

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

In the Matter of)
) OAH No. 22-0112-LUI and
) 21-2569-PUA
TAE TURNER)
) Agency Nos. 21 1861 66
) and P21 1056 03
_____)

CONSOLIDATED APPEAL DECISION

Docket Numbers: 21 1861 66
P21 1056 03

Hearing Dates: Jan. 25, 2022
Feb. 1 and 4, 2022

CLAIMANT APPEARANCES:

Tae Turner

EMPLOYER APPEARANCES:

None

DETS APPEARANCES:

Tristan Varela (one session)

CASE HISTORY

Tae Turner initiated two appeals in the fall of 2021. The first was a timely challenge to an August 30, 2021 decision to refuse to allow backdated filing his unemployment compensation (UC) claim. The second was what appeared to be a greatly delayed appeal of denials of his claim for Pandemic Unemployment Assistance (PUA) that had been issued on November 4, 2020 and January 13, 2021.

The Department of Labor and Workforce Development referred the PUA appeal to the Office of Administrative Hearings in December of 2021. The UI appeal was referred in early February 2022 for the express purpose of facilitating a consolidated decision. Under the agreed terms of referrals, an administrative law judge hears and decides the appeal under procedures specific to UI appeals. AS 44.64.060 procedures do not apply.

The matters were heard in a recorded hearing that spanned three dates in late January and early February 2022. Mr. Turner testified under oath. DETS representative Tristan Varela participated in one session to provide helpful orientation on the complicated and interlocking history of the two claims. The issues presented at hearing were (1) whether Mr. Turner's PUA appeal should be entertained despite the delay in filing it; (2) whether Mr. Turner was precluded from PUA eligibility because of concurrent eligibility for UC; and (3) whether Mr. Turner should be allowed to make retroactive weekly filings for UC benefits between November 2020 and August 2021.

Although these matters are interrelated, it will be simplest to address them one at a time.

PUA APPEAL TIMELINESS

A. Facts Related to Timeliness

Tae Turner applied for PUA shortly after the pandemic started. At the time, he was marooned in Dutch Harbor, Alaska, having traveled there for work only to have the offer evaporate due to COVID-19. He was unable to afford the extraordinary fares for flights out of Dutch Harbor at that time (in the wake of the Ravn Air bankruptcy). PUA provided him with timely cash that enabled him to get back from Dutch Harbor and reach a place where he could resume employment. He credits it with saving his life.

Mr. Turner then found work with Silver Bay Seafoods in Valdez, and his PUA benefits did not continue. In November of 2020, however, he was notified that the PUA he had been paid in the spring was being retroactively denied because he ought to have been receiving unemployment benefits instead, and he was asked to repay the PUA benefits.

Mr. Turner credibly testifies that he was shocked by this determination and that he contacted the Division at about the time he learned of it and asked to appeal. He says the appeal evidently was not recorded. His recollection coincides with a DETS record of a call from Mr. Turner on November 30, 2020. Instead of taking an appeal, the representative apparently tried to transfer Mr. Turner directly to the Benefit Payment Control to work out a payment plan.

During this period, the logging of appeals was somewhat haphazard, and wait times for appeals that were logged were very long. Mr. Turner, who became homeless soon afterward, did not follow up with additional efforts to check on the status of his appeal. During a conversation with DETS on November 19, 2021, however, he mentioned having filed a prior appeal and the representative on that call informed him that none was in the system. The representative took in a new appeal at that time.

B. Determination

Tae Turner's appeal was flagged as untimely. This occurred because Alaska Regulation 8 AAC 85.151 provides a 30-day window for appeal, and Mr. Turner's appeal was not logged by DETS until a year after the first PUA denial notice was mailed out.

However, Mr. Turner's testimony, together with the DETS telephone log entry that corroborates important parts of his account, combine to make it more

likely than not that Mr. Turner in fact asked to appeal on November 30, 2020. The notice he was trying to appeal was dated November 4, 2020, and his initial request was therefore within the 30-day window. Once the appeal had been requested, it should have been recorded and should have subsumed the later denial of additional weeks of PUA that was sent on January 13, 2021. Accordingly, Mr. Turner will not be barred from challenging the PUA denials on account of timeliness.

