

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.
US BANK

Case No. 100230

DECISION OF THE HEARING OFFICER

Appearances: ██████████ the claimant appeared Pro Se.
Attorney Jennifer Nodes, on behalf of US Bank

Nature of Dispute: RSA 275:43 I - Weekly, Unpaid Wages/Bonuses

Claimant: ██████████

Employer: US Bank

Witnesses: ██████████ Claimant
Jennifer Gunderson, Incentives Manager
Frederick Thomas, Regional Sales Executive for the Northeast
Region

Date of Hearing: February 8, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on November 24, 2021, asserting that he is due unpaid wages in the amount of \$6,000 for a bonus he earned in the third quarter of 2021 and has not been paid.

The employer was notified by the Department of Labor (DOL) via mailing dated November 30, 2021. There was no response from the employer within the ten-day period provided by statute. This hearing was then scheduled accordingly for review of the claimant's claim for unpaid wages. Formal hearing was held at the DOL in Concord, New Hampshire on February 8, 2022. The claimant appeared in person with the employer's counsel and witnesses appearing via telephone.

FINDINGS OF FACT

Mr. ██████████ is a ██████████ man who was employed by US Bank from November of 2005 through October of 2021. He worked in the auto lending department as a regional

account manager and at some point, was promoted to associate vice president. He spent most of his career working for Donald Tilvis who retired in early 2021. Mr. Tilvis was replaced by Frederick Thomas as of May 24, 2021. He was paid via regular salary and a quarterly bonus. The bonus was based on sales metrics which were given to the employees on a yearly basis. See *Exhibit 1 page 2-5*.

On September 30, 2021, Mr. Thomas shared a photograph on the group chat for the Northeast Sales Team which Mr. ██████████ and many of his teammates believed to be racist in nature. Mr. ██████████ called Tim Sullivan, the executive vice president of sales and Mr. Fredrick's direct supervisor. Mr. ██████████ did not receive a satisfactory response and on October 5, 2021, he filed a complaint with human resources via their anonymous ethics hotline. He did not receive any update on the outcome of the human resources complaint.

While out on bereavement leave for his mother's funeral, Mr. ██████████ decided that he would retire instead of continuing to work for Mr. Thomas. He emailed Mr. Thomas on October 18, 2021, informing him of the retirement with a last of work set for October 29, 2021.

On October 29, 2021, Mr. ██████████ indicated he spoke with Sara Joseph in the bonus department to confirm he was eligible for his bonus based on his third quarter performance. This was confirmed by Ms. Joseph. Mr. ██████████ also reached out to Mr. Sullivan and confirmed that he would be receiving his final bonus, but he does not remember the date of this conversation.

US Bank presented a copy of a document titled "Business Line Incentive Plan Provisions" which the claimant recognized. On page one of this document, it states the following: "To be eligible for any advance, payment, award or other amount under the Plan, a participant must meet all conditions for receipt of such incentive compensation under terms of the Plan, including acknowledgement form requirements (where applicable), as well as actively at work in an eligible position as of the date such advance, payment, award or other amount is paid to the participant, unless otherwise required by state law or as specifically provided for in the Plan. Employees who terminate during the plan year due to position elimination, retirement (as defined by the U.S. Bank Pension Plan) or death may be eligible for prorated awards at the discretion of management."

Ms. Gunderson testified she is the Incentives Manager at US Bank since November 16, 2021. Prior to this she was an Incentive plan analyst team lead. She is responsible for the administration of the Incentive Plan (bonus program). Ms. Gunderson's team is notified by human resources when someone retires who would normally be eligible for payment under this plan. Ms. Gunderson also indicated that to her knowledge management then reaches out with a decision on payment. In the case of Mr. ██████████ she received no contact from management, but she admitted that her predecessor in the Incentives Manager position may have been the one who would have been informed of management's decision regarding Mr. ██████████ She was only made aware of Mr. ██████████ case about one week before the hearing.

