STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[redacted]
v.
Prime Communications, L.P.
CASE #63480

DECISION OF THE HEARING OFFICER

APPEARANCES:	Claimant, self-represented
	Dani Buchanan, Esq., representing the employer
NATURE OF DISPUTE:	RSA 275:43, I — Weekly (unpaid commissions)
DATE OF HEARING:	November 29, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage complaint on September 16, 2021, alleging that the employer owed him for commissions due September 15 and October 20, 2021. He estimated that the amount of commissions due was $5,800.00. Notice of claim was sent to the employer on September 21, 2021. No objection was received at the Department. The claimant requested a hearing and the hearing notice was sent on October 19, 2021.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, employer's representative,[1] employer's exhibits, and matters of record in the Department file. During the course of the hearing, both parties acknowledged under oath that their written submissions to the Department were true, and those statements are treated herein as part of the testimony in the case.

Claimant is 47 years old and lives in Hampton. He has a bachelor's degree in psychology from University of Massachusetts at Lowell, awarded in 1995. He worked for 10 years for ATT in mobile phone retail sales. In May 2021

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[1] Although Ms. Buchanan is a licensed attorney and serves as legal counsel to the employer, in this proceeding she appeared in her capacity as an employee with personal knowledge of the facts to which she testified under oath.

he was hired for inside sales at the employer's ATT mobile phone retail franchise in Seabrook. Shortly after being hired, he was promoted to assistant sales manager. He worked five days a week on a varying schedule. He was paid $14.50 per hour plus commissions. He generally received his commission checks two months after the sales month; he received his commissions for June sales in August.

Claimant testified that in late August, 2021 he decided to seek treatment for alcoholism. On Monday, August 30, 2021, he called his district manager and told him that he needed a leave of absence for that purpose, starting that day. The DM was very understanding and agreed that he could take the leave. Claimant testified that he did not complete any official company paperwork associated with the leave, which was unpaid.

Claimant testified that, during the course of his treatment at a detox facility, he realized that his work environment was not conducive to his maintaining sobriety, due to interactions with other staff members at the store, Accordingly, he decided not to return to work there. However, he still expected to receive his commissions for the sales he made in July and August 2021.

On September 15, 2021, he called his DM and told him he would not be returning to his job, but was still expecting to receive his commissions for July and August. The July sales commission check was due on September 15 and the August one, on October 20, 2021. The DM told him that, in order to receive commissions, he had to be actively employed. Unless he returned to work, he would not be considered actively employed and therefore would not be eligible to receive commissions. Later that day, claimant spoke to an HR representative who told him the same thing. He was advised that the eligibility requirement was set forth in the employee handbook.

Claimant admitted that he was offered the option of returning to his job, in which case he would be eligible to receive his commissions from past sales as well as commissions going forward. He declined the offer and resigned, effective September 15, 2021.

Presented with a copy of the handbook that was submitted in evidence by the employer, the claimant did not contest that he had received a copy of the employee handbook when he was hired, nor did he contest its contents, although he did not recall reading the specific policy regarding eligibility to receive commissions.

Dani Buchanan, 33, of League City, Texas, is legal counsel to the employer. She testified that company records showed the claimant had acknowledged receipt and acceptance of various policy and training materials upon hire, including the written description of the company's sales incentive plan. Pursuant to the terms of that plan, sales were not deemed to be earned until 180 days after the date of sale, although the company would pay an employee advances against commissions earlier than that, provided the employee fulfilled other listed responsibilities associated with the sale.

The opening paragraphs of the incentive plan document provide,

> This Sales Incentive Plan (this "Plan") governs the terms and conditions of commissions and/or bonuses ("sales incentives") you may be eligible to earn. In summary, the Company's right to payments from AT&T does not occur until at least 180 days after a sale or customer activation, and <u>your sales incentives also are earned no earlier than 180 days after a sale or customer activation</u>. You may be eligible for a sales incentive subject to the terms and conditions of this Plan, which include your continued employment in good standing at the time any sales incentive is earned. <u>For your benefit, the Company will advance unearned sales incentives to you, but all sales incentives remain unearned for 180 days after a sale or customer activation and require completion of all other requirements described below.</u> The specific calculations of your commission and/or bonus, the products and services on which they are based, and applicable sales goals and quotas will be posted on the Prime Portal.
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> **Earning Sales Incentives:** As you know, making a sale is just part of the job. You do not earn any sales incentives for an individual sale or customer activation. Rather, you may be eligible to earn sales incentives if you meet your monthly sales quota. Once you meet your monthly sales quota, sales incentives are not earned until the following conditions have been met....
>
> [Followed by a list of conditions that must be met]

Prime Incentive Plan, employer's exhibit (emphasis added).

