

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

Hubbingtons, Inc. d/b/a Hubbingtons Furniture

Case No. 22-WG-00069

DECISION OF THE HEARING OFFICER

APPEARANCES: ██████████ Claimant
Peter Rhoades, Employer

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

DATE OF HEARING: October 5, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on August 30, 2022, alleging that she was owed an estimated \$4,200.00 in unpaid commissions. The wage claim notice was issued August 31, 2022. The employer responded September 2, 2022. The claimant requested a hearing September 8 and the hearing notice was issued September 14, 2022.

FINDINGS OF FACT

The following findings are based on the testimony of the parties and matters of record in the Department file.

The claimant was employed as a furniture sales representative by the employer for 10 years until February 5, 2022, when she left the company without notice due to a family emergency. The claimant left employment February 5, 2022 with no notice and returned all company property on March 12, 2022. The claimant estimates she is owed \$4,200.00 in unpaid commissions for sales orders taken in December 2021, January 2022 and up to Saturday February 5, 2022, but acknowledged she had no documentation to corroborate her claim.

The claimant testified that although she kept a record of her sales and anticipated commissions, she did not submit her records as evidence and would need access to the employer's financial records in order to determine how much she believed she was owed. The parties agreed that her employment with the employer was terminated by mutual agreement on March 12, 2022.

The claimant testified that she believed that commissions were earned as a percentage of sales made. The claimant testified that commissions of 3% were paid to salespeople when the sales were final, *after* the furniture had been delivered to the

buyer and the buyer had paid for the furniture. The claimant testified that she had no documentation of that policy but that the practice had been followed during her 10 years of employment with the employer.

The claimant's wage claim and testimony were that she had no way of knowing which of her sales in the period in question had been delivered since she left the employer and that she requested an account of her outstanding deliveries from the employer. However, the claimant failed to provide any evidence of her sales.

The employer's September 2, 2022 response and oral testimony were that commissions of 3% were earned as a percentage of the final completed sale transaction and were paid to the sales person after the furniture had been delivered and the sales price paid to the employer. The employer testified that the commission earning period begins when the sales order is taken and is completed only after all changes to the order have been made and accepted, the furniture had been made, delivered, and accepted by the client and payment has been received. The employer's response and testimony were that commissions were not paid to salespeople who were not employed at the time the product had been delivered and the employer paid.

The employer's response and testimony were that the claimant was paid \$10,828.00 through August 26, 2022 in commissions for sales she had initiated but not completed through February 5, 2022. The response and testimony were that the employer reassigned the claimant's sales to other colleagues and asked the colleagues if they were willing to forego commissions so that the commissions could be sent to the claimant. The employer's testimony was that this was done due to the claimant's length of service with the company and the nature of the claimant's family emergency. Under questioning from the hearing officer, the claimant acknowledged she had received \$10,828.00.

The employer's response and testimony were that the commissions were discontinued after sales staff complained that they were servicing the claimant's sales orders 6 months after she left the company and were not receiving commissions. The decision to discontinue paying commissions was communicated to the claimant by e-mail on August 23, 2022. The August 23, 2022 e-mail indicates that most of the claimant's outstanding sales orders had been completed by that date and that the claimant's last sale of January 30, 2022 had significant chargebacks which would have eliminated her commission on the sale and notes that the employer made an exception to the commission policy due to the nature of the claimant's family emergency.

The claimant replied via e-mail August 24, 2022. The claimant's e-mail explicitly acknowledges commissions only get paid when the furniture is delivered and again requests an account of her outstanding sales so that she may compare it to her account of her sales. Again, the claimant's account of her sales was not submitted to the Department.

The claimant introduced the employer's current commission policy dated April 11, 2022. The commission policy reads in relevant part,

"Employee must be employed by Hubbingtons when the commission is available to be paid to receive payment. Once employee is no longer employed by Hubbingtons no commissions are due or earned by the employee.

