CHAPTER 8
REASONABLE ASSURANCE

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2.8.1 INTRODUCTION

Determinations of reasonable assurance are neither eligibility determinations nor disqualifications; rather, they are valid original claim determinations. The weeks of employment and wages earned with educational institutions cannot be used to establish a claim or a benefit rate so long as the evidence establishes that the claimant was given reasonable assurance of performing work in the next semester or year, or after a holiday or vacation period under particular circumstances. Reasonable Assurance means "the availability of a job,"[1] but is not intended to mean a guarantee of employment.[2]

Pursuant to Labor Law § 590 (10), reasonable assurance exists when the educational institution employer expresses a good-faith willingness to rehire a professional for the next academic year or term and the economic terms and conditions in the new school year or term are not expected to be substantially less favorable than in the prior year or term.

Additionally, Labor Law §§ 590 (10) excludes, for the purposes of establishing a valid original claim or benefit rate during a customary vacation period or holiday recess, wages paid to a claimant who worked for an educational institution if the claimant worked immediately prior to the vacation period or holiday recess and has reasonable assurance of working immediately following such period. Labor Law §590 (11) contains the same provisions but applies to non-professional employment at educational institutions.

2.8.2 SUBSTITUTE TEACHERS

The majority of cases adjudicated by the Unemployment Insurance Appeal Board under this statute involve substitute teachers seeking benefits during the summer break between academic years. Whether such teachers are given reasonable assurance will depend on the record on these factors: the contents of the letter sent to the claimant; the list used by the employer to obtain the services of a substitute; the competency of the employer's witness(es); the manner in which the employer uses the list; and whether the economic terms and conditions will be substantially the same in the coming school year as they were in the prior school year.

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[1] *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 5-17 (December 22, 2016).

[2] *See, e.g.,* Appeal Board No. 543951 ("[R]easonable assurance does not mean a guarantee of employment; it means that the educational institution will use its best efforts to employ the claimant").

THE REASONABLE ASSURANCE LETTER

To establish that a claimant was given reasonable assurance, the evidence must establish that the offer of employment meets the criteria established by the United States Department of Labor.[3] These criteria include the following:

1. The offer of employment may be written, oral, or implied, and must be a genuine offer, that is, an offer made by an individual with actual authority to offer employment. Thus, if someone without authority to commit the educational institution to employing an individual makes the offer, this prerequisite is not met.

2. The employment offered in the following year or term, or remainder of the current academic year or term, must be in the same capacity.

3. The economic conditions of the job offered may not be considerably less in the following academic year or term (or portion thereof) than in the first academic year or term (or portion thereof). The Department interprets "considerably less" to mean that the economic conditions of the job offered will be less than 90% of the amount the claimant earned in the first academic year or term.

It is the employer's responsibility to demonstrate through competent evidence and witness testimony that an offer was made to the claimant that meets these criteria. The Board has found the employer's witness competent to testify as to the contents of the letter when the witness assisted in drafting the reasonable assurance letter.[4]

The fact that the letter does not specifically state that the claimant's name would be or was on a substitute list does not invalidate the letter, as UIPL 5-17 does not impose such a requirement.[5]

A reminder to the claimant to complete the renewal process to be eligible to receive assignments does not render the letter insufficient to constitute an offer of reasonable assurance so long as it

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[3] Employment & Training Administration Unemployment Insurance Program Letter (UIPL) 5-17, dated December 22, 2016.

[4] *See, e.g.,* Appeal Board No. 598425.

[5] Appeal Board No. 600418 (letter sent by the school districting stated that "that the employer intended to continue to employ her in a 'SUB TEACH PENDING-CERT position' in the 2017-2018 school year, in the same manner and on substantially the same terms and conditions of employment that she had been employed in the prior year, and that the employer expected the claimant to earn not less than 90% of her 2016-2017 earnings during the 2017-2018 school year". The Board concluded that there was no conflict with *Matter of Sandick*, 197 A.D.2d 737 [3rd Dep't 1993], as that decision was based on the fact that the letter in that case "placed the burden on claimant to contact the schools if he was interested in teaching" [at 738]. The Board's decision ruled that prior Board decisions requiring that the reasonable assurance letter state that the claimant's name was on a substitute list should no longer be followed).

contains the three necessary elements.[6] Additionally, advising a claimant that he or she must continue to meet certain statutory requirements and update his or her availability with the employer or electronic system does not negate a finding that the letter satisfies the requirements of reasonable assurance. [7] Further, the inclusion of a section for the claimant to complete and return the letter or click or sign a confirmation that the letter was received and read, does not turn the letter into a letter of inquiry only.[8]

Many educational employers send reasonable assurance letters electronically. For example, the New York City Department of Education sends a letter to substitutes' Department of Education email addresses. The substitutes are required to click on a link to view the text of the letter and to confirm that they viewed and read the letter.[9] Since 2014, the letter has stated that the claimant's name is on an electronic register, which has been used to grant access to assignments during the prior school year and will continue to be used to grant access to assignments in the next school year.[10] The letter also states that the economic terms and conditions are expected to be the same in the next school year as in the prior school year and that the employer anticipates as much work for occasional per diem substitutes during the next school year as was available in the prior school year.[11] The Board has held that the current version of the Department of Education's reasonable assurance letter (2018), which has remained largely the same since 2014,[12] is sufficient to constitute an offer of reasonable assurance.[13]

The claimant's receipt of the employer's letter is not dispositive and the fact that a claimant may not have physically received the letter does not necessarily preclude a finding of reasonable assurance.[14] If the claimant alleges non-receipt of the letter, the employer must produce a witness competent to testify to the mailing of the letter.[15]

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[6] Appeal Board No. 598228; 582471; 582547.

[7] Appeal Board No. 582612.

[8] *Id.*; Appeal Board No. 593755.

[9] *See* Appeal Board No. 593755.

[10] *See* Appeal Board No. 583265.

[11] *Id.*

[12] *See* Appeal Board Nos. 588162, 593456, 599535.

[13] *See* Appeal Board Nos. 582547, 582520, 582471.

[14] Appeal Board No. 549360 ("reasonable assurance may exist even if a claimant never receives the communication intended to provide the reasonable assurance").

[15] *See, e.g.,* Appeal Board No. 576168 (no reasonable assurance found where claimant alleged non-receipt of letter, employer's witness was not individual responsible for mailing, and had no personal knowledge of the mailing).

Where the non-receipt of the letter is due to the claimant's inaction, it does not affect the determination of whether an offer of reasonable assurance was made. For example, in Appeal Board No. 588162, the employer sent letters of reasonable assurance via the substitute teachers' individual work e-mails. The claimant had been having trouble accessing her work e-mail, but failed to notify the employer of the issue and subsequently never received the reasonable assurance letter. The Board held "the claimant's inaction (failing to access her work e-mail, and failing to seek assistance from the employer to fix her work email so that she could access it) does not affect our determination of whether an offer of reasonable assurance had been made by the employer" and stated the Board has repeatedly held that it is the "action of the employer and not the action or inaction of the claimant that satisfies the statutory requirements."[16]

The offer of reasonable assurance contained in the notification sent to substitutes may contain instructions that the substitute must complete renewal requirements towards the end of the summer to be eligible to work in the next school year.[17] These requirements could include taking required workshops through the Department of Education (in New York City) or professional educational credits.[18] In some cases, the claimant may fail to complete the renewal requirements by the deadline, and so is not eligible to work at the beginning of the next school year. However, as the employer is not aware of the claimant's ineligibility to work at the time the reasonable assurance letter is sent, the claimant's failure to obtain all renewal requirements does not prevent the employer from offering good faith reasonable assurance.[19] As long as the claimant is eligible to work at the time the reasonable assurance is sent, the employer's offer is a good faith offer of reasonable assurance[20] if the other requirements have been met.[21] The same applies to disciplinary suspensions that occur after the reasonable assurance letter is sent.[22]

THE COMPUTERIZED LIST

Prior to the rise of the personal computer, school districts maintained a physical paper list of substitute teacher names and telephone numbers. School administrative employees used that list to manually place telephone calls to substitute teachers for work when there was an opening

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[16] Appeal Board No. 588162

[17] *See* Appeal Board No. 588584.

