

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

In the Matter of)
)
KATHERINE WHITTINGTON) OAH No. 21-2469-PUA
) Agency No. P21 1036 03
_____)

APPEAL DECISION

Docket Number: P21 1036 03

Hearing Date: December 7, 2021 and
December 9, 2021

CLAIMANT APPEARANCES:

Katherine Whittington

DETS APPEARANCES:

None

CASE HISTORY

On November 3, 2021, Katherine Whittington appealed a July 2, 2021 determination by the Division of Employment and Training Services (DETS) that denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136, beginning the week ending March 14, 2020. The Department of Labor referred the appeal to the Office of Administrative Hearings on November 15, 2021. Under the agreed terms of referral, an administrative law judge (ALJ) hears and decides the appeal under procedures specific to PUA appeals. AS 44.64.060 procedures do not apply.

The matter was scheduled to be heard on December 7, 2021 but, after the hearing opened, it was continued at Ms. Whittington's request to December 9, 2021. The hearing was recorded. Ms. Whittington appeared telephonically from Kenai, Alaska and testified under oath. The DETS was notified of the hearing but chose not to appear; it relies on the documents submitted in this appeal and admitted as Exhibit 1. The record remained open through December 15, 2021 to allow Ms. Whittington to submit additional documents.

There are two issues before the ALJ. The first is whether the appeal is barred for failure to file within thirty days of the determination under AS 23.20.340(e). The second is whether the claimant meets the eligibility requirements of the CARES Act.

FINDINGS OF FACT

Katherine Whittington filed a claim for PUA benefits on May 1, 2020. Initially, the DETS paid her PUA from the week ending March 14, 2020 through the week ending January 2, 2021. These payments were made as lump sums in May 2021. On July 2, 2021, the DETS determined that Ms. Whittington was not eligible for PUA benefits, going back to the week ending March 14, 2020, saying she "did not meet program

requirements” without further explanation (Ex. 1, pg. 3). Ms. Whittington filed an appeal in November, after calling and learning she had been denied. Until then, Ms. Whittington stated, she had not realized she had been denied benefits.

Ms. Whittington holds a BA in Physics. She had worked as a substitute teacher for the Anchorage School District for a number of years when, in October of 2019 she developed a plan to move to property she owned in Kenai and to commute to Anchorage for teaching jobs. As she explained it, job-spots for substitute teachers are posted on an online “calendar” and substitutes sign up for the ones they wish to take on a “first come” basis. Some posts are for only a ½ day job. Ms. Whittington testified she mostly worked in elementary schools, although she had substituted for a high school science teacher who took his class to robotics tournaments. Ms. Whittington explained that she planned to drive to Anchorage, stay overnight with friends, teach, and drive back to Kenai.

The property she lives in is a former airplane hangar along a grass airstrip. She testified she still has pieces of a kit airplane her father was building in the hangar. She moved to the hangar on April 9, 2020, which was sooner than planned, but had made the decision to sell her house in Anchorage to meet other financial obligations.

Ms. Whittington based her claim for benefits as an unemployed substitute teacher on two provisions of the CARES Act. First, she testified that in March 2020, when the Anchorage School District went fully online pursuant to the governor’s order, there was no work for substitute teachers. The last job she took was January 27, 2020, but that did not mean she was ineligible for jobs; she still had access to the Anchorage School District substitute calendar as late as May 2021. Thus, she asserted, she was eligible as an employee of an educational institution who was unemployed due to the closure of the Anchorage School District through January of 2021 under 15 U.S.C. § 9021(a)(3)(A)(ii)(kk). Ms. Whittington also asserted that for part of that period of time she was subject to a “do not travel” order (i.e., orders to stay home).

Ms. Whittington also explained that she was, during the same period, executive director of a non-profit organization called “Homes for Heros.”¹ Although initially created with the purpose of building homes for disabled veterans, the organization had shifted emphasis to providing them with service dogs. Ms. Whittington, a former dog trainer under the name “KW-K9s”, did not earn any money as executive director of the organization, although she anticipated she would be able to be paid for training a dog to be purchased and given away. She was not paid for her service to the non-profit organization. She provided this information to the DETS, but she does not claim that she suffered lost work as an unpaid volunteer to a non-profit.

