting ended the assistant chief thanked claimant for his honesty, told claimant it "would be a non-issue" and "[n]ot to worry about it." Transcript at 19.

(6) A couple of weeks later, the employer received a second email about claimant's alleged involvement with marijuana. The email was "along the lines of you didn't – you didn't seem to take my first e-mail seriously. And kind of escalating it . . ." Transcript at 21. The second email was sent from claimant's ex-wife's father's email account, but he had died the previous year and could not have sent either email. The assistant chief spoke with claimant about the second email. Claimant explained that his father-in-law was dead and that he thought the email had been sent by his ex-wife. The assistant chief again told claimant "that there was not going to be a problem." Transcript at 22.

(7) Sometime in October 2016 claimant attended a party, at which claimant began to eat a brownie. When claimant had finished most of the brownie someone told him that the brownie contained marijuana. Claimant did not know the brownie contained marijuana when he consumed it, and he discarded the brownie without finishing it. In late October, claimant received word that DHS had found that his abuse and neglect allegations against his ex-wife were founded.

(8) In early November 2016, claimant was working at the airport inspecting runways; he had worked there for more than two years, performed many inspections, and was taught to "go[] quickly to get on and off of . . . the airstrip because of safety factors . . ." and follow instructions from tower personnel. Transcript at 25. Claimant was authorized by the tower to do a full runway inspection; while inspecting one runway, airport personnel instructed claimant to "hold short at a runway." Transcript at 25. Claimant understood the instruction meant that he should get off the runway and wait for further instructions. Unbeknownst to claimant, tower personnel meant that he was supposed to stop in the middle of the runway, which he had "never been told to do before." *Id.* Because claimant misunderstood the instruction, he inadvertently caused what was considered a "runway incursion" that had to be reported to the FAA and the employer. *Id.* The runway incursion had not resulted in any damage to claimant's fire engine and had not interfered or been close to interfering with a moving helicopter. The employer considered the incursion as a work-related accident and, on November 7, 2016, directed claimant to report for reasonable suspicion drug testing on November 9, 2016.

(9) Claimant felt panicked because he thought it the marijuana he had inadvertently consumed in October might still be in his system. Although claimant knew that he could not be discharged from his job if he tested positive, he feared it would negatively affect his ability to win his custody suit. On November 9, 2016, claimant reported for drug testing carrying synthetic urine. When asked to provide a urine sample, claimant poured the synthetic urine into the testing container. The tester almost immediately identified claimant's sample as synthetic; claimant subsequently provided a second urine sample, which ultimately tested negative for marijuana and other drugs.

(10) On November 9, 2016, the employer suspended claimant with pay for providing synthetic urine for his urine test. On December 9, 2016, the employer discharged claimant for the same reason.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from benefits if the individual was discharged for committing a disqualifying act. ORS 657.176(9)(a)(C) defines a "disqualifying act" to include refusal to cooperate with, subversion of or attempted subversion of a drug testing process required by an employer's "reasonable written policy," including interfering with the accuracy of the test results by conduct that includes dilution or adulteration of a test specimen.

There is no dispute in this case that claimant violated the policy under which the employer was permitted to require him to submit to drug testing by providing synthetic urine in place of a genuine urine test specimen, nor is there any dispute that he did so with the intent to interfere with the accuracy of the test results by ensuring that the test specimen he provided would be negative for marijuana. At issue in this case is whether the employer required claimant to submit the test sample in accordance with its "reasonable written policy." OAR 471-030-0125(3)(March 12, 2006) defines the term "reasonable written policy" to require, in pertinent part, that "[t]he employer follows its policy."

The employer's policy, as explained at the hearing, allowed the employer to subject employees to a reasonable suspicion test for drugs if the individual had "a work related accident in conjunction with other facts which determine reasonable suspicion." Transcript at 8. Although an anonymous tip would not, by itself, justify subjecting an employee to a drug test, the employer alleged that, under its policy, claimant's runway incursion was a "work related accident" and the "tips" about claimant's alleged drug use that the employer had received were the "other facts." However, the "tips" the employer received cannot reasonably be considered "other facts" that could be used to inform a reasonable suspicion that claimant might be using marijuana. The second email the employer received accusing claimant of marijuana use purported to be from an individual who had died the previous year and therefore could not have been sent by the individual who purported to have sent it, making the email an unreliable basis upon which to suspect claimant of marijuana use. The second email also referred back to the first email, stating that the second email was sent because the employer "didn't seem to take my first e-mail seriously." That reference removed any suggestion that the first email was anonymous, indicating instead that the first email, like the second, had been sent from an individual who had been dead for a year. In other words, whoever sent both of the emails was lying about the identity of the sender, and the second email was sent from claimant's ex-wife's deceased father's account suggesting that claimant's ex-wife was the actual sender, and claimant's ex-wife was in a "major custody battle" and under investigation for abuse and neglect with the Department of Human Services, and she had threatened to report claimant to the employer as retribution. Under those circumstances, the "tips" the employer received could not have reasonably been relied upon as "other facts" that formed the basis of the employer's decision to test claimant. In the absence of those "other facts," the sole basis for subjecting claimant to drug testing was the runway incursion. Assuming *arguendo* that the runway incursion can be considered a "work related accident," that accident, in and of itself, was not sufficient under the employer's policy to subject claimant to drug testing.

Because, on these facts, the employer failed to follow its own policy, for purposes of this case the policy under which the employer required claimant to submit to a urinalysis drug test was not "reasonable," and claimant cannot be disqualified from receiving unemployment insurance benefits because he attempted to subvert those test results. Claimant's discharge was, therefore, not for a disqualifying act,

and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-82704 is affirmed.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating.

DATE of Service: June 1, 2017

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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