PUA ELIGIBILITY

A. Facts Related to Eligibility for PUA

Based on prior, substantial employment with Pacific Stevedoring, Mr. Turner was eligible for either regular unemployment or Pandemic Emergency Unemployment Compensation (PEUC) in every week of 2020 up until his reemployment by Silver Bay Seafoods in the third quarter, *except* for two weeks that will be discussed momentarily. Later in 2020, he was laid off by Silver Bay Seafoods for pandemic-related reasons, but after that layoff until his next reemployment he was eligible for PEUC or Extended Benefits (EB, a program with substantial state funding) in every week until his reemployment as a cook in the spring of 2021. He eventually lost the cook position, for reasons unrelated to Covid, just before the expiration of the PUA program.

There were two weeks during the duration of the PUA program when Mr. Turner was *not* eligible for any other benefits. These were the weeks ending March 21 and March 28, 2020. In those weeks his benefits screen records “BX” (benefits exhausted).

B. Determination

PUA is a program of last resort. The federal CARES Act provides unambiguously that a claimant is not eligible for PUA if the claimant is eligible “for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation.”¹ Mr. Turner was eligible for one of these other programs in every week of the PUA program, except two, and thus he had no PUA eligibility in those weeks.

The two-week exception is the two “BX” weeks that ended March 21 and 28, 2020. DETS stated at hearing that those two weeks appeared to have been “overlooked” in the November 4, 2020 decision denying PUA benefits. Therefore, that decision (Letter ID L0006010519) will have to be modified so as not to deny PUA for those two weeks.

¹ CARES Act § 2102(a)(3)(A)(i).

UNEMPLOYMENT COMPENSATION ELIGIBILITY

A. *Facts Related to UI Backdated Filing*

In the summer of 2020, Mr. Turner worked for a substantial period for Silver Bay Seafoods in Valdez, earning \$7641.57. Before the end of September, he was laid off for reasons related to the pandemic.²

Mr. Turner filed for unemployment compensation. He was paid PEUC for the week ending September 5, 2020, and then either paid or credited with EB from the week ending September 12, 2020 through the week ending November 21, 2020. In the meantime, he moved to Pennsylvania and began looking for work there.

In November of 2020, it will be recalled, Mr. Turner learned that a substantial portion of his PUA claim from the previous spring had been denied on the basis that he was eligible for unemployment. His EB stopped being paid. As best as can be pieced together from the record and testimony, this led to a telephone call with DETS on November 30, 2020 in which it was explained to Mr. Turner that he would no longer be receiving UC because his unemployment benefits were being offset against a large overpayment of PUA benefits to which he had—as it had now been redetermined—never been entitled. Mr. Turner understood that he was being told that he might as well stop filing for unemployment since the UC benefits would simply be withheld to offset the PUA overpayment, and he would never receive them. To be fair, DETS does seem eventually to have told Mr. Turner that he *should* keep filing, as a way to pay down the PUA indebtedness, but this does not seem to have occurred until September 22, 2021, about ten months later.

Relying on his understanding that filing for UC was pointless, Mr. Turner stopped doing so. He then went into a mental health crisis and a period of homelessness. Eventually, with the help of a VA program, he was stabilized and returned to the workforce, working as a cook for a number of months for Chili's Grill & Bar in Pennsylvania. He left that job via a voluntary quit (which he does not contest) on August 25, 2021.

After leaving the Chili's job, Mr. Turner was advised by his VA counselor to seek to revive his Alaska UC claim from the previous winter, to the extent he was eligible, by asking to backdate his filings. He did so on August 30, 2021. DETS issued a denial the same day, basing it in part on the finding that "Your reason for not reopening your claim was within your control" and in part on the general rule that reopened UC claims are not backdated. Mr. Turner appealed two weeks later.

² This information comes from the PUA record rather than the UI record.

At some point during 2021, Mr. Turner sought Pennsylvania unemployment benefits, but was apparently told he should be filing in Alaska. He remains a Pennsylvania resident and all benefit filings he has made since approximately September of 2020 have been made from Pennsylvania.

B. Determination

In 2020-21, Mr. Turner had an extended period during which he did not file weekly as required. The sole issue to be addressed here is whether Mr. Turner should be permitted to make backdated filings for UC for that period.

The period in question runs from the week ending November 28, 2020 forward. As a practical matter, this means for the period from that week until he was employed by Chili's in Pennsylvania (which occurred on an uncertain date but was a number of months later). Mr. Turner has expressly disclaimed any desire to receive unemployment benefits—from any state—following his separation from Chili's.