Ms. Whittington admitted that the Post Office Box address is correct. She testified that she does have wi-fi and internet available at her home in Kenai. She testified,

¹ Alaska State records show that Homes for Heros of Alaska, Inc. is a registered domestic non-profit corporation in good standing and that Katherine Whittington is a director, president, treasurer and vice-president of the corporation.

however, that she didn't get the letter telling her she was denied and didn't realize that she had been.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

THE CARES ACT OF 2020, PUBLIC LAW 116-136, TITLE II, SEC. 2102 PANDEMIC UNEMPLOYMENT ASSISTANCE, AMENDED BY CONSOLIDATED APPROPRIATIONS ACT (ALSO KNOWN AS THE CONTINUED ASSISTANCE ACT), PUBLIC LAW 116-260, DIV. N, TITLE II, SUBCHAPTER IV, SEC. 241 (A), CODIFIED AS 15 U.S.C. § 9021:

(a) DEFINITIONS.—In this section:

...

(3) COVERED INDIVIDUAL.—The term “covered individual”—

(A) means an individual who—

(i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107; and

(ii) provides self-certification that the individual—

(I) is otherwise able to work and available for work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because—

...

(ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;

...

(jj) the individual's place of employment is closed as a direct result of the COVID- 19 public health emergency; or

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section; or

(II) is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107 and meets the requirements of subclause (I); and

(iii) provides documentation to substantiate employment or self-employment or the planned commencement of employment or self-employment not later than 21 days after the later of the date on which the individual submits an application for pandemic

unemployment assistance under this section or the date on which an individual is directed by the State Agency to submit such documentation in accordance with section 625.6(e) of title 20, Code of Federal Regulations, or any successor thereto, except that such deadline may be extended if the individual has shown good cause under applicable State law for failing to submit such documentation; and

(B) does not include—

- (i) an individual who has the ability to telework with pay; or
- (ii) an individual who is receiving paid sick leave or other paid leave benefits, regardless of whether the individual meets a qualification described in items (aa) through (kk) of subparagraph (A)(i)(I).

UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 16-20, CHANGE 5.

Guidance issued by the Secretary of Labor on February 25, 2021, added the following eligibility provisions under Section 2102(a)(3)(A)(ii)(I)(kk):

- 4.i The individual has been denied continued unemployment benefits because the individual refused to return to work or accept an offer of work at a worksite that, in either instance, is not in compliance with local, state, or national health and safety standards directly related to COVID-19. This includes, but is not limited to, those related to facial mask wearing, physical distancing measures, or the provision of personal protective equipment consistent with public health guidelines.
- 4. ii An individual provides services to an educational institution or educational service agency and the individual is unemployed or partially unemployed because of volatility in the work schedule that is directly caused by the COVID-19 public health emergency. This includes, but is not limited to, changes in schedules and partial closures.
- 4.iii An individual is an employee and their hours have been reduced or the individual was laid off as a direct result of the COVID-19 public health emergency.

ALASKA STATUTE 23.30.340. DETERMINATION OF CLAIMS.

(e) The claimant may file an appeal from an initial determination or a redetermination under (b) of this section not later than 30 days after the claimant is notified in person of the determination or redetermination or not later than 30 days after the date the determination or redetermination is mailed to the claimant's last address of record. The period for filing an appeal may be extended for a reasonable period if the claimant shows that the application was delayed as a result of circumstances beyond the claimant's control.

ALASKA STATUTE 23.20.415. REVIEW BY APPEAL TRIBUNAL

(a) A party entitled to notice of determination provided in AS 23.20.340 may file an appeal from the determination to an appeal tribunal within the time specified in that section. However, an appeal from a determination which involves AS 23.20.383 shall

be made to the department. The parties to an appeal from a determination shall include all those entitled to notice of the determination and a properly designated representative of the department.

8 ALASKA ADMINISTRATIVE CODE 85.151. FILING OF APPEALS.

(a) An interested party may file an oral or written appeal from a determination or redetermination issued under AS 23.20 and this chapter. The appeal may be filed in person, by mail, or by telephone. An oral or written protest indicating a desire to appeal is an appeal to a referee or the commissioner.

