

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT**

In the Matter of)
)
RUSSIMONE CACACTING) OAH No. 22-0072-LUI
) Agency No. 21 1306 74,33,32

APPEAL DECISION

Docket Number: 21 1306 74,33,32

Hearing Date: April 20, 2022

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Russimone Cacacting

Christian Parker

CASE HISTORY

The claimant, Russimone Cacacting, timely appealed a June 28, 2021 determination which imposed penalties under AS 23.20.387 and AS 23.20.390 after the Division found she knowingly made false statements or misrepresentations during the unemployment claim process. The Department of Labor referred the appeal to the Office of Administrative Hearings. Under the agreed terms of referral, an administrative law judge (ALJ) hears and decides the appeal under procedures specific to UI appeals. AS 44.64.060 procedures do not apply.

The matter was heard in a recorded hearing April 20, 2022.

The issues before the ALJ were 1) whether the claim contained material misstatements of fact, 2) whether the claimant knowingly made those misrepresentations with the intent to defraud, and 3) whether the claimant is liable for repayment of benefits, payment of a penalty, and temporary disqualification.

FINDINGS OF FACT

Russimone Cacacting established a claim for UI benefits. The Division initially approved the claim and benefits were paid. Subsequently the Division concluded Ms. Cacacting failed to correctly report her work and wages and, as a result, received a benefit overpayment. The Division asserted wages were incorrectly reported the benefit weeks March 13, 2021, March 20, 2021, March 27, 2021, April 3, 2021, April 10, 2021, April 17, 2021, April 24, 2021, and May 1, 2021.

A grid showing the claim week, the wages and work reported by the claimant, and the wages and work subsequently reported by the employer demonstrates the following:

| Claim Week | Claimant Reported Wages | Employer Reported Wages | Claimant Reported Work | Employer Reported Work |
|-------------------|--------------------------------|--------------------------------|-------------------------------|-------------------------------|
| 03/13/2021 | \$0 | \$53.76 | 0 | 4 |
| 03/20/2021 | \$0 | \$161.28 | 0 | 12 |
| 03/27/2021 | \$322.56 | \$362.55 | 24 | 27 |
| 04/03/2021 | \$161.28 | \$523.90 | 12 | 39.65 |
| 04/10/2021 | \$107.52 | \$408.58 | 8 | 30.4 |
| 04/17/2021 | \$161.28 | \$419.33 | 12 | 31.2 |
| 04/24/2021 | \$215.04 | \$321.22 | 16 | 23.9 |
| 05/01/2021 | \$161.28 | \$322.56 | 12 | 24 |

Division Hearing Exhibit 1 included copies of Ms. Cacacting’s electronic claims submissions. Each week Ms. Cacacting answered “yes” to the question of whether she “read and understood the fraud warning.” Each week Ms. Cacacting also answered “yes” to the question “do you certify the answers you provided are true and correct for the claimed benefit week?”

The Division identified a total state UI benefit overpayment of \$1,533.00 resulting from the inaccurate wage reporting and made a demand for repayment. Of that amount the Division concluded \$1,503.00 in overpayments were the result of inaccuracies knowingly made with the intent to defraud and the Division requested a penalty of \$751.00. The Division also identified a federal overpayment of \$2,100. The Division imposed a six-week disqualification from future benefits for each week of alleged fraudulent reporting for a total disqualification of 42 weeks.

Ms. Cacacting appealed.

The hearing took place April 20, 2022.

Ms. Cacacting testified that she was currently living in Hawaii where she moved after losing employment in Alaska due to the COVID-19 pandemic. She was offered a job as a teacher’s aide on the local Navy base. During the benefit weeks ending March 13 and 20, 2021, she remained at home. She filled out employment forms and watched online programs regarding policies and procedures. She did not realize she was going to be paid to do so, and she did not think of it as training for her job.