[18] *Id.*

[19] *Id.*; Appeal Board No. 598164.

[20] *See* Appeal Board Nos. 588584, 598164,

[21] Appeal Board No. 598164 (concluding that the claimant's subsequent failure to meet the renewal requirements did not prevent the employer from offering reasonable assurance but finding no reasonable assurance where the Sub-Central system did not offer at least 90% of the days the claimant worked).

[22] *See* Appeal Board No. 599332.

due to a regular teacher absence. As the method of calling substitute teachers evolved to the use of automated electronic calling systems, the term "list" survived and still refers to the group of substitute teachers educational employers call to fill teaching positions in their district when a regular teacher is absent, even though the list is more than likely kept electronically and is no longer a physical list.[23]

Presently, many school districts employ one of several different automated electronic calling systems, however, they all work in essentially the same manner. The New York City School District's Sub-Central System is similar to the AESOP system used by many upstate school districts, including the Buffalo City School District; the SmartFind System used by the Rochester City School District; and the Sub-it system used by the Syracuse City School District.

THE SUB-CENTRAL SYSTEM

Sub-Central is an automated system for hiring substitutes developed by a vendor, E-School Solutions, for the New York City Department of Education.[24] Upon hire, a substitute's information is entered into the Sub-Central system and the substitute is instructed to register.[25] During the registration, the substitute must provide information, including a callback number, and confirm name and address.[26] Subject matter and location classifications become associated with the profile as well.[27] For teachers, subject classifications are the subjects they are willing to teach,[28] whereas for paraprofessionals, subject classifications include gender, language, and special training.[29] Location classifications are the school districts the substitutes are willing to work in.[30] In addition, substitutes may be put on priority lists, school-created lists of substitutes, that are first called during the automated calling process.[31]

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[23] *See, e.g.,* Appeal Board No. 551885 (electronic registry is treated as the equivalent of a substitute list maintained by a school).

[24] While this section addresses the specifics of the Sub-Central System, most electronic calling systems generally work in the same manner. There may be variations between systems and if it is material to a finding of reasonable assurance, the record must be developed on the specifics of the system utilized by the particular employer.

[25] *See* Appeal Board No. 598838.

[26] *See* Appeal Board No. 598204.

[27] *See id.*

[28] *See* Appeal Board No. 576449.

[29] *See* Appeal Board No. 592579.

[30] *See* i*d.*

[31] *See* Appeal Board No. 595441.

When a fulltime staff member is going to be absent, the staff member or a school administrator, reports the absence to Sub-Central.[32] Sub-Central then generates lists of substitutes to whom to offer the assignment. The first list is the priority list created by the school where the vacancy is located. The second list is a list of substitutes, with matching subject and location classifications to the assignment. The third list is the general list of substitutes in the borough in which the school with the vacancy is located. All lists are supposed to be called one time in a random order. [33] There are designated calling periods in the mornings and evenings.[34] When a substitute answers a call, the substitute hears an automated recording, asking for login credentials. After logging in, the substitute hears details about the assignment, and then is presented with the option of accepting or declining the assignment. [35] If declining, the substitute can choose several options for the reason for declining.[36]

In addition, the assignments registered with Sub-Central can also be accessed by substitutes through the Sub-Central website.[37] Substitutes are then able to search for available assignments based on their profiles.[38] Once a substitute accepts a website assignment, the Interactive Voice Response (IVR) process will stop calling to offer the same days of work.[39] Administrators can also hire substitutes directly. An administrator can go into Sub-Central and place a substitute into an assignment directly. Once that occurs, the IVR system will stop calling the selected substitute to offer the same days of work. Many administrators do not put the assignment in Sub-Central, in which event the IVR system will continue to call the substitute to offer the same days of work.

Substitutes can make themselves unavailable to receive calls for particular days of the week or dates.[40] The IVR system will not call to offer work for a day the substitute has made herself unavailable.[41] Also, if the claimant makes herself unavailable for a limited number of days, the IVR system will not call to offer a longer assignment that includes those dates.

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[32] *See* Appeal Board No. 576329.

[33] *See* Appeal Board No. 595441.

[34] *See* Appeal Board No. 583408.

[35] *See* Appeal Board No. 592017.

[36] *See* Appeal Board No. 582584.

[37] *See* Appeal Board No. 598838.

[38] *Id.*

[39] *Id.*

[40] *See* Appeal Board No. 599534.

[41] *See* Appeal Board No. 599293.

WITNESS COMPETENCY

It is the responsibility of the employer to demonstrate with competent testimony from knowledgeable witnesses concerning the employer's personnel practices and procedures that these basic conditions have been met. Absent proof that these conditions have been satisfied there is no reasonable assurance of employment in an instructional capacity. It is necessary for each witness to establish his or her competency at each hearing, even if the Board has held them competent in other cases.[42]

The employer's "personnel practices and hiring procedures" means, for purposes of reasonable assurance cases, how the employer hires substitute teachers. At the time of hire, the substitute teacher's name is added to the employer's electronic list. The employer's witness must be able to explain on the record the *compilation* and *use* of the list to call substitute teachers for work.[43]

"Compilation" of the list means "the inclusion of names, and qualifications, if any, of substitute teachers in the list/automated system for the relevant years."[44] The compilation of the list is intertwined with and part of the process the employer uses to hire substitute teachers. "Use" of the list means the "procedure involved in calling substitute teachers to cover full-time teachers' absences."[45]

An essential element in determining the employer witnesses' competency is determining what training and experience the witness has with the employer's electronic calling system. The witness must provide testimony on when and how he had been trained, any continuing training,

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[42] *Cf.* Appeal Board No. 598457 (finding EC not competent where he failed to describe the order of the automated calling lists) and Appeal Board No. 593102 (previously finding the same witness competent).

[43] See *Matter of Sandick*, 197 A.D.2d 737, 738 (3d Dep't 1993) ("Board also found that the employer failed to produce a witness with personal knowledge of its personnel practices and hiring procedures and that there was no testimony from those who compile or use the list from which the substitutes were called. The employer's witness offered no testimony as to how substitute lists were prepared or how hiring practices related to such lists."); Appeal Board No. 575811 ("In order to establish reasonable assurance exists that the claimant will be offered substantially similar employment…the employer must produce knowledgeable witnesses who are able to testify to the compilation and use of the list in offering substitutes in general, and the claimant, in specific, work in the [previous] school year and as to the employer's intent and expectations regarding calling the claimant to work in the [subsequent] school year."); Appeal Board 591014A (Board determined the employer's witness to be competent to testify as to the compilation of the list, but not the use as there was no testimony "regarding what information substitutes are required to supply to the employer for inclusion in the Registry, if any, how that information would be put into the AESOP database, and what information is maintained in the Registry. Consequently, the witness may not establish herself as competent to testify as to the use of the AESOP substitute placement system to obtain substitutes to cover full-time teacher absences, in general, or, if in specific, as the claimant as any explanation of how AESOP worked in order to call substitutes to fill in for absences of full-time teachers was premature as it had not been established that there was any information in the database from which anyone could be called to act as a substitute").