(b) An appeal from a determination or redetermination on a claim for benefits may be filed with a referee or at any office of the division. An appeal must be filed no later than 30 days after the determination or redetermination is personally delivered to the appellant or no later than 30 days after the date the determination or redetermination is mailed to the appellant's last address of record. The 30-day time period will be computed under Rule 6 of the Rules of Civil Procedure. However, the 30-day period may be extended for a reasonable time if the appellant shows that the failure to file within this period was the result of circumstances beyond the appellant's control.

APPLICATION

TIMELINESS.

The law requires that a person who wants to appeal an adverse determination must file an appeal within 30 days after the notification is mailed to the person's last address of record. In this case, Ms. Whittington's notification was mailed to her July 6, 2021; the deadline for filing an appeal was August 9, 2021, with allowance for mailing under Civil Rule 6. When filed, her appeal was 86 days late.

Ms. Whittington did not present any reason beyond her control as to why she delayed so long to file an appeal except to say that she "did not know" she had been denied, and she didn't get the letter (Ex. 1, pgs. 3-4) in the mail. She did admit that she had the capacity to look up her account online, where she might have discovered that her claim had been denied. While the delay in payment Ms. Whittington experienced (a full year from her application) would confuse any recipient as to what exactly they had been paid and when she could expect resumption of payment, I find Ms. Whittington did not present sufficient evidence of circumstances beyond her control that would make an extension of time to November 3, 2021 reasonable. Therefore, I reluctantly conclude that her appeal is barred by AS 23.20.340(e).

MERITS.

Because the merits of this case may have an impact on Ms. Whittington's request for a waiver of recoupment, or because there may be further appeal, I address the merits of her claim.

Ms. Whittington was clearly a part-time substitute for the Anchorage School District. She was eligible to accept posted substitute jobs when the Anchorage School District closed to in person classes and she remained eligible through May 2021. She did not withdraw her eligibility to accept posts. There is no evidence that the six-week hiatus

between the end of January and the middle of March reflected an intent to withdraw from substitute teaching and her move to Kenai, given the intermittent nature of her work, would not have made it impossible to accept posted jobs. However, she, like other substitutes, was no longer needed between March 13, 2020 (when schools were first closed by the Governor's COVID-19 Health Mandate 008) and May 21, 2020 (the last day of scheduled classes) and again between August 20, 2020 and March 15, 2021 (See Ex. 1, pg. 12) as a direct result of the closure of schools by the COVID-19 public health emergency. I find that she was eligible to receive benefits under 15 U.S.C. § 9021(a)(3)(A)(ii)(kk) from the week ending March 21, 2020 through the week ending May 23, 2020 and from the week ending August 22, 2020 through the week ending March 13, 2021, when most elementary schools in Anchorage had reopened. While Ms. Whittington claimed benefits during the summer, there is no evidence that she had a practice of seeking employment as a substitute during the summer.

I recognize that that Ms. Whittington may have incurred an overpayment as a result of this decision. It is possible, however, that she could qualify for a waiver from recoupment or, if a waiver were not granted, that she must be afforded an appeal hearing in which such matters as estoppel could be explored. The present referral does not encompass these issues, and the present decision does not decide them for or against her.

The Division has advised that its Benefit Payment Control (BPC) office handles waiver requests for overpayments and recoupments. For questions and information regarding options that may be available, the claimant can call the BPC at 907-465-2863, 1-888-810-6789, or email to jnu.bpc@alaska.gov.

DECISION

The appeal is **DISMISSED** as untimely.

However, if this appeal were not dismissed, I would MODIFY the determination so as to limit the denial of PUA benefits to the period beginning from the week ending May 30, 2020 through the week ending August 15, 2020 and again beginning from the week ending March 20, 2021 and continuing through September 4, 2021.

Dated: December 21, 2021,



Kris Knudsen
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 December 22, 2021, the foregoing decision was served on Katherine Whittington (by mail and email). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.


Office of Administrative Hearings