

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V
Tyco Integrated Security

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages and commissions
RSA 275:44 IV liquidated damages
Interest

Employer: Tyco Integrated Security, 35 Progress Ave, Nashua, NH 03062

Date of Hearing: November 2, 2016

Case No.: 53141

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$9,943.92 in unpaid commissions. He further seeks liquidated damages and interest.

The employer denies the claimant was not paid for all commissions due under the written agreement. The agreement specifically notified the claimant commissions were not earned until specific criteria are met.

FINDINGS OF FACT

The claimant worked for the employer from December 2013 through May 25, 2016.

The claimant argues he had three remaining commissions due to him on sales made prior to his separation from the employer.

The employer argues the agreement specifically notified the claimant he was not entitled to the payment of commissions on sales not earned prior to his separation from employment.

The Tyco Integrated Security LLC Compensation Plan FY2016 Commercial Executive Account reads, in relevant part, “**Commissions**, An **advance** on unearned commissions is paid 50% when a sale is booked in accordance with Tyco Integrated Security policies and procedures. The remaining 50% of commissions are deferred and paid when the installation process is complete, provided that the Customer Care Representative is employed by Tyco Integrated Security on the date that the installation is complete. In order to ensure a high level of customer satisfaction, employees understand and agree that commissions are paid in **advance**, but are **not earned until**

the employee closes the sale, the installation is complete, and all installation fees are paid in full by the customer.”

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 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 Tyco Integrated Security LLC Compensation Plan FY2016 Commercial Executive Account agreement that informed him that his commissions are not earned until the employee closes the sale, the installation is complete, and all installation fees are paid in full by the customer. The claimant agrees these criteria were not met until after his separation from employment. Because the claimant was given the agreement, the general rule was altered to demonstrate a different compensation scheme. Because of this alteration of the general rule, the claimant fails to prove by a preponderance of the evidence that he is owed the remainder of the commissions on the outstanding sales made prior to his termination.

As no wages/commissions are found to be due, no liquidated damages can be assessed.

Even if the commissions had been found to be due, the claim for liquidated damages would have failed.

RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer, "willfully and without good cause fails to pay" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

The employer provided credible testimony that they held a genuine belief that no commissions were owed to the claimant.

The Hearing Officer would have found that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good case failed to pay him all wages due in the time required because the employer had a genuine belief that the wages/commissions were not owed.

DISCUSSION

The burden of proof lies with the claimant in these matters. The claimant has the burden to prove by a preponderance of the evidence that the claimed wages are due. 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 claimant failed to meet this burden.

DECISION

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

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that this portion of the Wage Claim for liquidated damages is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: November 9, 2016

Original: Claimant
cc: Employer
Attorney

MJD/das