[44] See Appeal Board 598243, (citing Appeal Board Nos. 597456 and 588283).

[45] *Id.*; *see also,* Appeal Board No. 597456.

what the training consisted of, who provided the training, whether he was trained on how information on substitute teachers was put into and stored in the system and what experience he has had with the electronic calling system. The testimony must be sufficiently detailed to demonstrate the witness's knowledge of the system to allow an assessment as to whether the witness is competent to testify about the system. For example, the Board has concluded that a witness is competent where he offered detailed testimony regarding his initial training, which included hands-on training to learn how to navigate the system, and detailed his own prior experience using the system as a fulltime teacher.[46] Vague or general testimony regarding a witness's training and experience with the employer's system will not suffice to find the witness competent. [47]

A witness must also provide a detailed explanation about his or her job duties and there must be some relationship between those duties and knowledge of how the system works.[48] Vague testimony as to the witness's job duties is insufficient to establish competence.[49] Job duties must

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[46] Appeal Board No. 593102.

[47] See Appeal Board No. 594921 ("While the witness testified to receiving training from the lead trainer, her supervisor, and the person in charge of the Sub Central Call Center, her testimony lacks sufficient detail to explain what it was each person trained her in, how, and how it related to the compilation and use of the Sub Central system."); Appeal Board Nos. 588283 and 552093 (In both cases the employer's witness was determined to be not competent to testify to the compilation and use of the list because his testimony lacked detail. The Board decisions delineated the detail that was missing from the witnesses' testimony); Appeal Board Nos. 597456, 598017, 598243, 598426 (all finding that the witness was incompetent as there was insufficient evidence regarding training and experience with the employer's system).

[48] Appeal Board No. 592425 (Board found witness did not establish that he was competent regarding the electronic system since his job duties had little to do with substitute teachers, he was not involved with the recruitment or hiring of substitute teachers, only occasionally worked with the employer's electronic system and then only to analyze data. His training included logging into the system, looking at reports, what the data represented, how the data was put into the system, looking up assignments for a specific person, location assignments and how assignments were initiated. Although the witness had been employed for about 3 ½ years, the Board found that the length of the training or experience alone was not dispositive on the issue of the witness's competency and that the claimant did not have sufficient training in or experience with the employer's system to be able to "testify from personal knowledge how the employer hired substitutes, how the employer compiled their data in the registry, what data was put in the registry, or how the [system] offers days of work to substitute teachers."); *cf.* Appeal Board No. 591651 (Board found witness competent where she testified to her training on the system by the prior person who worked with the system and through tutorials provided by AESOP representatives. The witness described the hiring process and how the substitute's information is entered to AESOP and that she assists new substitutes in creating their AESOP profile and trains them on how the system works and how to use it. She testified in detail about how the AESOP system calls substitutes for work, that she monitors the system throughout the year for proper functioning and assists schools with entering absences to the system. The witness was also involved with the drafting of the reasonable assurance letter).

[49] Appeal Board No. 594921 ("Further, the witness' testimony with respect to her day-to-day duties was extremely vague, noting only that she is 'involved with the hiring of substitute paraprofessionals,' has 'communications with substitute paraprofessionals almost daily about issues that come up,' and 'is involved with testing Sub Central.' She provided no details to explain how she is involved with hiring, what issues she may be communicating with substitutes

include more than “[t]he mere use of the system to view a profile or print reports,” duties that “do not establish knowledge of how the system might work to offer work to substitutes.”[50] Job duties that tend to establish competency include testing the system,[51] attending meetings regarding the system,[52] using the system to compile data for supervisors,[53] or assisting substitutes in using the system.[54] However, testing is not required to establish competency. [55]

The employer’s witness will need to explain the documents showing how much work was offered to the claimant. The witness should be asked how the documents were generated and where the data displayed in the documents came from. If this information can be provided, the document has been properly authenticated and can be used to establish how much work was offered by the claimant. A witness’ inability to explain substantial portions[56] or a material aspect[57] of the employer’s documents may indicate that they are not competent to testify on how the system works. However, an inability to explain minor anomalies in the employer’s documents is not an indication that the witness is incompetent where the witness has otherwise offered sufficient testimony as to their training and experience and fully explained how the system works on the record.[58]

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about and how those may be relevant to the compilation or use of Sub Central, and what was the purpose of her testing of the system and what said testing consisted of”).

[50] Appeal Board No. 592322.

[51] *See* Appeal Board No. 598228 (“JD also tests the system to verify it is operational, which requires a higher level of understanding and fluency with the registry such that JD is competent”).

[52] *See* Appeal Board No. 598344.

[53] *Id.*

[54] *See* Appeal Board No. 593102.

[55] Appeal Board No. 593102.

[56] *See* Appeal Board No. 592207 (“Notably, it was clear from the witness' testimony that she could not competently explain the data contained in the employer's own documentary evidence, as she was unable to respond to the ALJs questioning regarding the substitute detail report at several points, including being unable to explain the source of the claimant's work in the 2015-2016 school year, and being unable to explain the discrepancy enlisted number of days worked according to the Sub Central detail report versus the payroll detail report”).

[57] *See* Appeal Board No. 592067 (noting the witness, JD’s inability to explain canceled assignments in the detail report).

[58] *See* Appeal Board No. 598228 (finding that the witness’ inability to explain two overlapping assignments in the detail report was an insufficient basis to conclude that she was not competent).

Practice Tip:

Questions to develop the record on a witness' training and experience:

- How long have you been in your position?
- Describe your job duties as they relate to substitute teachers.
- Does the [educational employer] have a system for obtaining substitutes?
- What is that system called?
- Do you have personal knowledge of how that system is used to fill absences?
- How did you gain that knowledge?
- Do you receive any recurrent training?
- How do you use the electronic system to perform your job duties?

Practice Tip:

Analyzing Witness Competency

Factors Supporting Competency	Factors Undermining Competency
Training and Experience • Detailed explanation of training, including how and what taught. • Detailed explanation of job duties that relate to how the electronic system compiles data on and offers work to substitutes, such as testing the system, helping substitutes use the system, or compiling data from the system. *Explanation on the Record* • Complete description of how the registry is compiled, including how a substitute registers, what information is provided during registration, how classifications/locations are associated with a profile. • Complete description of the calling process, including what lists are called, what order the lists are called in, when the calls are made, the contents of the calls, and the substitutes' options in responding to the calls. • Complete description of the website process, including how substitutes access the website, how they search for assignments, what assignments are available, and how they accept or decline assignments. *The Employer's Records* • Witness provides sufficient explanation of the employer's records, including how they are generated and where the data comes from. • Witness is able to explain the material portions of the detail report, even if unable to explain a minor anomaly.	*Training and Experience* • Vague testimony regarding training that does not explain what was taught. • Vague testimony as to job duties. • Job duties limited to those unrelated to how the system works, such as looking up profiles or printing reports *Explanation on the Record* • Witness fails to explain how a claimant registers or how profile information becomes associated with the profile. • Witness fails to explain how an absence is entered into the electronic system. • Witness fails to explain what lists are called. • Witness fails to explain the order in which the lists are called. • Witness fails to explain the contents of the calls. • Witness fails to explain the website process, in particular failing to explain what assignments are available on the website, how they are viewed, and how they are accepted. *The Employer's Records* • Witness unable to explain how its documents are generated • Witness unable to explain a material part of the detail report, such as how much work was offered, a discrepancy between the payroll report and the detail report as to the days worked, or the meaning of the document's notations regarding work offered or canceled.

