

**BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319**

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**IAN H MCMURRAY**

Claimant

and

**THE UNIVERSITY OF IOWA**

Employer

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**HEARING NUMBER: 21B-UI-08257**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**SECTION:** 10A.601 Employment Appeal Board Review

**D E C I S I O N**

**FINDINGS OF FACT:**

A hearing in the above matter was held June 4, 2021. The administrative law judge's decision was issued June 21, 2021. The administrative law judge's decision has been appealed to the Employment Appeal Board. The Board finds that the decision and record below failed to address issues critical to an accurate resolution of this case.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 10A.601(4) provides:

5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

Pursuant to this authority we review this case and determine to remand it for further proceedings consistent with this decision.

The decision below found the Claimant had reasonable assurance without accounting for the fact that the parties agree that the offer was contingent on enrollment. The federal Department of Labor has explained what is to be done in such circumstances:

The state agency must analyze the totality of circumstances to find whether it is highly probable that there is a job available for the claimant in the following academic year or term. This element requires considering factors such as funding, including appropriations, enrollment, **the nature of the course (required or optional, taught regularly or only sporadically)**, the claimant's seniority, budgeting and assignment practices of the school, the number of offers made in relation to the number of potential teaching assignments, the period of student registration, and any other contingencies. When considering whether funding will be available, the state agency must consider the history of the educational institution's funding and the likelihood that the educational institution will receive the funding for a specific course and the individual claimant's likelihood of receiving an assignment. For a state agency to find that it is highly probable that a job is available does not require it to find that there is a certainty of a job.

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If the offer contains a contingency, the state agency must give primary weight to the contingent nature of the offer. This requires the state agency to find whether it is highly probable that the contingency will be met. If it is not highly probable the contingency will be met, there is no reasonable assurance because the contingent nature of the offer outweighs any other facts indicating that the claimant has a "reasonable assurance." The term "highly probable" is intended to mean **it is very likely that the contingency will be met**. For example, if a claimant has an offer that is contingent on funding, the state agency's analysis must consider the likelihood that the institution will have funding available to teach the course. This analysis could entail consideration of previous funding or appropriation levels, the likelihood of obtaining funding in the following term, and any other information that indicates whether the educational institution will have funding for the course in the following term. The Department acknowledges that states have some latitude in making this determination. The examples in Attachment I provide situations of when reasonable assurance does and does not exist.

*UIPL 5-17*, p. 7 (DOL ETA 12/22/16) (emphasis added); *see also Attachment I to IPL 5-17*. Notably, in 1970 Congress passed the "Employment Security Amendments of 1970" P.L. 91-373. Section 3309 of that law for the first time imposed a requirement on states that their unemployment laws must cover employees at state-run "institutions of higher education." P.L. 91-373, §3309, 84 Stat. 697-98. It is the desire to conform to this law, now codified at 26 U.S.C. §3304(a)(6), that Iowa developed the between academic years denial. Thus the DOL program letters are particularly instructive.

The attachment to this IPL directly addresses offers contingent on enrollment by discussing several examples. In these discussions the DOL emphasizes factors like as "enrollment (no indication it was declining), teaching history (ten consecutive semesters teaching the course), and nature of the course (intro-level required course taught every semester)." *Attachment II to IPL 5-17*, p. 7 (DOL ETA 12/22/16). In the remand, therefore, the Administrative Law Judge should elicit testimony on the nature of the course (*e.g.* required, regularly offered elective, sporadically offered special topic), the recent history of the enrollment in the course, the number of semesters the course had been offered, etc. Also, of course, testimony on the effect of the Pandemic on any uncertainty is also desirable. We note, finally, that the Claimant did not end up teaching the course he was given contingent approval to teach, and the question then if why this happened?

As the Iowa Court of Appeals noted in *Baker v. Employment Appeal Board*, 551 N.W. 2d 646 (Iowa App. 1996), the administrative law judge has a heightened duty to develop the record from available evidence and testimony given the administrative law judge's expertise. Since the Employment Appeal Board is unable to adequately make a decision based on the record now before it, this matter must be remanded for a new hearing in order that evidence may be obtained from the parties.

In conducting the new hearing the Administrative Law Judge and the hearing should address the issues we set out above, and the Administrative Law Judge should the guidelines of the UIPL and make a decision on the effect of the contingency on the “reasonable assurance” issue given the totality of the circumstances.

**DECISION:** The decision of the administrative law judge dated June 21, 2021 is not vacated at this time and remains in force unless and until the Department makes a differing determination pursuant to this remand. This matter is **remanded** to an administrative law judge in the Workforce Development Center, Appeals Bureau. The administrative law judge shall conduct a new hearing following due notice. After the hearing, the administrative law judge shall issue a decision that provides the parties appeal rights.

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James M. Strohman

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Ashley R. Koopmans

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Myron R. Linn

RRA/fnv