If an employee gives 4 week (sic) notice of leaving Hubbingtons will extend their commissions earned period to any sales completed 4 weeks after they terminate their employment.

Future commissions can be considered for payment after the employee leaves but none are required and any payments considered will be considered as a gift to the employee."

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that she 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).

Under RSA 275:42 III commissions are classified as wages and under RSA 275:42 VII commissions must be reconciled monthly. Under RSA 275:43 I wages must be paid within 8 days after expiration of the work week if paid on a weekly basis and within 15 days if paid on a biweekly basis.

The claimant argued that unless there is a written agreement between employer and employee the commission is due even though the product was not delivered and paid for until after the employee left the company. Alternatively, the claimant argued she should have received the April 11, 2022 policy although she was no longer employed by the employer on that date. The claimant argued that because she did not receive or sign such a policy she is entitled to the \$4,200.00 she seeks, which she admits is an estimate uncorroborated by documentation. The claimant argued she should have been provided access to the employer's financial records after she left employment in order to accurately determine her sales and expected commissions.

The employer argued that the commission policy was that commissions were not available to be paid until the product had been delivered and payment received. The employer argued that the conduct of the parties over the previous 10 years clearly indicated that commissions were not paid until the product had been delivered and payment received. The employer argued that he was within his rights to reduce the policy to writing and that commissions had never been paid to departed employees except in the current instance. The employer argued that he had no duty to provide the claimant the April 11, 2022 policy or provide her access to his financial records.

Concerning the claim for commissions, after hearing the testimony and reviewing the evidence it is clear the claimant was not confused about the policy and had no documentation supporting her contention that commissions were based on the sales order as opposed to final delivery and receipt of payment. The claimant's wage claim, documentation and testimony are clear that the claimant believed commissions were due after delivery of furniture and receipt of payment. The claimant's August 24, 2022 e-mail to the employer confirms this. It is clear that the commission structure was acceptable to the claimant for 10 years while she was employed by the employer.

In this case, it is found that the conduct of the parties clearly demonstrated a different compensation scheme. The employer's evidence and testimony were that 3%

commissions are paid when the project is completed and final payment has been received. The claimant testified that commissions of 3% were paid to salespeople when the sales were final, after the furniture had been delivered to the buyer and the buyer had paid for the furniture. The employer and the claimant both testified to the same commission policy. The employer's and claimant's unrefuted testimony and evidence is found to be credible and is adopted.

There is no evidence that the claimant had requested commissions be paid to her between her last day of work on February 5, 2022 and August 24, 2022, after she had been informed she would no longer be receiving commissions. There is evidence the claimant was aware of the April 11, 2022 policy as the claimant submitted the policy into evidence. Therefore, the claimant knew or should have known that former employees were not eligible to receive commissions on sales finalized after leaving the employer. Therefore, the evidence supports the proposition that the employer paid these commissions to the claimant voluntarily under the April 11, 2022 policy.

The claimant received \$10,828.00 in commissions and requested \$4,200.00. Therefore, the claimant seeks total estimated commissions of \$15,028.00. The commission rate was 3% during the claimant's tenure. If the claimant's argument were to be accepted, the claimant would have had to show she made sales of at least \$500,933.00 between December 1, 2021 and February 5, 2022. The claimant provided no documentation of her sales, although her wage claim, testimony and submittals all mention the existence of the claimant's personal sales log, which was not submitted into evidence.

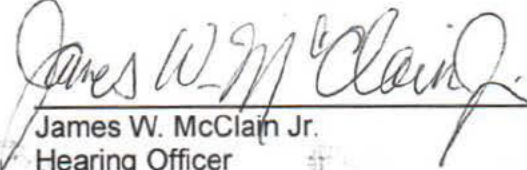
In light of this conclusion, the claimant did not meet her burden of proving that she was not paid in accordance with RSA 275:43 I.

DECISION

The employer presented credible evidence that the employer paid the claimant all commissions due.

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

October 31, 2022
Date of Decision


James W. McClain Jr.
Hearing Officer

JWM/nd