In seeking to revive his claim after a lapse in filing, Mr. Turner is asserting a “reopened claim.”³ A “reopened claim” is a type of “initial claim.”⁴

If Mr. Turner were an intrastate claimant, backdating would almost certainly be impossible in his case.⁵ However, Mr. Turner is an interstate claimant.⁶ A department regulation, 8 AAC 85.110, sets out circumstances under which an interstate claimant can backdate an “initial claim” claim which, as we have seen, encompasses a “reopened claim” (one in which there was a gap in filing). Backdating is possible, but there is only one set of circumstances under which it can happen. The circumstances are:

(i) Backdating an Interstate Initial Claim at Agent State's Request. An interstate initial claim may be backdated up to one calendar year at an agent state's request if the liable state determines that it is liable and the agent state has established good cause for the backdate.

The “agent state” is the state from which the claim is being filed (here, Pennsylvania), even if that state has not been acting as an agent or facilitator

³ 8 AAC 85.010(a)(16).

⁴ 8 AAC 85.010(a)(10).

⁵ *E.g., In re Dennis*, 20 2350 (DLWD Appeal Tribunal, April 23, 2021).

⁶ This comes about as follows. In Mr. Turner's case, Alaska is a “liable state” as defined in 8 AAC 85.110(j)(5), because it is a “state against which an individual files, *from . . . another state*” (italics added). Mr. Turner has filed from Pennsylvania. “[A]n individual who claims benefits under the unemployment insurance laws of one or more liable states . . . directly with the liable state” is one type of “interstate claimant.” 8 AAC 85.110(j)(4)(A).

for the person's claim in the liable state.⁷

What this means in Mr. Turner's case is that his claims can be backdated only if there is a "request" from Pennsylvania, with Pennsylvania having established that there is good cause for the backdate.

Where DETS went wrong in this case was in being too hasty to render a decision and in selecting the wrong reasoning path. Mr. Turner requested backdated filing on August 30, 2021, and DETS denied the request instantaneously. In doing so, it recited the general language that would be used to deny backdating for an intrastate (not interstate) claimant, without acknowledging that claims for interstate claimants can be backdated.

Instead, Mr. Turner should have been told that his claim could only be backdated if he obtained a request for backdating from the state where he lives, and should have been given an opportunity to seek that request. Because this was not done when the request was made, it will be done now.

One additional item needs to be corrected. The Division led into its denial by stating "Your reason for not reopening your claim was within your control." The evidence taken at hearing indicates that this may not be accurate, or at least not wholly accurate, in that Mr. Turner may have stopped filing in Alaska because he was led to believe that doing so would be useless. Regardless of the truth of the matter, however, this issue is a determination for Pennsylvania, not Alaska. 8 AAC 85.110(i) assigns the establishment of "good cause" to backdate to the agent state, not the liable state.

This matter will be remanded to DETS to provide Mr. Turner with an opportunity to obtain an agent state request to backdate from Pennsylvania. If he does not do so within a reasonable period, DETS should deny the request to backdate from Mr. Turner on the basis that he lacks the agent state request required by 8 AAC 85.110(i).

DECISION

Appeal P21 1056 03: With regard to PUA, the appeal is **TIMELY**. On the merits, the DETS decision dated November 4, 2020 (Letter ID L0006010519) is **MODIFIED** and the DETS decision dated January 13, 2021 (Letter ID L0009012170) is **AFFIRMED**. ***Unless disqualified for reasons that have not been adjudicated, the claimant was eligible for PUA the weeks ending March 21 and March 28, 2020, and for no other weeks.***


⁷ 8 AAC 85.110(j)(1).

Appeal 21 1861 66: With regard to unemployment compensation, the claimant's appeal is sustained. The Division's August 30, 2021 decision is **REMANDED**. On remand, DETS shall:

- (1) explain to Mr. Turner any known process for seeking an agent state request to backdate;
- (2) provide Mr. Turner with a reasonable time (not less than 30 days) to try to obtain the agent state backdate request; and
- (3) upon receipt of a backdate request or the expiration of the reasonable period, whichever is earlier, decide whether the criteria for backdating in 8 AAC 85.110(i) have been met.

Jurisdiction is not retained. The decision as to whether the criteria for backdating in 8 AAC 85.110(i) have been met will carry new appeal rights.

DATED February 15, 2022.



Christopher Kennedy
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 February 15, 2022, this document was sent to: Tae Turner (by mail and by email); DETS UI Appeals Team (by email); DETS UI Technical Team (by email).


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.

**ALASKA DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT
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