While a record on competency is required for every hearing where the employer appears, it is not always necessary to address competency in the decision. In cases where the employer fails to establish that the electronic calling system offered the claimant at least 90% of the days the claimant worked, [59] the case may be decided on those grounds rather than on witness

[59] *See* below for a discussion of how the 90% threshold is determined and what offers are included towards reaching the threshold.

competency.[60] Where it is necessary to address witness competency, the decision should include findings on the witnesses' training and job duties relating to Sub-Central. In a case where the witness is competent, the opinion may state that the witness established herself competent to testify based on her training and experience, and that she explained on the record how the Sub-Central registry is compiled and used to offer work to substitutes.[61]

EXPLANATION OF HOW THE SYSTEM WORKS

Once the employer's witness has been determined to be competent to testify with regard to the letter and the compilation and use of the employer's system, the witness must explain how the system works, both how the registry is compiled and how it used to offer work.[62] With respect to the compilation of the registry, the witness must explain how the substitutes' names and information are entered into the registry and what information is maintained by the registry.[63] The witness must explain how a substitute registers with the electronic system and what information is provided. In particular, whether the substitute provides a callback number and how the substitute's preferences and classifications/certifications become associated with her profile.[64] If a witness fails to offer this information, the witness should be found to be not qualified to testify on the electronic system.

The witness must also describe in detail how the system uses its automated calling process to contact substitutes. This explanation must include:

1. how an absence is registered with the electronic system;
2. what lists are generated and called to fill the absence;
3. what order and how many times each list is called;
4. when the calls are made;

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[60] *See, e.g.,* Appeal Board Nos. 597664, 598119.

[61] *See, e.g.,* Appeal Board No. 598229.

[62] *See, e.g.* Appeal Board No. 595487 (citing to *Matter of Sandick*, 197 A.D.2d 737).

[63] *See* Appeal Board No. 595483 (finding KH not to be competent to testify on the compilation of the list where "he failed to explain how substitute names and information would be collected and put into the Sub Central database, if it is, and what information is maintained in the registry").

[64] *See* Appeal Board No. 596128 (finding the employer failed to present competent evidence where its witness, EC, "failed to provide testimony as to the input of information provided by substitutes including their name, address, call back number, and classification and location choices into the Sub Central Registry and likewise failed to testify as to the maintenance of the employer's Registry of substitute paraprofessionals"); *see also* Appeal Board No. 598237 (finding MN not competent where she failed to explain what information was provided during registration other than the callback number and failed to explain how classifications/locations become associated with a substitute's profile).

5. the content of the calls made to the substitutes; and

6. the substitutes' options in responding to the calls.

Practice Tip:

Questions to develop the record on the automated calling process:

- What information does the electronic system maintain about each substitute?
- How does that information get entered into electronic system?
- How does a substitute register with electronic system?
- When does he or she register?
- How is an absence reported to the electronic system?
- How does electronic system know which potential substitutes to contact?
- Is there an order in which potential substitutes are contacted?
- If so, what is that order?
- Does the electronic system go through each list more than once?
- When does the electronic system make these calls?
- What does a substitute hear when he/she answers an automated call from the system?
- What are a substitute's options when receiving an IVR call?

The record should also be developed on other methods used by the school district to offer work to substitutes. These other methods include website offers and offers made directly by schools. With respect to the website, the witness should offer competent testimony similar to the automated calling process. This should include how the substitute accesses the website, when it can be accessed, what screens a claimant would view to see offers of work, what offers of work would be available to the substitute, and how a substitute can accept or decline an assignment appearing on the website.[65]

[65] *See* Appeal Board No. 598838, which made the following findings regarding the website assignments: "A substitute can also obtain, through the Sub-Central Registry, assignments via the internet "Web offers", using their PIN number to get to their own page. Once on the "employee page", they can open the "job availability" window and see a listing of assignments. There is a drop-down date/date range, and a listing of assignments available to the substitute. The assignments are offered to the substitutes based upon their profiles as to priority lists and classification and location,

Practice Tip:

Questions to develop the record on website offers:

How does a substitute know that the website is a means of responding to offers of work?

- When and how does a substitute access the website?
- Once in the website, what screen(s) does the substitute view to see offers of work?
- How does a substitute accept or decline an assignment on the website?
- What types of offers are on the website?
- What offers is a substitute able to view on the website?
- Are the offers that are available through the web the same as those made by the IVR?
- What happens after a substitute accepts an assignment through the website?

With respect to the administrator offers, post-*Enman,* the record must be developed on how administrators hire substitutes, and in particular how they interact with electronic system to do so.[66] This should include testimony on how the administrator accesses the system and how the select a particular substitute for an assignment.

Practice Tip:

Questions to develop the record on administratively assigned offers:

- How do administrators offer work to substitutes directly?
- Are administrators required to enter those assignments into the electronic system?
- How does an administrator assign a substitute to an assignment in the electronic system?

as well as general offers. A substitute can click on the assignment to review. There are no ramifications for simply reviewing the assignment."

See also Appeal Board No. 598701.

[66] *Matter of Enman,* 2018 NY Slip Op 03416 (3d Dep't May 10, 2018)

Once the record has been developed on the different methods of offering work, it also needs to be developed on how these methods interact – in particular, how the website and administrator assignments affect the automated calling process.

ECONOMIC TERMS AND CONDITIONS

Generally, to find reasonable assurance, the record must establish that the economic terms and conditions for the coming school year will be substantially the same as the economic terms and conditions of the prior school year. This involves a comparison of the rate of pay and any fringe benefits between the prior and the coming years and determining whether there has been any change in staffing levels or hiring practices.[67]

Staffing levels may depend on whether the school district institutes a new policy to offer substitute teaching assignments to excessed, or absent teacher reserves (ATRs) before offering the assignments to per diem substitutes.[68] A contention by the claimant that he was informed that ATRs and retirees would be given preference over per diem substitutes has been found sufficient to rebut the employer's testimony that reasonable assurance was offered to the claimant.[69]

[67] *See, e.g.,* Appeal Board No. 591987

[68] ATRs are former fulltime teachers who have lost their positions due to school closings or other issues. The issue of ATRs is generally only addressed when raised by the claimant as a defense to reasonable assurance.

[69] Appeal Board No. 552097 (the employer's witness did not adequately explain whether the preferred use of these classifications by the individual schools would have any impact on the number of requests for substitutes made to Sub Central by the individual schools for the coming school year). *See also*, Appeal Board No. 562564 (NYC DOE and the teachers' union reached a contract which provided that excessed teachers would be used in 2011-2012 to fill in for teacher absences in an attempt to forestall teacher layoffs).