Ms. Cacacting testified that during the benefit week March 27, 2021, she attended online training related to her work as a teacher’s aide at the Navy facility and reported it as such. She further testified that for the benefit period the week of April 3, 2021 through April 24, 2021, she sometimes trained at home and sometimes went to the on-site location for training. She testified she was a poor recordkeeper and likely forgot to include the time she spent at home training in her claims submission. She

also testified that she filled out her UI claims submission on her telephone and it was easy to get confused because she could not readily see the data she input.

She testified that the benefit week ending May 1, 2021 was her first week working solely at the classroom on base. She agreed the Navy records provided to the Division regarding her wages and work hours would be more accurate than her personal report. However, she testified she simply made a mistake due to poor recordkeeping.

Division representative Christian Parker testified he concluded Ms. Cacacting committed unemployment fraud on her UI claim submissions each week except March 27, 2021. For that week the report by Ms. Cacacting was close enough to her employer's report not to make a fraud finding, although an overpayment occurred as a result of her error.¹

Having heard her testimony at the hearing, he argued it was improbable Ms. Cacacting was mistaken in good faith over how to report participating in the military on-board programming the weeks March 7 and 14, 2021. Mr. Parker argued her testimony that the error was the result of accidentally failing to report time she spent in training due to confusion about how to report was not credible because the claim submission asked if she attended school or a training program during the week and she responded that she had not.²

Mr. Parker pointed to the following facts to support the Division's conclusion fraud occurred during the benefit period the weeks ending April 3, 2021 through May 1, 2021. First, the Navy reported Ms. Cacacting worked six or more hours daily Monday through Thursday the week of April 3, 2021. She did not work Friday that week.³ In contrast, Ms. Cacacting claimed she worked 4 hours Monday, Tuesday, and Wednesday. She did not report any work on Thursday.⁴

Second, the Navy reported Ms. Cacacting worked more than 6 hours daily Monday through Friday the week of April 10, 2021.⁵ Ms. Cacacting, however, claimed to have worked only 4 hours on Tuesday and 4 hours on Thursday. She failed to report work three of the five days and her daily tallies were incorrect. Again, her testimony that the error was the result of confusion due to working some hours and training some hours was not credible because the claim submission asked if she attended school or a training program during the week and she responded that she had not.⁶

Third, the Navy reported Ms. Cacacting worked more than 5 hours daily Monday through Friday the week of April 17, 2021.⁷ She reported working 6 hours on Monday

¹ C. Parker testimony.

² Ex. 1, p. 49.

³ *Id.* at 8.

⁴ *Id.* at 51.

⁵ *Id.* at 8.

⁶ *Id.* at 56.

⁷ *Id.* at 8.

and 6 hours on Friday. She failed to report three of her five days worked.⁸ She also certified that she did not attend school or training.⁹

Next, the Navy reported Ms. Cacacting worked 5 hours or more every weekday except Monday the week of April 24, 2021.¹⁰ She reported working 4 hours on Monday. She also reported 4 hours for Tuesday, Wednesday, and Friday, but claimed not to have worked Thursday.¹¹ She also certified that she did not attend school or training.¹²

Lastly, the Navy reported Ms. Cacacting worked 6 or more hours every weekday except Thursday the week of May 1, 2021.¹³ However, she reported only working 4 hours on Monday, Tuesday, and Friday.¹⁴ She also certified that she did not attend school or training.¹⁵

Mr. Parker argued the fact that Ms. Cacacting consistently reported her work as approximately half her actual labor demonstrated a pattern inconsistent with an honest mistake. Instead, it appeared to the Division that she intentionally under-reported her work hours and wages to insure she would not exceed her excess earning amount and lose all benefits. It also did not make sense to him that the Navy would have her working in the classroom part of the time and returning home for training rather than training on site. He found her testimony especially suspicious since each contemporaneous claim week she denied training participation but explained the missing hours as “training” at the hearing.¹⁶ Lastly, he argued that her testimony she filed her claims by telephone to be at odds with other testimony she had a computer at home for job training.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

AS 23.20.387. Disqualification for misrepresentation.