Included among the conditions that had to be met was the following:

> [That] you are still employed in good standing with the Company at that time. *"Good Standing" means you are actively employed and not on suspension for policy violations or in violation of any policies, third party agreements or applicable state or federal laws. As a general matter, the Company has determined that it is valuable that the employee who was involved in the point of sale to a customer continue to be available to that customer during the 180-day period after account activation. Thus, generally, sales incentives are based on consistent customer service, the maintenance of a customer for at least 180-days, continued employment with the Company during the 180-day period after a new account is activated, and meeting each factor listed above.*

(Emphasis in original.)

Ms. Buchanan did not contest that the claimant met his sales quotas for the months of July and August 2021 and that, had he fulfilled the eligibility requirements, he would have received commissions of $2,669.77 for July and $2,171.46 for August 2021. She also did not contest his testimony that he would normally have received advances on those commissions on September 15 and October 20, 2021, respectively. However, she testified that the claimant was not "actively employed" on and after August 15, 2021, and therefore he was not eligible to receive commissions on sales in July and August 2021; moreover, as of his separation date, September 15, 2021, the required 180 days had not elapsed for either sales month.

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).

Regarding entitlement to commissions, the New Hampshire Supreme Court has ruled as follows:

> As a general rule, a person employed on a commission basis to solicit sales orders is entitled to his commission when the order is accepted by his employer. The entitlement to commissions is not affected by the fact that payment for those orders may be delayed until after they have been shipped. This general rule may be altered by a written agreement by the parties or by the conduct of the parties which clearly demonstrates a different compensation scheme.

Galloway v. Chicago-Soft, Ltd. (N.H. 1998).

The Hearing Officer finds that the general rule in the current case was altered by the written Incentive Plan that was provided to and accepted by the claimant upon hiring. Pursuant to that plan, commissions were not actually earned upon acceptance of the order by the employer; a number of other conditions had to be met, including the elapse of 180-days from the date of sale and the employee's status as "actively employed at that time."

Arguably, the claimant was still "employed" by the company while he was on personal leave, prior to giving formal notice on September 15, 2021 that he was resigning effective immediately. Whereas, after his resignation, he could not reasonably be said to be so. If employment were sufficient to render him eligible for an advance on commissions, he was arguably entitled to an advance on commissions for his July 2021 sales, but was clearly ineligible to receive an advance on commissions for his August sales.

"Active employment" is not defined in the written sales incentive plan, but the plain language imports a requirement that the employer at least be currently reporting for work or perhaps be on medical leave. Here, the claimant was on unpaid, informal personal leave; he agreed that it was not medical leave. It is therefore found that he was not actively employed on or after August 30, 2021, and therefore, pursuant to the written commission agreement, was ineligible to receive commissions for his sales in July and August 2021.

The claimant argued that this conclusion produces in an unfair windfall to the employer. There was no evidence that he failed to complete any specific pre-sale or post-sale duties or that the company did not receive full payment on those sales. He further argued that a strict construction of the agreement would mean that every employee leaving the company would necessarily forfeit his commissions for the preceding 180 days.

These arguments are unavailing in the present forum. The Department is charged with enforcement of wage and hour laws, as construed by the courts. It does not have equitable powers to address claims of unjust enrichment or windfalls, nor can it decide a case based on speculation about the rights and circumstances of third parties.

Accordingly, is found that the claimant failed to meet his burden of proving that he was owed unpaid commissions.

DECISION

The claimant having failed to prove that he was entitled to the commissions claimed for sales in July and August 2021, pursuant to the terms of the written commissions agreement, his claim for unpaid commissions is respectfully ruled to be **invalid**.

December 10, 2021
Date of Decision

George A. Stewart, Hearing Officer

GAS/cb