Practice Tip:

Developing the Record on Economic Terms and Conditions

- The witness should testify as to the number of fulltime teachers/paraprofessionals, substitute teachers/paraprofessionals, schools, and students in the previous and upcoming/current school years.
- The witness should be asked how many absences the employer was able to cover in the previous school year.
- The witness should be asked whether Sub-Central will continue to be used to offer assignments to substitutes in the next school year.

If the claimant raises the issue of ATRs, ask the employer's witness the following:

- What is an excessed teacher/ATR?
- What impact, if any, do excessed teachers have on work available to per diem substitutes? Why or why not?
- How many excessed teachers were there in the 20--/20-- school year?
- How many excessed teachers will there be (are there) in the 20--/20-- school year?

If there have been changes to the way ATRs are used, the witness should be asked to explain the change, including the procedure in the previous year, the procedure in the upcoming/current school year, and the details of any agreements that resulted in the change.

THE 90% RULE

The phrase "substantially the same" has been interpreted to mean that in the coming year the claimant will be offered an amount of work equal to at least 90% of the work performed in the prior school year. Where the claimant received assignments electronically and by other means, a calculation must be made as to whether the electronic assignments offered to the claimant equaled at least 90% of all days worked in the prior school year. It is not controlling whether the claimant actually accepted all days of work that were offered. [70]

Offers of work now include assignments the claimant obtained by logging into the employer's system and searching for and accepting assignments, provided that the record includes evidence

[70] Appeal Board No. 575707 (claimant worked 135 days in the school year, and had been offered 168 days).

from the employer regarding how a per diem substitute is able to obtain work through their own efforts, either electronically or by telephone.[71]

Offers of work also now include days of work offered to the claimant directly from a school administrator, provided that the offer is accounted for in the employer's electronic system.[72]

Practice Tip:

Developing the Record on Days Worked and Days Offered

- Days Worked: The employer's witness should explain how many days the claimant worked in the previous school year and should explain the payroll records used to obtain that number.
- Determining the Threshold: The number of days of work should be multiplied by 90%. This is the "threshold" that the number of offered days must equal or exceed to find reasonable assurance.
- Days Offered: The employer's witness should explain how many days of work were offered to the claimant through the Sub-Central system. These offers can include IVR offers, website offers, or administratively assigned offers. The employer's witness should explain the detail report or data sheet used to obtain the number of days offered.

UNAVAILABILITY

In some cases, a school district or department of education may not offer a claimant work because the claimant marked him or herself as unavailable in the electronic calling system. Generally, this

[71] Appeal Board No. 598838 ("Prior Board decisions have not considered days of work obtained by the claimant through her own efforts of accessing the employer's website (See Appeal Board Nos. 593458 and 595664). However, in those cases, the record did not contain any testimony explaining how assignments are offered and obtained through the website. Unlike those cases, in the case at hand, the employer has provided sufficient testimony explaining how the claimant is able to obtain days of work through the website. Based on this credible testimony, we now find that work accepted by a claimant through the website shall be included as an offer of employment to determine whether the claimant has reasonable assurance in the next academic year or term. To the extent our prior decisions hold that the Board will not consider days of work obtained by the claimant through the employer's website, we no longer follow those decisions in cases where credible testimony exists concerning assignments offered and accepted through the Sub-Central website.")

[72] *Matter of Enman,* 2018 NY Slip Op 03416 (3d Dep't May 10, 2018) ("By tracking assignments in this manner, the SubCentral Registry identified paraprofessionals who were working as well those who were not, a critical factor in ascertaining those paraprofessionals who were available and would be likely to accept future assignments. As long as a paraprofessional was registered in the SubCentral Registry, as was claimant, his or her assignments and/or availability were monitored and the manner in which those assignments were obtained was irrelevant.") Cases decided pre-*Enman* which excluded administrator assignments should no longer be followed, provided that those assignments are included in the electronic records.

occurs where the claimant has accepted a long-term assignment from a particular school.[73] The number of days of work offered during the period when the claimant was available in the system is used to infer the number of days the employer would have offered had the claimant not been marked as unavailable in the system.[74]

Whether a claimant's unavailability is a factor in determining whether the employer meets the 90% rule will depend on whether the employer's electronic system includes administrator offers. If the system tracks administrator offers then, pursuant to *Enman,* a claimant's unavailability in the electronic system is not material. However, in cases where the electronic system does not include administrator offers, it must be determined whether the employer would have met the 90% rule had the claimant not made her or himself unavailable in the system.[75]

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[73] *See, e.g.,* Appeal Board No. 582612 (claimant had accepted work from one school district and then marked herself as unavailable in the system of another school district after having declined two offers made in the first 13 days of the school year).

[74] Appeal Board No. 597929 (the employer offered the claimant only two days over the 33 days she was available in the system, representing 6% of the days on which she was available to work; there was thus no basis to conclude that the employer would have offered the claimant enough days of work during the period she was unavailable to meet the 90% mark).

[75] *See, e.g.,* Appeal Board No. 598211 (the employer offered the claimant 126 days of work during the 129 days when she was available in the system, representing 97% of the days on which the claimant was available to work); *cf.* Appeal Board No. 597929.

Practice Tip:

Questions to ask on unavailable days:

To the employer:

- What was the limitation placed by the claimant on his availability?
- How many days did the claimant make herself unavailable in the system?
- Are there any days that the IVR system offered the claimant work and then the claimant subsequently made herself unavailable on those days? How many?
- How were you informed of that limitation?
- Do you know why the claimant limited his availability?
- Does the IVR system call the claimant on days that the claimant sets limits on availability?
- Does the IVR system continue to call the claimant on those days where the claimant was available?
- Did the claimant work for the school(s) during the period(s) she made herself unavailable in the system?
- How many does of work was the claimant offered through the IVR system (and the website) during the period the claimant was available?

To the claimant:

- Did you let the employer know that you were limiting your availability to be offered work through the system?
- How did you notify the employer of that?
- What was the number of days you informed the employer you were not available to be offered work?
- Why did you make yourself unavailable on those days?

Practice Tip:

Determining Reasonable Assurance in a Case Involving Unavailable Days

Step 1: Calculate the Number of Days the Claimant was Available

# of School Days - # of Days Unavailable = Available Days

Step 2: Calculate the Percentage of Days Offered During the Available Period

# of Days Entered in SubCentral* / Available Days = % of Available Days Offered

Step 3: Calculate the Number of Inferred Offers

% of Available Days Offered x Unavailable Days = Inferred Offered Days

Step 4: Add the Actually Offered Days to the Inferred Days

Is the number of Actual Offered Days + Inferred Offered Days ≥ 90% of the Days Worked?

LONG TERM ASSIGNMENTS

Substitute teachers that work more than 30 days in the same assignment (called "Z status" teachers in New York City and "Long Term Substitutes" elsewhere) receive a higher rate of pay then regular per diem substitutes.[76] The question of whether the claimant will earn at least 90% of the days worked is based on the claimant's earnings in the prior school year, not the days worked. Such teachers may also receive fringe benefits, such as paid sick leave or vacation leave, not received by per diem substitutes, and the value of those benefits are included in the claimant's earnings for the prior year.[77] To determine whether the 90% threshold is reached, the number of days of work offered during the previous year is multiplied by the per diem rate of pay that will be paid in the next school year. If that result is at least 90% of the claimant's earnings from the prior school year, then the claimant has reasonable assurance.[78]

[76] *See, e.g.,* Appeal Board No. 597929.