- (a) An insured worker is disqualified for benefits for the week with respect to which the false statement or misrepresentation was made and for an additional period of not less than six weeks or more than 52 weeks if the department determines that the insured worker has knowingly made a false statement or misrepresentation of a material fact or knowingly failed to report a material fact with intent to obtain or increase benefits under this chapter. The length of the additional disqualification and the beginning date of that disqualification shall be determined by the department according to the circumstances in each case.

⁸ *Id.* at 65.

⁹ *Id.* at 63.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 72.

¹² *Id.* at 70.

¹³ *Id.* at 8.

¹⁴ *Id.* at 79.

¹⁵ *Id.* at 77.

¹⁶ C. Parker testimony.

- (b) A person may not be disqualified from receiving benefits under this section unless there is documented evidence that the person has made a false statement or a misrepresentation as to a material fact or has failed to disclose a material fact. Before a determination of fraudulent misrepresentation or nondisclosure may be made, there must be a preponderance of evidence of an intention to defraud, and the false statement or misrepresentation must be shown to be knowing and to involve a material fact.

AS 23.20.390. Recovery of improper payments; penalty.

- (a) An individual who receives a sum as benefits from the unemployment compensation fund when not entitled to it under this chapter is liable to the fund for the sum improperly paid to the individual.
- (f) In addition to the liability under (a) of this section for the amount of benefits improperly paid, an individual who is disqualified from receipt of benefits under AS 23.20.387 is liable to the department for a penalty in an amount equal to 50 percent of the benefits that were obtained by knowingly making a false statement or misrepresenting a material fact, or knowingly failing to report a material fact, with the intent to obtain or increase benefits under this chapter. The department may, under regulations adopted under this chapter, waive the collection of a penalty under this section. The department shall deposit into the general fund the penalty that it collects.

8 AAC 85.380. Disqualification for misrepresentation

(a) A disqualification under AS 23.20.387 begins with the week in which the department makes the determination of disqualification and may not exceed 52 weeks. The period of disqualification is at least six weeks for each week affected by the false statement, misrepresentation, or failure to report a material fact. Additional weeks of disqualification will be imposed if the circumstances of the case require an increased penalty

THE UNEMPLOYMENT INSURANCE FRAUD INVESTIGATION FRAMEWORK

An individual is eligible for unemployment compensation under Alaska labor law if the individual's employment is covered by the Alaska Employment Security Act AESA, AS 23.20.005-535 as implemented in 8 AAC 85.010-842 and detailed in the Department's Benefit Policy Manual (BPM).¹⁷ Under those rules the employment and training services division of the Department of Labor and Workforce

¹⁷ The BPM fulfills the mandate in 8 AAC 85.360 that the Department "maintain a policy manual interpreting the provisions of AS 23.20 and this chapter." The Alaska supreme court has referred to the BPM as the "Precedent Manual" and looks to the BPM to interpret labor issues. See, *Calvert, supra*; *Westcott v. State, Dep't of Labor*, 996 P.2d 723 (Alaska 2000). The BPM is divided into eight sections: Able and Available, Evidence, Labor Dispute, Miscellaneous Misconduct, Suitable Work, Total and Partial Unemployment, and Voluntary Leaving with individual subsections addressing specific issues and incorporating recent updates.

Development conducts a two-part analysis of each claim filed by an unemployed worker. The first step in the analysis is the “non-monetary determination” of whether the claimant is eligible to for benefits.¹⁸ If the claimant is eligible, the division conducts the second step and issues a “monetary determination” calculating the benefit amount payable to the claimant.¹⁹

Benefit claimants are required to be accurate in their initial and weekly claims submissions.²⁰ Inaccuracies can lead to incorrect unemployment claims determinations, including overpayment. Pursuant to AS 23.20.387(b), a person who knowingly submits a material misrepresentation of fact²¹ or who knowingly fails to provide material information commits statutory unemployment fraud and may be assessed administrative penalties under AS 23.20.390.²² Those penalties include repayment of overpaid benefits; payment of penalties; and disqualification from future benefits.

