

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

In the Matter of )  
 )  
SUVI BAYLY ) OAH No. 21-1106-PUA  
 ) Agency No. P21 339  
\_\_\_\_\_ )

**APPEAL DECISION**

**Docket Number:** P21 339 **Hearing Date:** July 20, 2021

**CLAIMANT APPEARANCES:** **DETS APPEARANCES:**

Suvi Bayly Tristan Varela  
Steven Mahoney, attorney

**CASE HISTORY**

The claimant, Suvi Bayly, timely appealed two determinations denying Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The first determination, dated January 26, 2021 (Letter ID L0009340218), denied PUA eligibility for the week ending February 8, 2020 through the week ending May 2, 2020. The second, dated January 27, 2021 (Letter ID L0009336469), denied eligibility for the week ending May 9, 2020 and ongoing. Both decisions found that Ms. Bayly was not impacted by COVID-19 in a manner that made her a “covered individual” as defined by section 2102 of the Act.

The Department of Labor referred the appeal to the Office of Administrative Hearings in June 2021. Under the terms of referral, the administrative law judge (ALJ) hears and decides the appeal according to procedures specific to PUA appeals. AS 44.64.060 procedures do not apply.

The recorded hearing took place on July 20, 2021. Ms. Bayly was represented by attorney Steven Mahoney. She testified under oath and submitted written materials. Tristan Varela represented the Division of Employment and Training Services (DETS).

The issue before the ALJ is whether the claimant meets the eligibility requirements of the Act.

**FINDINGS OF FACT**

Ms. Bayly established a claim for Pandemic Unemployment Assistance benefits effective the week ending February 8, 2020. DETS initially approved the claim and issued benefits for the week ending March 14, 2020 through the week ending October 3, 2020. On January 25, 2021 it redetermined the claim, issuing written notices dated January 26<sup>th</sup> and 27<sup>th</sup>, finding that Ms. Bayly was not a covered individual.

DETS concluded that the nonrenewal of the claimant's business lease in January 2020 - and her ensuing need to relocate her restaurant - was the primary cause of her lost income and ability to operate in 2020.

Ms. Bayly has been self-employed as a restaurant owner and operator since 2017, when she opened the Homer Spit Oyster Bar in Homer. The restaurant's busy season is from April through October each year. Ms. Bayly works year-round, using the off-season for planning, updating licenses and contracts, and completing an array of other tasks.

In late December 2019, the claimant was surprised to learn that the lease for her restaurant's location would not be renewed when it expired on January 31, 2020. She immediately began searching for a new lease site on the Homer Spit. By mid-January, she had been issued a pre-qualification letter for a loan to purchase real estate. In January and February 2020, she was actively negotiating lease terms and pursuing needed permits at three potential sites.

She abandoned the first possibility, in the Little Mermaid building, because a private investor backed out. The claimant agrees the deal fell through for reasons unrelated to COVID-19.

The second potential site, in a building owned by Chad and Crisi Matthews, fell through because the claimant felt the lease terms were unreasonable. Specifically, a five-year lease was too short to justify the cost of renovations that were needed. Ms. Bayly asserts that COVID-19 considerations also directly impacted the negotiations and resulted in her inability to move forward, citing banks' less attractive loan terms, a slower pace of negotiations and permit approvals, and difficulty getting supplies.

It is not clear when the negotiations for this site ended. Given the January 2020 dates on draft purchase agreements and proposed closing dates in February or mid-March, the deal likely fell through before mid-March, when COVID-19 began causing widespread disruptions. Even if negotiations continued past that time or financing terms had started to change, the evidence is that issues other than COVID-19 were the primary reason the deal fell through.

The third potential site involved a lease with the City of Homer to build a new restaurant facility on public land on the Homer Spit. The claimant has actively pursued the necessary permits. On April 9, 2020, she received a Letter of Permission from the Army Corps of Engineers authorizing piling and construction work for the project. The claimant explained that the permit was issued in an efficient and timely way.

This project remains a possibility, but Ms. Bayly appears unlikely to pursue it in the near term. She has not signed a lease with the city, and a number of financing and construction issues are unresolved. The claimant contends that COVID-19 impacts on the restaurant industry caused banks to be significantly more restrictive in their

lending and pandemic-related shortages have increased construction costs, thereby making the project unworkable.

There is insufficient evidence to support a finding that the claimant would have moved forward with this project but for COVID-19's impact on financing terms or construction costs. Many other factors also influenced that decision. And, even if Ms. Bayly had signed a lease and obtained acceptable financing, the timing of the Corps of Engineers permit suggests construction would not have begun until the summer of 2020. It was not shown that the restaurant would have been ready to open in 2020. This was because of the need for permits and new construction, not the pandemic.

Sometime in the spring of 2020, the claimant realized she was unlikely to relocate and re-open her restaurant in time for the summer season. She purchased a trailer and had it renovated and turned into a food truck. Her plan was to operate a mobile hot dog stand. She obtained a business license on May 5, 2020 for Spit Dogs. She did not open the business until mid-September 2020 because she could not get the trailer renovated and ready for business before that time. She attributes the delay in opening to COVID-19's impact on supply chains and worker availability.

The hot dog truck business was not as successful as hoped. Ms. Bayly closed it in mid-November 2020. At one time, she planned to sell the truck but now has decided to keep it.