[77] *See, e.g.,* Appeal Board No. 592073.

[78] Appeal Board No. 598278; *cf.* Appeal Board No. 597874 (but note that the result reached in this case might be different applying the rule in *Enman*).

2.8.3 ADJUNCT INSTRUCTORS

INTRODUCTION

An adjunct instructor is a part time instructor at the college or community college level. An adjunct instructor may teach one or more courses, regularly or irregularly, but is not a member of the college's full time professorial staff. The adjunct instructor is notified of work available for him or her in the upcoming academic year or semester via an offer of reasonable assurance by the employer, similar to the way an offer of reasonable assurance is made to substitute teachers in K-12 school districts. The offer of work to an adjunct instructor can be verbal or written.[79] It must be a genuine offer of employment,[80] contain enough details about the position so that it can be considered a bona fide offer, and the evidence must establish that the economic conditions of the offer are not considerably less favorable than the previous year. If the job offered meets each of these prerequisites, any contingencies in the offer and the totality of the circumstances must be evaluated to determine whether the claimant has reasonable assurance of working in the position offered.[81]

SUFFICIENTLY PARTICULAR OFFER

The employer's expression of its intent to hire the claimant to work as an adjunct instructor in the next academic year or semester must be of sufficient detail to determine that the offer was bona fide. Specifically, the offer must state:

1. That the employer intends to hire the claimant to work as an adjunct instructor in the upcoming year or semester;
2. The claimant's rate of pay;
3. The number of courses being offered; and

[79] *See* Appeal Board No. 579744 (Board found letter sent to claimant in November was insufficient to constitute reasonable assurance because although it contained information about the amount of earnings per hour, it failed to mention the number of hours and did not contain a statement that it would be under substantially similar financial conditions but when employer later met with claimant in January to verbally discuss his schedule and hours, the verbal discussion filled in those missing items and the claimant had reasonable assurance at that time).

[80] *Matter of Upham,* 132 A.D.3d 1221 (3d Dep't 2015) (no reasonable assurance found where department chair mentioned that the claimant could potentially teach four courses during the next semester but that was never confirmed during any subsequent conversations or by letter); *see also,* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 5-17 (December 22, 2016).

[81] U.S. Department of Labor UIPL 5-17.

4. The total number of credit hours being offered or the number of credit hours per course.[82]

The offer needs to be in the form of a clear action by the employer; it cannot require the claimant to make assumptions about whether he will be hired to work for the employer in the next academic year or semester.[83] A general discussion between the claimant and the employer's witness prior to the end of the semester about whether the claimant is available for work in the upcoming academic year or semester, or a general statement that the employer will have classes for the claimant to teach the following semester is not sufficient.[84] Additionally, form letters or other generalized communications informing a claimant that he or she will be reemployed or that potential schedules have been posted online, without more, is insufficient to establish reasonable assurance.[85]

An employer may cure a deficient offer of reasonable assurance with subsequent communication with the claimant. If the communications, when considered together, are a sufficient expression of the employer's intent to rehire the claimant as an adjunct instructor in the next academic year or semester, the Board has determined that the claimant has reasonable assurance following the later of the employer's two communications.[86] The Board has also determined that the employer

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[82] *See* Appeal Board No. 568921 A (Board held that reasonable assurance was not provided until the employer told claimant she was would be teaching in the following semester, specified her hourly rate, and specified the number of classes and hours being offered to the claimant).

[83] See Appeal Board No. 594516 (No reasonable assurance found where the employer failed to provide claimant with written or oral assurance that he would work in the following semester despite employer's contention that the claimant should have assumed he was working based on his past work history, seniority status, knowledge of the employment process and the collective bargaining agreement that gave him a preferred recall status based on his seniority; although those factors may be used to prove the bona fides of the employer's offer, they do not constitute an offer of reasonable assurance of continued employment).

[84] See Appeal Board No. 593759 (A verbal conversation between the claimant and the Department Chairman took place during the Spring semester 2016 regarding a position for the entire 2016-2017 academic year. The claimant was told that the position would have five courses each semester and that the salary would be in the mid-50's. The courses, course schedule, hours and specific salary was not known at the time of the conversation. The department Chairman did not have authority to set the claimant's salary. The Board determined that the conversation was not an offer of reasonable assurance to the claimant).

[85] Appeal Board No. 582318 (The claimant and other adjunct instructors were required to complete an availability form prior to the end of the semester regarding their availability to teach in the upcoming semester. The claimant did so. The employer thereafter sent the adjuncts an e-mail advising that that their assignments were online. The employer only presented the e-mail as evidence. The Board determined that without knowing if the claimant was offered specific courses or if he was only given a general offer to "teach two unnamed, un-credited courses" there was no reasonable assurance).

[86] See Appeal Board No. 583684 (Employer's April letter expressed an intent to rehire the claimant as an adjunct assistant professor for the fall semester and informed him of his hourly rate but failed to mention of the number of hours or that the financial conditions would be substantially the same as the prior semester did not give claimant reasonable assurance. An e-mail sent to the claimant in June with the two, three credit hour classes the claimant would be teaching, his class schedule, and the number of hours he was being offered to teach filled in the missing information from the

has failed to establish a sufficient offer of reasonable assurance when an employer issues two communications to the claimant, neither of which is a sufficient expression of reasonable assurance by itself and is still lacking in necessary details even when read together.[87]

Practice Tip:

The employer's witness at the hearing is often the chairman of the department the claimant worked in and is usually the person who wrote the reasonable assurance letter or made the verbal offer of reasonable assurance. Testimony from the employer's witness will be necessary to determine the bona fides of the employer's offer. After taking testimony on the claimant's employment history with the employer and the details of the claimant's work for the employer in the last academic year or last semester, depending on the scope of the employer's offer of reasonable assurance under consideration, the record development should next focus on whether the economic terms and conditions the four enumerated items above.

ECONOMIC CONDITIONS

For reasonable assurance to be found, the economic conditions of the job offered may not be considerably less in the following academic year or term. This has been interpreted to mean the claimant will earn at least 90% of the earnings received during the last academic period.[88] The claimant's rate of pay, the number of classes being offered and the total number of credit hours being offered or the number of credit hours per class are necessary considerations to determine whether this prerequisite can be met.

If the adjunct is paid at a rate per credit hour or at a rate per course taught, the number of credit hours or the number of courses taught is necessary to make the calculation of the claimant's expected earnings in the upcoming academic year or semester. Even when the employer's offer contains an hourly rate of pay, the Board has held that the claimant did not have a reasonable assurance of continued employment when the letter did not specify the number of course hours the employer anticipates that it can offer to the claimant, which could then be used to determine if the claimant will earn substantially the same in the upcoming semester as in the prior semester.[89]

April letter and gave claimant reasonable assurance); Appeal Board No. 588944 (considering similar circumstances); Appeal Board No 579744 (considering similar circumstances).