The Division provides access to The Unemployment Insurance Claimant Handbook (Handbook) to assist claimants in properly submitting claims.²³ Pages nine through eleven of the Handbook include definitions and instructions on how to report work and wages.

Work is defined broadly to include: “Reportable work includes time spent on self-employment or volunteer activities as well as anything you do for wages, whether paid or not, during the seven days of the week you claim. Even if you are only working part-time or temporarily, all work and earnings, including tips and commission, must be reported when you file your biweekly certifications.”

Wages are also expansively defined as “any kind of payment you receive for the work you do, including room and board, goods, barter, tips, commission, stipend,

¹⁸ 8 AAC 85.010(a)(14); 8 AAC 85.085.

¹⁹ 8 AAC 85.010(a)(12).

²⁰ AS 23.20.340; AS 23.20.387; 8 AAC 85.104.

²¹ A material fact is one that is “relevant to the determination of the claimant’s right to benefits. It need not actually affect the outcome of that determination.” *Blas v. State, Dept. of Labor and Workforce Development, Div. of Employment Sec.*, 331 P. 3d 363, 366 (Alaska 2014). The failure to report earnings over \$50.00 a week is always material. Department Policy and Procedure Manual (DPM), Fraud or Misrepresentation, MS 340.1.C.b.

²² The Alaska supreme court held that “knowingly” as used in AS 23.20.387(b) requires proof of subjective intent to defraud. *Blas*, 331 P.3d at 373-74. AS 23.20.387(b) does not establish an objective, reasonable person standard. Whether the claimant had a subjective intent to defraud is often a credibility determination. *See, e.g., ARTEC Services v. Cummings*, 295 P.3d 916 (Alaska 2013)(Worker’s Compensation Board determination that claimant did not subjectively intend to defraud because she considered her unpaid work at an herbal store to be a hobby was issue of credibility for the Board to determine.

²³ Prior to March 2020, the Division reliably provided a hard-copy of the Handbook to all claimants. Due to the exponential increase in unemployment assistance claims caused by the COVID-19 pandemic, it can no longer be said that the Division provides a hard copy to each claimant. However, the Handbook is available on-line at the Division’s website and a link provided for electronic claim filers.

abor.alaska.gov/unemployment/documents/uihandbook.pdf

honorarium, per diem, COLA, payment for jury duty, bonuses and back pay.” The claimant is directed to “report the gross amount of any of the following payments: vacation, holiday, sick, pension, retirement, severance, commission, bonus, wages in lieu of notice and back pay awards” and that a deduction may be taken from the weekly benefits based on receipt of any of these payments.

Applying these standards, the Division establishes a *prima facie* case of unemployment fraud if it demonstrates the information in the claim filing is falsified. Since 1979 the Division has applied a rebuttable presumption of intent to defraud if the information in the claim filing is falsified. Once it is established that a claim submission is inaccurate or falsified, the burden of proof shifts to the claimant to establish lack of subjective intent to defraud.²⁴

Typically, all overpaid benefits must be repaid.²⁵ Exceptions to repayment are set out by regulation and can include certain good faith errors and financial hardship.²⁶ However, if the error was fraudulently made a 50% penalty must be imposed.²⁷

A person found to commit unemployment fraud will also be disqualified for receiving future benefits for up to fifty-two weeks.²⁸

APPLICATION

The Division established a *prima facie* case of unemployment fraud. It clearly demonstrated material errors in Ms. Cacacting’s claims submissions. Those errors resulted in overpayment.

Ms. Cacacting’s testimony that she did not knowingly provide the inaccurate answers was not credible. The questions to her were not complicated. She was asked if she worked for any employer and to list the hours she worked if she did so. If hours were worked, she was asked to list her wages. Ms. Cacacting was also asked if she participated in training during the benefit week.

