

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

█
v.

US Cellular

CASE #100682

DECISION OF THE HEARING OFFICER

APPEARANCES: █ – Claimant, Telephonic
Izik Youker, Adam Bisch, Heather Jeschke –
Employer, Telephonic

NATURE OF DISPUTE: RSA 275:43 I — Weekly Unpaid Wages, Unpaid
Commissions

DATE OF HEARING: February 17, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on January 1, 2022, alleging that he was owed \$2,248.87 in unpaid wages and commissions. The wage claim notice was issued January 5, 2022. The claimant submitted exhibits January 7, 2022. The employer filed an objection and exhibits January 13, 2022. The claimant requested a hearing January 20, 2022 and the hearing notice was issued January 21, 2022.

FINDINGS OF FACT

The following findings are based on the testimony of the employer's representative and matters of record in the Department file.

The claimant was employed as a wireless associate by the employer from October 4, 2021 to December 22, 2021. The claimant's wage claim alleged that he is owed \$1569.90 in unpaid wage guarantee money. The claimant testified he was paid \$16.50 per hour in wages and \$780.00 monthly in guaranteed money. The employer corroborated that testimony. The claimant's oral and written testimony indicated that he believed he was owed \$2,563.66 and was paid \$993.76, leaving a balance of \$1,569.90. The claimant's wage claim included a claim for \$678.97 in wages for lunch breaks he alleged he was not allowed to take.

The employer corroborated the claimant's testimony regarding the guaranteed money, stating that new associates such as the claimant receive 90 days of guaranteed commission payment of \$780.00 per month calculated per day for proration purposes. The employer denied the claimant was denied lunch breaks and submitted detailed time sheet records showing the claimant was paid for more hours than he actually worked. The claimant did not dispute this evidence.

The employer's exhibits contained documentation of commissions paid to the claimant. The employer's oral and written testimony and documentation indicate that the claimant was paid \$2,148.87. Regarding the claimant's assertion that he was owed \$2,563.66 in unpaid commissions, the employer testified and submitted documentation that the claimant earned \$2,123.45 in commissions and guarantees during his employment and was slightly overpaid \$2,148.87 in commissions and guarantees.

The employer testified that the higher figure cited by the claimant assumed that the claimant worked every day. When the guaranteed money was prorated to reflect the claimant's attendance at work, the lower figure was the result. The employer testified that the claimant was terminated for attendance issues. The claimant did not refute that testimony.

The employer testified that the commissions were paid at the end of the following month in which they were earned, with no fixed date. Commissions earned in October were paid at the end of November. The employer testified that the claimant's October commissions were paid November 26, 2021 and December 1, 2021, the November commissions were paid December 28, 2021, and the December commissions were paid to the claimant January 5, 2022.

The employer provided detailed documentation in response to the wage claim. The employer testified that the commissions and guarantees are calculated by a software system called Orca. The employer documented and testified that the claimant's October guarantee of \$780.00/ 31 days was prorated to 27 days worked for a total of \$702.89. However, the claimant worked 28 days in October. Therefore, the guarantee should have been \$728.00.

The employer testified that somehow the claimant was mistakenly paid \$25.11 in commissions earned in October on November 26, 2021 instead of \$728.00, leaving a shortfall of \$702.79 owed to the claimant for October commissions. The employer testified that the claimant was paid \$679.41 December 1, 2021 for the October guarantee, a total of \$704.52, leaving a shortfall of \$23.48 owed to the claimant for October commissions.

The employer's documentation and testimony confirmed that the claimant earned \$867.01 in commissions in November 2021. The claimant was paid \$993.76 on December 28, 2021, which was confirmed by the claimant in his

wage claim. That payment included the November commissions and \$126.75 in payment for December commissions as of December 27, 2021.

The employer's documentation includes the claimant's Individual Summary Report for November 2021. The report lists the \$867.01 in commissions and the \$702.89 guarantee amount for October as a prior period adjustment. The total is \$1569.90, the exact amount claimed by the claimant. The employer testified this was the amount in guarantees paid to the claimant for the months of October and November. The claimant did not contradict that testimony or documentation.

