

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

In the Matter of )  
 )  
SHELBYE BRUNQUIST ) OAH No. 21-1807-PUA  
 ) Agency No. P21 895  
\_\_\_\_\_ )

**APPEAL DECISION**

**Docket Number:** P21 895

**Hearing Date:** October 6, 2021

**CLAIMANT APPEARANCES:**

**DETS APPEARANCES:**

Shelbye Brunquist

None

**CASE HISTORY**

The claimant, Shelbye Brunquist timely appealed a June 11, 2021 determination which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136. The Department of Labor referred the appeal to the Office of Administrative Hearings on or about August 2, 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 October 6, 2021. The claimant appeared and testified under oath. At its own election, the Division of Employment and Training Services (DETS or Division) provided only written materials for the hearing and was not a live participant.

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

**FINDINGS OF FACT**

Shelbye Brunquist established a claim for Pandemic Unemployment Assistance benefits effective the week ending December 6, 2020. The Division determined that the claimant was not eligible for PUA benefits because she was not impacted by COVID-19 in a manner that made her a covered individual under the program.

The claimant testified that she last held a regular job in 2018, when she worked for the Alaska Department of Fish & Game. In 2019 she apparently had very little income. At the hearing, she was unable to provide an estimate of her income for 2019, but she testified that it was a negligible amount, resulting from a single house-painting project she did for her boyfriend. She also did some work in 2019 doing online sales of goods for two friends, essentially as a favor to them. She was not paid,

*per se*, but one of the friends never collected the sales proceeds from her, so she kept the money.

Just prior to the onset of the COVID-19 pandemic in March 2020, the claimant answered an advertisement from Mr. Randy Pitney, who was seeking help selling his extensive collection of antiques and artwork online and at auctions. They met to discuss the project on or about March 16, 2020; he told her that he had met with four other people seeking to work for him, but he felt that she was the best candidate and “offered [her] the job.” They discussed the terms under which she would do the work – they agreed she would be paid 8% of the total proceeds. The claimant testified that she never viewed the collection of items that Mr. Pitney wanted to sell and was never provided an inventory or other listing of the items. Based on his comments during their one meeting, however, she estimated that the collection was valued at roughly \$50,000. She estimated that marketing and selling the collection would take her at least six months.

According to an affidavit submitted by the claimant, later that evening after their meeting Mr. Pitney sent her a text stating that “due to the new news on the pandemic he wanted to wait a few days before proceeding” with the project. On March 24, 2020 he sent her “another message saying that he wanted to wait until the pandemic settled down before doing anything.” She waited several weeks, then texted him about the project on May 1, 2020; when she told him she had just gotten over a cold, he replied “it’ll be awhile if you [were] sick ... but I’m in no rush.” After that she was never able to get in touch with Mr. Pitney again, and the project never went forward.

The claimant applied for PUA benefits on February 8, 2021. The Division initially approved her application and paid her benefits for the week ending December 12, 2020 through the week ending January 16, 2021. The Division, however, later determined that the claimant was not eligible for a portion of her PUA benefits (from the week ending January 2, 201 forward) because she was not impacted by COVID-19 in a manner that made him a “covered individual” under the program. When DETS provided this notice to the claimant, she was apparently told she would have to repay a sum of overpaid benefits. It is not clear whether she was ever given a formal written notice to repay, or whether she has ever been informed of the opportunity to seek a waiver of the repayment obligation, or of the opportunity for a hearing regarding the overpayment liability and repayment obligation.

DETS’s June 11, 2021 denial notice (Letter ID L0013308501) states its reasoning for denying eligibility as follows:

Under Section 2102 of the CARES Act of 2020, Public Law 116-136, you do not meet the program eligibility requirements beginning the week ending January 2, 2021. ... The agency has reviewed your provided documentation and determined it does not substantiate your employment/self-employment as required by the Continued Assistance Act, Public Law 116-260. (Exhibit 1, p. 3.)

The claimant timely appealed DETS's partial denial of her eligibility for PUA benefits. At the time of the October 6, 2021 hearing, there was still an outstanding balance of overpaid PUA benefits that the Division presumably intends to recoup from the claimant.

### **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 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

(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

(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).

### **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 in this case that the claimant’s history of employment did not qualify her for a claim for regular or extended unemployment or pandemic emergency unemployment benefits in 2020-2021.

The claimant stated in filing her appeal with the Division that she should have been found eligible for PUA benefits because “I had a job lined up and I was supposed to start ... and because of the pandemic it was pushed off and never started.” (Exhibit 1, p. 1.) During the hearing, the claimant agreed that she did not expect to be hired as an “employee” of Mr. Pitney, and she characterized their agreement as an independent contractor arrangement, where she would inventory his collection, market the items as she thought best, sell them online or at in-person auctions, and would receive an 8% commission on the sales. It is this loss of work as an independent contractor that the claimant argues should qualify her for PUA benefits. At the hearing, she successfully demonstrated the confirmed arrangement with Mr. Pitney through her testimony and the text messages they exchanged in March through May 2020.

As noted above, a self-employed, independent contractor can be eligible for PUA benefits if the pandemic caused them to experience a “significant diminution” of income. In order to show such an impact, however, the claimant must be able to demonstrate a history of supporting herself with income from the area of self-employment – in the absence of such, a person cannot demonstrate a “diminution” of income as a result of the pandemic. In this case, the claimant did not have a history of supporting herself from the online sales of goods. She had performed such work for herself on occasion in the past, and in 2019 she did such projects for two friends and had inadvertently retained money from one of them when the friend failed to collect the sales proceeds (and in any event, the claimant characterized those proceeds as negligible). The claimant’s undisputed track record of self-employment did not establish that she suffered a diminution of income from the pandemic, and therefore the Division’s denial of her eligibility for PUA benefits was correct.