Ms. Cacacting did not accurately submit her hours worked, wages, or training. Ms. Cacacting’s answers each week but one were significantly different from the information reported by her employer. The significant difference in hours and dates between the reports demonstrates Ms. Cacacting consciously and consistently understated her work hours and wages. The reasonable conclusion from this evidence is that Ms. Cacacting consciously and

²⁴ See e.g., *In the Matter of J. Halat*, Comm’r Dec. 19-0101 (Dept. of Labor and Workforce Development 2019) citing *In Re Morton*, Com. Dec. Comm’r Dec. 19-0101 (Dept. of Labor and Workforce Development 1979)(available on-line at <https://appeals.dol.alaska.gov/SearchRoot/comdecs>)

²⁵ AS 23.20.390.

²⁶ 8 AAC 85.220(b).

²⁷ AS 23.20.390(b).

²⁸ AS 23.20.387(a).

intentionally withheld information to increase the likelihood she would receive maximum benefits.

Accordingly, the Division met its burden of proof that an intentional misrepresentation under AS 23.20.387 occurred.

DECISION

The June 28, 2021 Notice of Determination and Determination of Liability is **AFFIRMED**.

- Claimant submitted an inaccurate fact or omitted a material fact in the claims process.
- That portion of the determination holding that the claimant is liable for the repayment of benefits is **AFFIRMED**. The claimant remains liable to the fund for benefits she received to which she is not entitled.
- That portion of the determination holding that the claimant intentionally submitted inaccurate information to obtain a benefit, i.e., statutory unemployment fraud occurred, is **AFFIRMED**.
 - The claimant remains liable to the fund for benefits received to which the claimant was not entitled.
 - A 50% penalty is imposed.
 - A disqualification under AS 23.20.387 is imposed, and benefits are denied for 42 weeks.

DATED May 16, 2022.




Carmen E. Clark
Administrative Law Judge

APPEAL RIGHTS

This decision is final unless an appeal is filed in writing to the Commissioner of Labor and Workforce Development **within 30 days** after the decision is mailed to each party. The appeal period may be extended only if the appeal is delayed for circumstances beyond the party's control. A statement of rights and procedures is enclosed.

CERTIFICATE OF SERVICE

I certify that on May 17, 2022, the foregoing decision was served on Russimone Cacacting (by mail); Christian Parker (by email). A courtesy copy has been emailed to the DETS UI Technical Team and UI Appeals Team.

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Office of Administrative Hearings



*Alaska Department of Labor and Workforce Development
Appeals to the Commissioner*

Please read carefully the enclosed Appeal Tribunal decision. Any interested party (claimant or the Division of Employment and Training Services [DETS]) may request that the Commissioner accept an *appeal* against the decision (AS 23.20.430-435 and 8 AAC 85.154-155).

A Commissioner appeal must be filed within 30 days after the Appeal Tribunal decision is mailed to a party's last address of record. The 30-day period may be extended for a reasonable time if the appealing party shows that the appeal was late due to circumstances beyond the party's control.

A Commissioner appeal must be in writing and must fully explain your reason for the appeal. You or your authorized representative must sign the appeal. All other parties will be sent a copy of your appeal. Send Commissioner appeals *to the Commissioner's Hearing Officer* at the address below.

A Commissioner appeal is a matter of right if the Appeal Tribunal decision reversed or modified a DETS determination. If the Appeal Tribunal decision did not modify the DETS determination, the Commissioner is not required to accept the appeal. If the appeal is accepted, the Commissioner may affirm, modify, or reverse the Appeal Tribunal decision. The Commissioner may also refer the matter back to the Appeal Tribunal for another hearing and/or a new decision. The Commissioner will issue a written decision to all interested parties. The Commissioner decision will include a statement about the right to appeal to Superior Court.

Any party may present *written argument* to the Commissioner stating why the Appeal Tribunal decision should or should not be changed. Any party may also request to make an *oral argument*. Written argument and/or a request for oral argument should be made when you file an appeal or immediately after you receive notice that another party filed an appeal. You must supply a written argument or a request for oral argument promptly, because neither will likely be considered after the Commissioner issues a decision.

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