[87] See Appeal Board No. 574376A (Employer sent letter reappointing claimant for entire school year, informing him of his hourly rate and indicated classes and hours for fall semester in a subsequent letter; as the letter did not contain information about the spring semester, when the appointment was for the entire school year, reasonable assurance was not found).

[88] *See Matter of Murphy,* 17 A.D.3d 762 (3d Dep't 2005).

[89] *See* Appeal Board No. 583526 (no reasonable assurance where employer case sent the claimant a "boilerplate letter" of its intent to reappoint the claimant for the following semester, containing rate of pay and indicated that specifics of

The Court and the Board have strictly construed the terms of the employer's reasonable assurance letter and have determined that a claimant does not have reasonable assurance if the evidence fails to establish that the claimant is being offered substantially similar economic conditions. If an employer's offer of work is for the entire school year, the focus of the analysis is on whether the economic terms and conditions for the entire school year, not just the upcoming semester. The employer must provide evidence of the classes and hours for the whole year before a determination can be made regarding the similarity of the economic conditions of the offer.[90] For example, in *Matter of Rosenbaum*,[91] the Court found no reasonable assurance where claimant worked 105 in the previous fall semester, out of a total of 150 hours during the entire academic year, was provided a letter advising him that the employer would reappoint him to the same position for the following academic year, but was only offered 45 hours in the fall semester and was not advised of any work for the spring semester. The Court did not reach the issue of the contingencies in the employer's letter before determining that the claimant did not have reasonable assurance, noting that the appointment was for the entire academic year, the "claimant was offered significantly fewer hours during the…fall semester than he had worked during the [previous] fall semester" and that the employer did not specify any hours at all for the spring semester.[92]

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the assignment would come in a subsequent communication but claimant never received any subsequent communication from the employer); Appeal Board No. 568933 (claimant did not have reasonable assurance at the time he received a form letter advising him that his position and salary per class would continue in "much the same manner" in the upcoming semester as it had in the prior semester with no specifics given about courses and credit hours; claimant had reasonable assurance when, a short time before the beginning of the upcoming semester, the employer informed him he was being offered 3 courses amounting to 11 credit hours and it could be determined that the economic conditions were substantially similar).

[90] *See* Appeal Board No. 585792 ("the claimant received a letter of reappointment for the Fall 2014 and Spring 2015 terms. When she received her Fall 2014 schedule, there would have been no reasonable assurance at that point because there was no mention of the Spring 2015 schedule and no monetary determination would have been possible to be made for the full year. However, as of the date that the college provided claimant with her Spring 2015 schedule, it could be determined whether the statutory requirement of meeting the substantial terms and conditions was satisfied."); Appeal Board No. 584008 ("As the college chose to send the claimant a letter reappointing him for a full year as an adjunct professor, the college was required to establish that it could offer the claimant substantially the same financial terms and conditions for the 2014-2015 school year as the claimant had experienced in the 2013-2014 school year."); Appeal Board No. 582631 (The claimant received a letter prior to the end of the spring 2013 semester purporting to give the claimant reasonable assurance for the fall 2013 and spring 2014 semesters. Thereafter, the claimant received an offer to teach one class in the fall 2013 semester, but was never offered work for the spring 2014 semester. The Board determined the claimant did not have reasonable assurance and also found it significant that the letter did not indicate whether the employer anticipated that the financial conditions for the upcoming fall 2013 and spring 2014 semesters would be substantially the same as the claimant had experienced in the prior academic year).

[91] 125 A.D.3d 1019 (3d Dep't 2015) *aff'g* Appeal Board No. 568989A.

[92] *Id.*

CONTINGENCIES

If the employer's letter or verbal representation of its intent to hire the claimant to work as an adjunct instructor in the next academic year or semester is of sufficient detail to determine that the offer was bona fide, there must next be an examination of whether there are any contingencies in the letter. If any of the contingencies are within the employer's control, the claimant does not have reasonable assurance of work in the subsequent academic term.[93] The U.S. Department of Labor has determined that the following contingencies are within the employer's control: allocation of available funding, course programming, final course offerings,[94] program changes, facility availability, and any offer that allows the employer to retract it at their discretion.[95]

It has also determined that contingencies based on enrollment, funding or seniority are not within the employer's control.[96] When an offer contains contingencies outside the employer's control, the totality of the circumstances must be evaluated to determine whether it is highly probable that a job will be available for the claimant in the next academic year or term.[97] These circumstances include the history of the employer's funding, the likelihood that the employer will receive the funding for a specific course, and the likelihood that the claimant will receive an assignment.[98]

TOTALITY OF THE CIRCUMSTANCES

Reasonable assurance can only be found when, after evaluating the totality of the circumstances, it is highly probable that the claimant will have a job available in the academic period being offered. If the employer's offer contains a contingency, primary weight must be given to that circumstance. This requires a determination of whether it is highly probable that the contingency will be met.[99]

It is the responsibility of the educational institution to establish with competent testimony that an offer of reasonable assurance has been made to the claimant and that the bona fides of the

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[93] *See* U.S. Department of Labor, UIPL 5-17.

[94] *See* Appeal Board No. 587853 (no reasonable assurance where employer made a curriculum change and dropped a class usually taught by claimant; Board held employer could not establish that the contingencies would not affect the financial terms and conditions of the claimant's employment).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

offer can be fulfilled.[100] Circumstances that must be considered in determining the availability of the job include:

1. Funding;
2. Enrollment
3. Nature of the course (required or optional, taught at regular intervals or sporadically)
4. Claimant seniority
5. Budget
6. Assignment practices at the school[101]

A contingency that often appears in a reasonable assurance letter is one that allows the employer's current or retired full-time professors, or adjunct instructors with more seniority, to take classes away from, or "bump," an adjunct instructor up until the first day of the semester. In those circumstances, the claimant would not have reasonable assurance until he or she actually starts teaching the class if the evidence establishes that the claimant has been "bumped" from classes in the past,[102] that there is a likelihood he or she could be bumped from the assignment offered based on seniority,[103] or where the offered class could be reassigned to a tenured professor without consideration of any other factor.[104]

The Board and Court have also held that evidence of the employer's past hiring practices may have an impact on whether reasonable assurance can be found. For example, in *Matter of Jama*[105] the Court considered the issue of the employer's past practice of rehire of the claimant,

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[100] *See* Appeal Board No. 594516 (citing Appeal Board No. 582631).

[101] *Id.*

[102] *See* Appeal Board No. 592044 (no reasonable assurance where evidence established that the claimant had previously been bumped from a course by a newly hired full time professor, had course offers withdrawn, full-time professors could bump her from a course, there had been a significant drop in enrollment and 20% fewer teaching positions available); Appeal Board No. 587853 (no reasonable assurance where claimant testified that in the past he had been bumped from teaching a class, had courses withdrawn, and where the employer implemented a curriculum change, dropping a class the claimant usually taught); *see also Matter of Cardin,* 119 A.D.3d 1014 (3d Dep't 2014) (no reasonable assurance where bumping contingency existed up until the first day of classes) .

[103] *See* Appeal Board No. 582318 (no reasonable assurance found where evidence established that adjuncts with more seniority could bump an adjunct with lower seniority out of teaching a class and employer failed to offer evidence to establish the likelihood of the claimant, who was lower in seniority than a number of other adjuncts, would not have been bumped before the start of the upcoming semester); Appeal Board No. 582631.

[104] *See* Appeal Board No. 582631.