During the hearing, the claimant expressed concern at the possibility that in the near future she may be faced with an effort by the Department of Labor to recoup the overpaid PUA benefits that she received in early 2021. The claimant, however, may

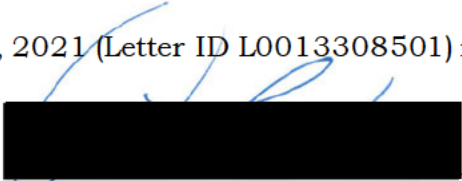
qualify for a waiver from recoupment or, if a waiver is not granted, she must at least be afforded an appeal hearing in which such matters as estoppel could be explored.<sup>1</sup> The present referral does not encompass these issues, and the present decision does not decide them for or against the claimant.

The Division has advised OAH that its Benefit Payment Control (BPC) office handles **waiver requests for overpayments and recoupments**.<sup>2</sup> 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](mailto:jnu.bpc@alaska.gov).

### DECISION

The determination issued on June 11, 2021 (Letter ID L0013308501) is **AFFIRMED**.

Dated: January 11, 2022,


  
Andrew M. Lebo  
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 January 11, 2022, the foregoing decision was served on Shelby Brunquist (by U.S. mail & email). A courtesy copy has been emailed to the DETS UI Technical Team, UI Support Team, and UI Appeals Team.

  
Office of Administrative Hearings

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<sup>1</sup> When DETS seeks repayment, the claimant must be informed of the opportunity for a hearing on the overpayment liability, the opportunity to seek a waiver excusing her from repayment, and any other matters covered in UIPL 16-20 Change 4, Sec. 4(d) & Att. I sec. C.21.c. (See Appendix to this Decision.)

<sup>2</sup> The BPC's overpayment waiver form can be obtained at: [https://labor.alaska.gov/unemployment/documents/Overpayment\\_Waiver\\_Application.pdf](https://labor.alaska.gov/unemployment/documents/Overpayment_Waiver_Application.pdf).

## APPENDIX

### EXCERPTS OF RELEVANT PROVISIONS OF LAW - OVERPAYMENTS

#### **Unemployment Insurance Program Letter (UIPL) 16-20, Change 4, attachment I, sec. C.21.c. Issued January 8, 2021, by the U.S. Department of Labor:**

1. *Opportunity for a Hearing.* A State may not require repayment of a PUA overpayment until it determines that the payment was an overpayment, the individual was provided notice of the determination, the individual had an opportunity for a fair hearing, and the determination is final.

2. *Authority to Waive Overpayments (new).* Section 201(d) of the Continued Assistance Act amends Section 2102(d) of the CARES Act and authorizes states to waive the repayment if the state determines that the payment of PUA was without fault on the part of any such individual and such repayment would be contrary to equity and good conscience. This waiver authority applies to overpayments that meet this criteria at any time since the PUA program began.

The waiver provision is permissive. Therefore the state may choose not to waive the PUA overpayment. A state may also, if a state has an existing [unemployment compensation] law that provides for the waiver of overpayments for equity and good conscience, apply its own definition of the terms “equity and good conscience” in applying the waiver.

If a state UC law provides for the waiver of overpayments but does not include a provision defining “equity and good conscience” the state must use the following provisions for equity and good conscience, when assessing whether an individual overpayment may be waived.

It would cause financial hardship to the person from whom it is sought;

The recipient of the overpayment can show (regardless of his or her financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment either he/she has relinquished a valuable right or changed positions for the worse; or

Recovery could be unconscionable under the circumstances.

States that choose to waive overpayments under Section 201(d) of the Continued Assistance Act must notify all individuals with a non-fault overpayment of their ability to request a waiver. The notification must include how to request the waiver.

#### **8 Alaska Administrative Code 85.220. Recovery of overpayments**

(a) A determination of overpayment liability issued under AS 23.20.390 will include a statement of the right to request a waiver of repayment of the overpayment. An individual may request a waiver within 30 days after the date on which the determination of liability becomes final. The director may extend this period if the request is delayed by circumstances beyond the individual's control.

(b) The director shall waive repayment of an overpayment of benefits to an individual under AS 23.20.390 if

- (1) the individual has died or received the benefits in good faith;
- (2) repayment would be against equity and good conscience; and
- (3) the request for a waiver meets the requirements of this section.

(c) Benefits have been received in good faith if the overpayment was received without fault by the individual, and the individual did not have the capacity to recognize that he or she was incorrectly overpaid. Benefits have not been received in good faith if the individual (1) negligently reports or fails to report information, which results in the overpayment; or (2) knew or should have known that the individual was not lawfully entitled to receive the benefits.

(d) Repayment of an overpayment is against equity and good conscience if

(1) repayment in 12 consecutive monthly installments would cause great hardship to the individual, considering the current and potential income and other financial resources available to the individual and the individual's family;

(2) the overpayment resulted from a decision of the department or a court overturning a determination of eligibility made at any level of appeal, and the individual did not withhold or conceal pertinent information on any claim for benefits or in any investigation or proceeding;

(3) the individual received the overpaid benefits by relying on clearly incorrect advice, given to the individual by the division or an employment security agency of another state, which the individual could not recognize as incorrect; or

(4) the overpayment cannot be waived under (1) - (3) of this subsection, but the department determines that recovery would be injurious to the individual after consideration of the standards in (1) - (3) of this subsection, and any extraordinary circumstances.

(e) A waiver of repayment of the overpayment will not be granted if the overpayment is the result of a false statement or misrepresentation of a material fact, or failure to report a material fact.