

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

In the Matter of)
)
 TASHINA FLETCHER) OAH No. 21-1787-PUA
) Agency No. P21 876 03
 _____)

APPEAL DECISION

Docket Number: P21 876 03

Hearing Date: September 16, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Tashina Fletcher

None

CASE HISTORY

Tashina Fletcher of Eagle River appealed a May 21, 2021 determination denying Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136 for the period beginning the week ending December 26, 2020. The decision was recorded in Letter ID L0013227528. The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in June 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 heard in a recorded hearing on September 16, 2021. Ms. Fletcher testified under oath. At its own election, the Division of Employment and Training Services (DETS) provided only written materials for the hearing, and was not a live participant.

The issue before the ALJ is whether the claimant's appeal was timely and, if so, whether she meets the eligibility requirements of the Act.

TIMELINESS

Ms. Fletcher's appeal was flagged as untimely. This seems to have happened because Alaska Regulation 8 AAC 85.151 provides a 30-day window for appeal, and the phone call from Ms. Fletcher formally requesting an appeal occurred 35 days after the notice of her adverse decision was mailed out. However, to keep this in perspective, one must recall that the 30-day deadline automatically extends under various counting rules to account for weekends, holidays, and mailing time. See 8 AAC 85.151(b) and Alaska Rule of Civil Procedure 6. Under the standard counting rules, Ms. Fletcher's

appeal would ordinarily be due on June 24, 2021, and she called in her appeal on June 25, 2021, one day afterward.

The presumptive appeal period under 8 AAC 85.151 can be further extended “for a reasonable time” if the failure to file within the period “was the result of circumstances beyond the appellant’s control.” In Ms. Fletcher’s case, that rule should be applied to extend the appeal period by one day, because she was in an extraordinarily confusing posture with DETS.

First, Ms. Fletcher’s claim had already been denied once before, in December of 2020, and she had appealed that determination. The appeal was referred to the Office of Administrative Hearings (OAH). While her appeal was pending, DETS discussed the issue with Ms. Fletcher, telling her that her case was going to be redetermined at least partly in her favor. It did redetermine the case on May 21, 2021. However, the redetermination apparently mooted Ms. Fletcher’s earlier appeal was not communicated to OAH. OAH tried to hold a hearing on May 28 and then dismissed Ms. Fletcher’s case for failure to appear. Meanwhile, Ms. Fletcher became aware that the redetermination did not solve eligibility issues relating to weeks ending after December 19, 2020. Thinking these should be addressed in her original appeal (as, indeed, they could have been, had OAH been timely informed by DETS of the subsequent actions on the file),¹ she tried to get the original appeal reinstated. She did so in an email to the Department of Labor Appeals Tribunal on June 23, 2021 – which was before her appeal deadline on Letter ID L0013227528 had expired under standard counting rules. She was also in regular contact with DETS over the phone, as shown in DETS phone logs. She learned that the proper procedure was to file a fresh appeal on Letter ID Letter ID L0013227528, and she did so just two days later, on June 25, 2021. This was a diligent effort to put the matter in contest and respond to the procedural confusion created, in large part, by deficiencies in communication between state agencies.

On this record, the appeal deadline should be extended by one day and the appeal should be treated as timely.

FINDINGS OF FACT

Tashina Fletcher has been a licensed real estate salesperson for eight years, operating as an independent businessperson within a brokerage. She claims a downturn in business volume due to COVID-19, primarily because difficulties obtaining childcare reduce the effort she can devote to the business. From the inception of her claim through the week ending December 19, 2020, DETS has now accepted the factual basis for her claim and has granted and paid benefits. This determination will not be revisited here.

¹ See AS 23.20.415(c).

Beginning the week ending December 26, 2020, DETS has disallowed benefits for a single reason: Ms. Fletcher’s real estate license became inactive in December 2020 due to the loss of a brokerage relationship (all real estate salespeople must hang their licenses in a brokerage). The Division believed the inactivation date to be December 22, 2020. The division reasoned that a real estate salesperson who is not maintaining an active license cannot attribute her downturn in business to COVID-19; instead, the lack of business is because she does not have an active license.