[105] 96 A.D.2d 1007 (3d Dep't 1983).

in conjunction with a contingency that whether the claimant would teach or not depended on enrollment for the semester. The employer did not rely on past enrollment to determine the scheduling of future classes, but rather determined if a class would be offered on whether there was a sufficient number of students enrolling to take the upcoming class. The employer did not make a decision on whether the class would be held until after the semester ended, possibly up to the beginning of the next semester. The employer asked the claimant if she was available to teach in the upcoming semester, but there was no evidence that she was ever told a job would be available. The Court held the claimant did not have reasonable assurance of continued employment, reasoning that since whether the claimant taught a class was dependent on enrollment and since the employer did not rely on past enrollment to schedule classes in upcoming semesters, past enrollment could not be "relied on as reasonable assurance that future enrollment would be adequate to continue the position."[106]

The Court reached a different conclusion in *Matter of Barton*.[107] The claimant in that case received a letter from the employer conditioned on sufficient registration, financial ability, and curriculum needs. Significant factors in determining that the claimant did have reasonable assurance were that the claimant taught a required freshman course and had been furnished with a schedule of his classes for the Fall before the Spring semester concluded. The Court held that the employer was justified in anticipating the same enrollment it had previously, that faculty size would remain the same and that its budget would be sufficient to pay the claimant. The employer in this case differed from the employer in *Jama* who did not anticipate enrollment, but waited until its enrollment numbers were fixed before determining if a class would be offered.[108]

Finally, in considering the totality of the circumstances, there may be factors that have an impact on whether a claimant has a reasonable assurance of continued employment that may not have been contemplated by either party at the time of the employer's letter. Although the case does not deal with an adjunct instructor, in *Matter of Sifakis*,[109] the Court considered the impact a collective bargaining agreement had on reasonable assurance of the claimant's continued employment. The claimant in that case worked for the employer since 1981. By 1986 she had risen to the position of senior registration supervisor. In June of that year, the claimant was verbally told she would be rehired in August. On or about July 18, 1986 the claimant received a written notice of rehire for August 18, 1986. In affirming the Board's determination that the claimant had reasonable assurance of continued employment, the Court found it significant that

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[106] *Matter of Jama,* 96 AD2d at 1008.

[107] 125 A.D.2d 858 (3d Dep't 1986).

[108] *See also, Matter of Whiting*, 243 A.D.2d 904 (3d Dep't 1997) (despite contingencies in the employer's letter regarding enrollment, financial ability and curriculum needs the claimant had reasonable assurance as he had received a set schedule of his assigned class for the upcoming fall 1993 semester by April 1993 and thereafter discussed the class with his supervisor).

[109] 133 A.D.2d 511 (3d Dep't 1987)

in addition to having received a verbal communication that she would be rehired in August 1986 the claimant's union's collective bargaining agreement with the employer "entitled her to a preferred recall status based on her seniority."[110]

2.8.4 VACATION AND HOLIDAY RECESS

Reasonable assurance may also cover vacation periods or holiday recesses other than the breaks between school years or terms. Labor Law §§ 590 (10) and (11) provide that claimants who worked for an educational institution may not use the wages received from such institution to establish a claim for benefits for

> [A]ny week commencing during an established and customary vacation period or holiday recess, not between such academic terms or years, provided the claimant performed services for such institution immediately before such vacation period or holiday recess and there is a reasonable assurance that the claimant will perform any services described in this subdivision or subdivision eleven of this section in the period immediately following such vacation period or holiday recess[.]

The Board has held that the provision of the statute requiring that the claimant worked "immediately before" the vacation period or holiday recess is satisfied if the claimant worked on any day in the week preceding the vacation period or holiday recess. Similarly, the requirement that the claimant has reasonable assurance of working in the period "immediately following" is satisfied if the claimant has reasonable assurance of working during the week after the vacation period or holiday recess.[111] The Court has not specifically endorsed the Board's interpretation of the word "immediately" but did reference it in *Matter of Scott.*[112]

A substitute who has a regular assignment which will continue after the vacation or holiday recess has reasonable assurance. For example, claimant had a written offer of an

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[110] *Id.* at 511; *see also Goodman v. Barnard College*, 259 A.D.2d 907 (3d Dep't 1999) (striking non-instructional employees were held to have reasonable assurance based in part on the expired collective bargaining agreement which remained in effect until a new agreement was negotiated and which protected the claimants from removal or termination).

[111] Appeal Board No. 360,620 (holding that reasonable assurance is demonstrated by the existence of a priority list listing the names of those substitutes who will be called during the week immediately following the vacation or recess and where the substitutes listed are only those who worked in the week prior to the vacation or recess; but see below for the limitations on the precedential value of this decision); Appeal Board No. 554067.

[112] 25 A.D.3d 939 (3d Dep't 2006) (claimant had not been called for work on any day between the first day of school and the start of the winter recess, so the interpretation of "immediately" was not at issue).

assignment beginning in the fall and continuing until the end of the school year in June and thus had reasonable assurance for the Christmas vacation;[113] beginning in February, claimant was given a regular assignment, substitute teaching on three days a week, through the end of the school year and thus had reasonable assurance for the spring recess;[114] claimant had a continuing, long-term assignment filling in for a suspended teacher.[115] A claimant who worked as a typist during the week prior to the Easter recess and was verbally informed during that week that her services would be required in the week immediately following the Easter recess was also found to have received reasonable assurance.[116]

In cases where substitutes do not have a continuing assignment, reasonable assurance may also be demonstrated by the existence of a priority list containing the names of only those substitutes who worked in the week prior to the vacation or holiday and which is used to obtain substitutes during the week following the vacation or holiday. If there is no such list, reasonable assurance cannot be established.[117] In cases where there is a list, there must also be testimony from a witness who has knowledge of the employer's practices and procedures in compiling and utilizing the list.[118] The Board's longtime rule[119] that a substitute's name on a priority list testified to by a competent witness was sufficient to establish reasonable assurance without specific notice being given to the substitute was invalidated by the Court in *Matter of Papapietro.*[120] The Court held that in addition to the claimant's name on the list, the employer must provide assurance to the substitute, either by letter or other form of notice making a representation regarding employment after the recess.

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[113] Appeal Board No. 553263; *but cf.* Appeal Board No. 581545 (letter did not specify the exact length of the assignment and indicated that the assignment could end upon notice).

[114] Appeal Board No. 581354.

[115] Appeal Board No. 519153.

[116] Appeal Board No. 553407.

[117] Appeal Board No. 472493 (employer did not prepare a priority list of substitutes who worked in the week prior to the winter recess; Appeal Board No. 579724 (contention that the school district's automated system maintained a preferred list was rejected as there was no evidence that the employer's witness had firsthand knowledge of the computer system); Appeal Board No. 550833 (the school district used its master list of all substitute personnel to contact substitutes after a vacation break).

[118] Appeal Board No. 438956.

[119] Appeal Board No. 360,620, referenced above.

[120] 156 A.D.3d 1048 (3d Dep't 2017); *see also*, Appeal Board No. 585960 (no reasonable assurance where the employer did not provide a letter advising claimant he would be placed on a priority list and no testimony that the claimant had been personally advised he would be rehired after the holiday recess).

Absent a continuing assignment or the substitute's presence on the priority list with notice given to the claimant, there is no reasonable assurance.