### **RELEVANT STATUTORY PROVISIONS**

#### **The CARES Act of 2020, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance:**

(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—

(aa) the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(bb) a member of the individual's household has been diagnosed with COVID-19;

(cc) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;

(dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;

(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;

(ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

(gg) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;

(hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;

(ii) the individual has to quit his or her job as a direct result of COVID-19;

(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

(ll) 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);

(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 (UIPL) 16-20, Change 2, Issued July 21, 2020, by the U.S. Department of Labor:**

Clarification on item (kk) of acceptable COVID-19 related reasons. Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act provides for the Secretary of Labor to establish any additional criteria under which an individual may self-certify eligibility for PUA benefits. Section C.1.k. of Attachment I to UIPL No. 16-20 provides for coverage of an independent contractor whose ability to continue performing his or her customary work activities is severely limited because of the COVID-19 public health emergency. The example provided includes a driver of a ride sharing service who has been forced to suspend operations because of COVID-19. Question 42 of Attachment I to UIPL No. 16-20, Change 1, explains that an independent contractor who experiences a “significant diminution of work as a result of COVID-19” may be eligible for PUA. With these examples in UIPL Nos. 16-20 and 16-20, Change 1, the Secretary provides coverage under item (kk) to those self-employed individuals who experienced a significant diminution of services because of the COVID-19 public health emergency, even absent a suspension of services.

**APPLICATION**

The CARES Act, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance (PUA) defines a “covered individual” as a person who is not eligible for unemployment benefits under any State or Federal program and who is unemployed because of one or more specified reasons related to the COVID-19 pandemic. There is no dispute the claimant is ineligible for benefits from other unemployment programs.

The claimant argues she was directly impacted by COVID-19 and prevented from continuing her restaurant business in a number of ways, including government mandates limiting dine-in restaurant operations, reduced income and demand for services across the restaurant industry, less favorable loan terms to finance a new restaurant site, and higher construction or renovation costs.

Guidance from the U.S. Department of Labor in UIPL 16-20 Change 2, above, holds that a self-employed individual whose ability to continue performing his or her customary work activities is severely limited because of COVID-19, or who experiences a significant reduction in work as a direct result of the pandemic, may be considered a covered individual.

The claimant’s restaurant lease was not renewed in January 2020 for reasons unrelated to COVID-19. The loss of the business location precipitated a crisis that involved significant expenses even absent a pandemic. Despite her many efforts, the claimant could not find a new site on terms she could agree to, and she did not open the Homer Spit Oyster Bar in 2020. As a result, she was not directly impacted by government mandates limiting dine-in services or the general drop in demand and income that many operational restaurants experienced during the pandemic.

Eligibility based on Ms. Bayly's inability to lease a new restaurant site and to re-open in 2020 cannot be sustained. Negotiations involving the restaurant's new location were complex. They involved coordination with multiple city and harbor offices, agreement on lease terms with the property owner and on loan terms with a lender, and contracts for renovation or construction work as needed. In the case of a new restaurant facility, the process was even more complicated.

The first two lease sites the claimant investigated proved unworkable for reasons largely unrelated to the pandemic. Even if COVID-19 played a role in raising the cost of financing and construction for the second and third sites, the causal chain is not direct enough to fall within the scope of the Act. Ms. Bayly opted not to pursue those business options for a variety of reasons, including financing and construction costs she could not agree to. However, it cannot be said with any confidence that the pandemic directly impacted the claimant by preventing her from moving forward at either the second or third location. Additionally, for the third location, it does not appear the restaurant would have been ready to reopen during the 2020 tourist season because of the construction required.

During the hearing, DETS agreed Ms. Bayly qualifies as a covered individual from the week ending May 9, 2020 through the week ending September 19, 2020. This is the period in which she was licensed and likely would have been operating her food truck business but was prevented from doing so by pandemic-created delays in her ability to renovate and supply the truck.

The food truck was a new and separate business. It had no history of pre-pandemic income. The claimant therefore cannot show it experienced a significant diminution of services after it opened that was a direct result of the pandemic.

The claimant is eligible for PUA benefits for the week ending May 9, 2020 through the week ending September 19, 2020.


To the extent Ms. Bayly believes the Department should waive or mitigate its recoupment of overpaid PUA benefits for other weeks, the Division has advised that the Department's Benefits Payment Control office handles these issues. The Benefit Payment Control office can be reached at (907) 465-2863, 1 (888) 810-6789, or [jnu.bpc@alaska.gov](mailto:jnu.bpc@alaska.gov).

## **DECISION**

The determination dated January 26, 2021 in Letter ID L0009340218 is **AFFIRMED**. The claimant is not eligible for PUA benefits for the week ending February 8, 2020 through the week ending May 2, 2020.

The determination dated January 27, 2021 in Letter ID L0009336469 is **REVERSED IN PART**. The claimant is eligible for PUA benefits for the week ending May 9, 2020 through the week ending September 19, 2020.

Dated: July 23, 2021


  
For: Kathryn Swiderski  
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 July 23, 2021 the foregoing decision was served on Suvi Bayly (by mail and email to her attorney, Steven Mahoney). A courtesy copy has been emailed to the DETS UI Technical Team, UI Appeals Team, & UI Support Team.

  
Office of Administrative Hearings