Ms. Fletcher’s real estate license did become inactive, due to lack of a brokerage, at a date no later than December 22, 2020 and probably somewhat sooner.² It became active again on March 18, 2021 under the auspices of a new brokerage.

The three-month gap in active licensure came about as follows. Ms. Fletcher became embroiled in an acrimonious dispute with the homeowners’ association (HOA) for the home she owns. Ms. Fletcher aired her side of the dispute online. The brokerage where Ms. Fletcher was hanging her license happened to also be the property manager for the HOA. The broker was unhappy with Ms. Fletcher airing grievances online about a client of the brokerage. Ms. Fletcher also was not up to date on her brokerage fees. More likely than not, the broker terminated his relationship with Ms. Fletcher for these reasons.³

Ms. Fletcher was able to borrow money to enroll in a new brokerage and get her license re-activated. She applied for reactivation on March 16, 2021, and the reactivation was effective only two days later. In the spring and summer of 2021, she has worked with some clients but has not pursued the real estate business aggressively. She has been trying to launch two new businesses, one involving sign rentals and another involving chaga harvesting and marketing.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

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

² The Real Estate Commission received the returned license from the broker on December 1, 2020, and it is likely that Ms. Fletcher would have been unable to practice her profession legally after that occurred.

³ The broker claimed on a Real Estate Commission form that he was “unable to locate” Ms. Fletcher, but this seems unlikely to be the true explanation, given that he was the property manager for the community she lived in.

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—

* * *

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

UIPL 16-20, Change 2 Issued by USDOL July 21, 2020

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 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 one of a list of reasons related to the COVID-19 pandemic. It is undisputed that Ms. Fletcher had no wage employment in recent years that made her eligible for unemployment benefits.

DETS ultimately found that Ms. Fletcher had a real estate business that was substantially affected by the pandemic, and granted benefits for the period during which it believed she was an actively-licensed salesperson able to practice that profession. It believed, however, that if the license was inactive, Ms. Fletcher could not attribute her lack of business activity to a pandemic-related downturn; the cause was instead her own lack of diligence in maintaining a license.

The DETS reasoning is sound in the context of this case. There may be circumstances in which a professional might reasonably allow a license to lapse during a period of complete inactivity caused by the pandemic, in order to save expense, but this is not why Ms. Fletcher's license lapsed. It lapsed because she had alienated her broker and had not paid a brokerage fee. The failure to cover the brokerage fee was not closely related to COVID-19, in that Ms. Fletcher was later able to re-activate her license without much apparent difficulty. She just did not do so right away. I decline to overturn the DETS determination that COVID-19 was not the cause of Ms. Fletcher's lack of real estate activity and income during the period when her license was inactive.

Once the license was reactivated, the basis for the DETS decision evaporated. Indeed, DETS seems to have agreed, because on June 25, 2021, upon seeing the reactivated license, it reinstated benefits.⁴ However, the license was actually reactivated on March 18, 2021, and the effect of the decision in Letter ID L0013227528 should have ended in that week.


It does not follow that Ms. Fletcher was eligible for PUA from that time forward. DETS is not precluded from identifying other reasons for disallowance. However, these would have to be articulated in a new decision, from which new appeal rights would flow.

DECISION

The appeal is timely. The determination in Letter ID L0013227528 is **MODIFIED**.

The claimant was not eligible for benefits from the Pandemic Unemployment Assistance (PUA) program from the week ending December 26, 2020 through the week ending March 20, 2021. She may be eligible thereafter, unless disqualified for reasons not addressed herein.

Dated: September 29, 2021


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.

⁴ Exhibit 1, p. 28.

CERTIFICATE OF SERVICE

I certify that on September 29, 2021 the foregoing decision was served on Tashina Fletcher (by mail and by email). A copy was emailed to the UI Support Team, UI Technical Team, and UI Appeals Office.

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Office of Administrative Hearings