

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Active Network Inc.

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 I unpaid commissions

Employer: Active Network Inc., 10182 Telesis Ct #100, San Diego, CA 92121

Date of Hearing: December 2, 2013

Case No.: 46650

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$25,000.00 in unpaid commissions. He alleges the employer failed to pay commissions due for 2012 in the amount of \$15,929.09 and for 2013 in the amount of \$6,985.41. He argues the employer used a pay rate notification signed on September 26, 2012 to pay commissions starting January 1, 2012, instead of using the 2011 offer letter.

The claimant submitted documents that arrived via US Mail on the hearing date.

The employer denies the claimant was not paid for all commissions due. They argue that the claimant did not provide specific instances in which he was missing commissions.

The hearing was left open until 4:30pm on December 16, 2013 for the employer to respond to the late submission of documents and submit a closing statement. They submitted documentation within the required timeframe. The claimant was given until 4:30pm on January 3, 2014, to provide a response and a closing statement. The claimant did not submit a response.

FINDINGS OF FACT

The claimant worked for the employer from February 1, 2011 through October 4, 2013, when he resigned.

The claimant argued the employer did not pay commissions pursuant to the written commission plans in effect. Specifically, the employer paid commissions in for all

of 2012 according to a commission plan he signed on September 26, 2012, and they did not pay all commissions due for 2013.

The claimant signed the 2011 commission plan on June 16, 2011, though it reflects an effective date of April 1, 2011. The claimant began work on February 1, 2011. The written commission policy states, in relevant part, "Business conditions may necessitate modifications of this compensation plan. Such modifications will be made at the sole discretion of the Plan Administrative Team as defined in Section E."

The claimant signed the 2012 commission plan on September 26, 2012, though it reflects an effective date of July 1, 2012. The written commission policy states, in relevant part, "Because business needs can change substantially during the course of the fiscal year, this Sales Compensation Plan Document, and any assigned quotas, targets, territories, accounts, commission rates, or bonus amounts are subject to change at any time of a prospective basis at Active Network's sole discretion without prior written notice."

No commission plan for 2013 was submitted, only the claimant's signature acknowledging the plan on February 28, 2013. However, the acknowledgement reads, in relevant part, "I have read and understand the Sales Incentive Plan document. I further understand that this Sales Incentive Plan, including the specific incentive components, does not form a part of my terms and condition of employment, is subject to modification or termination at any time, for any cause, and entirely within the discretion of management of The Active Network, Inc. and /or its applicable affiliates (collectively, the "Company"). In addition I understand that any payment made to me pursuant to the Sales Incentive Plan in no way guarantees or gives any rise to any future rights of payment."

The New Hampshire Supreme Court, in Bryan K. Galloway v. Chicago-Soft, Ltd. 142 NH 752, established a "general rule" regarding commission sales that states, "a person employed on a commission basis to solicit sales orders is entitled to his commission when the order it 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 (*emphasis in original*) demonstrates a different compensation scheme".

The Hearing Officer finds that the claimant was given a copy of the 2011 and 2012 Compensation Plans, as evidenced by his signature, which informed him that the employer had the exclusive right to change, modify or terminate any compensation plan, including those for commissions, at any time and at its own discretion. The claimant was also given a copy of the 2013 plan, again acknowledged by his signature, that informed him that employer had the right to modify or terminate the plan at any time, for any cause, and entirely within the discretion of management of The Active Network, Inc. and /or its applicable affiliates (collectively, the "Company"). Because the claimant was notified that the employer could change or terminate the commission plan, the general rule was altered to demonstrate a different compensation scheme. Because of this alteration of the general rule, the claimant failed to prove by a preponderance of the evidence that he is owed the claimed commissions.

Further, the claimant did not present credible testimony and evidence that he had not been paid the wages/commissions claimed.

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed wages/commissions, it is hereby ruled that the Wage Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: January 22, 2014

Original: Claimant
cc: employer

MJD/all