Mr. Thomas is the Regional Sales Executive for the Northeast Region. He began this position on May 24, 2021, and was preceded in this position by Don Tilvis. He did not have a conversation with any other managers about Mr. ██████████ third quarter incentive pay. Mr. Thomas testified that he did get contacted by human resources about the text he sent, but he was not informed who had made the complaint until the day before the hearing. Mr. Thomas confirmed Mr. ██████████ had met or exceeded the sales metrics for his position in the third quarter and would have been eligible for a bonus during that time-period. Mr. Thomas was of the opinion that Mr. ██████████ was not entitled to the bonus because he left before the bonus was paid. When asked directly about the wording referring to management discretion on the matter, he indicated he did not believe he had the ability to exercise that discretion. He explained that Mr. ██████████ had only worked for him a few months, and he believed someone who knew him better should make the decision.

Mr. ██████████ had a conversation with Don Tilvis on February 2, 2022, regarding payment of bonuses for retirees. Mr. Tilvis indicated that in 2021 before he retired three people left positions like Mr. ██████████ Michael O'Brien resigned from the company to accept a job elsewhere, while Carol Vogelpohl, and John Gingrich both retired. All three of these people were paid their bonuses for the final quarter they worked.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he is owed unpaid wages. Proof by a preponderance of evidence as defined in Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not. The issue in this case is whether bonus payments are wages, if so, were wages owed and due to the claimant.

The claimant argued that the bonus was not paid because of his complaint to human resources about Mr. Fredrick. The claimant argued there was a precedent set by the payment of bonuses to other retirees during 2021, (as well as one person who resigned). The claimant further argued that he retired in good standing. He further argued that it was therefore, up to the "discretion of management" to pay him the third quarter bonus under the provisions of the bonus plan, and he was not simply barred because of when his last day of work was.

The employer argued that the claimant was not punished for the complaint about Mr. Thomas but was not paid because he was not actively employed with US Bank on the date the bonuses were paid. The employer further argued that Mr. Thomas and Mr. Sullivan's lack of contact with the incentive department is tantamount to a decision by management that he was not entitled to the bonus.

The employer's argument that a lack of contact with the Incentive Department is tantamount to a denial of payment is not persuasive. First, Mr. Thomas testified that he did not believe he knew the claimant well enough to decide to pay him. Second, there was no definitive evidence provided in the form of documentation or testimony that Mr. Sullivan decided not to pay the claimant. Ms. Gunderson's testimony noted that she

took over the Incentive Manager role after the pay date for third quarter bonuses. Her testimony also indicated that her predecessor may have been given an answer on payment, but she was unsure. Given this information it cannot be concluded that the someone in management made an affirmative decision not to pay the claimant.

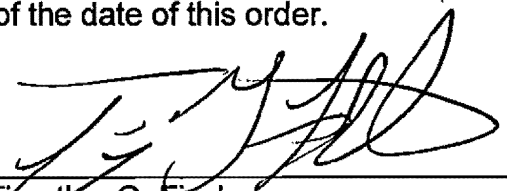
It is undisputed that the claimant met or exceeded the metrics required to qualify for a third quarter bonus. It is also undisputed that the claimant retired and was not terminated. These undisputed facts combined with the precedent set by the two previous 2021 retirees being paid their final earned bonuses supports the claimant's argument that he should have been paid his bonus. Furthermore, an employee who simply resigned was paid a bonus after leaving which is not supported, even under management discretion, by the employer's policies. The employer has no evidence to support its position that the non-payment of the bonus was based upon a bona fide business reason. Therefore, it is found that based on the employer's policy and practice the claimant was entitled to receive his last bonus payment earned while employed, despite his retirement.

Based upon a preponderance of the evidence, it is determined the claimant has met his burden and his bonus should be paid.

DECISION

Based on the evidence and testimony presented, and as RSA 275:43 I requires that an employer pay all wages due an employee and as RSA 275:43 considers bonuses to be wages when earned and due. The claimant has showed by a preponderance of the evidence that wages were due for a bonus in the amount of \$6,000. The claimant's request for payment of unpaid wages is approved.

The employer is ordered to send a check in the amount of \$6,000.00 to this Department payable to ██████████ less any applicable taxes, for the unpaid wages to this Department within 30 days of the date of this order.



Timothy G. Fischer
Hearing Officer

Date of Decision: March 3, 2022

TGF/nd