Evidence submitted at hearing from the claimant includes an email/text exchange between Will Rowell, the employer's Senior Financial Analyst for Incentive Payments and Resolution on December 30, 2021. On that date, the employer's Senior Financial Analyst for Incentive Payments and Resolution wrote to the claimant the following:

"In summary, I believe there will be a payout tomorrow in the amount of \$2,563.66. If so, an adjustment of -\$867.01 for November will be needed. I believe that the recalculated guarantee for December will be \$426.80 that would normally payout on 1/28/22. I will follow up next week to what actually paid and what is still owed."

The claimant was paid \$23.48 on December 31, 2021. The Orca system calculated the difference between the \$728.00 guarantee and the \$704.52 paid by December 1, 2021 and apparently made up the October shortfall. Finally, the claimant was paid \$427.11 on January 5, 2022 for the December guaranteed money. The claimant was terminated December 22, 2021. The employer testified that the claimant earned and was paid \$553.55 in prorated guarantees in December 2021 prior to termination. However, the claimant worked 22 days in December. \$26.00 x 22 days equals \$572.00. Therefore, the claimant is owed \$18.45 for December guarantees.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that he was owed unpaid wages. Proof by a preponderance as defined in Lab 202.05 is a demonstration by admissible evidence that a fact or legal conclusion is more probable than not. The hearing officer is charged with evaluating the testimony and exhibits in the case and deciding the issues presented, based upon "reliable, probative, and substantial evidence," Department Rule Lab 204.07(n).

RSA 275:43 I requires that an employer pay all wages due to an employee within 8 days of the expiration of the work week.

In this case, the amount of what is owed to the claimant is undisputed. In one month, November, he earned more than the guarantee and the other two months he is entitled to the guarantee. According to the employer's undisputed testimony and documentation, the employer paid the claimant \$2,148.87 in total commission payments during his tenure with the employer according to the employer's policy for paying commissions. The employer testified that the claimant was overpaid. Specifically, that he was only entitled to \$2,123.45 commissions. However, upon review the calculation of what the claimant is owed is inaccurate.

Calculation of the claimant's earned commissions is as follows:

October 2021 - (28 days; Oct. 4 – 31) x \$26.00/day= \$728.00

November 2021 - \$867.01

December 2021 – (22 days; terminated Dec. 22) x \$26.00/day= \$572.00

Total commission earned: \$2,167.01

Total commission paid: \$2,148.56

Total owed to claimant: \$18.45

The employer's evidence and testimony that the employer paid all commissions due to the claimant is not persuasive. In light of this conclusion, the claimant met his burden of proving that he was not paid in accordance with RSA 275:43 I.

Finally, the claimant was rightfully frustrated as to the timeliness of the payment of his commissions. It is unclear how the Senior Financial Analyst responsible for incentive payments resolution could inform the claimant on December 30, 2021 that he believed "there will be a payout tomorrow in the amount of \$2,563.96" if the employer's submission and testimony are accurate. The Senior Financial Analyst's explanation is confusing and appears to be inaccurate.

However, the claimant is not entitled to additional base wages due to the poor administration of the employer's commission structure in this matter. The issue of enhanced damages, for untimely payment, is not before this hearing officer. Nothing prevents the claimant from filing an additional wage claim to address the untimely receipt of his owed wages.

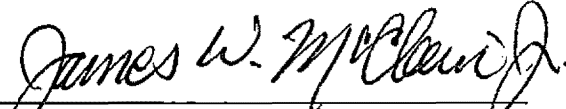
DECISION

The claimant presented credible evidence that the employer did not pay the claimant his commissions due.

The wage claim is found to be **valid**.

The employer is directed to send a check payable to ██████████ in the amount of \$18.45 for the unpaid wages, less any applicable taxes, to this Department no later than 30 days from the date of this decision.

March 3, 2022
Date of Decision


James W. McClain, Jr., Hearing Officer

JWM/nd