

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



**V**

**Oxford County Telephone & Telegraph Co dba Oxford Networks**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages and commissions  
RSA 275:43 V unpaid sick pay  
RSA 275:44 IV liquidated damages

**Employer:** Oxford County Telephone & Telegraph Co dba Oxford Networks, 491  
Lisbon St, Lewiston, ME 04240

**Date of Hearing:** November 29, 2016

**Case No.:** 53981

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts he is owed approximately \$1,675.58 in unpaid commissions and \$6,400.80 in unpaid sick pay due after his separation from employment. He further seeks liquidated damages.

The employer denies the claimant is due any commissions or sick pay under the written policies of the employer.

**FINDINGS OF FACT**

Oxford County Telephone & Telegraph Co dba Oxford Networks acquired Bayring Communications in September 2015.

The claimant's employment with Bayring Communications began June 19, 2000, and continued with Oxford County Telephone & Telegraph Co dba Oxford Networks (the employer) through his separation on July 20, 2016.

The Bayring Communications fringe benefits remained in effect through December 31, 2015, and then transferred to the employer's fringe benefit package on January 1, 2016.

The claimant argues he earned commissions during his employment which remain due after his separation from employment. The claimant argues that the February 23, 2012, commission statement was from the previous company and no longer in effect. He argues he did not receive any commission plan from the employer after the acquisition.

The employer argues the claimant is not due any commissions pursuant to the written commission statement signed by the claimant on February 23, 2012, which reads in relevant part, "In the event that an Account Executive terminates employment (for any reason) prior to commission payment, commissions will not be paid." Further, they argue this commission plan remains completely intact. With the acquisition by the employer from the previous company, they added two additional goals to earn more commissions than in the original February 23, 2012, plan. They acknowledge they did not put the additional opportunities over and above the existing policy in writing.

All of the sales employees from the previous employer, Bayring, remained separate from the Oxford sales employees. The Bayring sales employees kept their sales agreements. In an effort to bring synergy between the two separate divisions, the Bayring management opted to add two additional sales bench mark goals in addition to the original sales agreement.

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 employer properly notified the claimant through the February 23, 2012, agreement, that he would not receive commission payments after his termination. The employer's 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.

The claimant's argument that the February 23, 2012, agreement was not in force because it was from the previous company is not persuasive. The terms and conditions of the agreement did not change. The employer added opportunities, of which the claimant was aware, which were not reduced to writing. These additions do not invalidate the original agreement, nor did the claimant receive any new written commission statement to supersede the February 23, 2012, agreement, after the change of ownership of the employer.

The claimant also argues he is due \$6,400.80 is unpaid sick pay which he had available upon his separation from employment.

The employer argues the claimant is not due any payment of sick pay under the written policy of the employer. Further, the employer has never paid sick time to a separating employee.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding sick leave pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses,

severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

Through a December 2015 meeting, the employer explained that the former Bayring employees would be moved over to the Oxford fringe benefit plans effective January 1, 2016. The claimant signed an acknowledgement for the new Oxford written policies, including sick pay, on December 18, 2015.

The written plan states, in relevant part, "Sick time is to be used when you are sick or have a doctor's appointment which prevents you from working..... Sick time may be used for employees, children, parents and spouse/domestic partner." The written policy also states that sick time accumulates. The policy also does not contain any language specific to end of employment sick time provisions.

The parties agree the claimant accumulated more sick time pay than allotted by this written policy.

Though the policy does not state that sick time is forfeited upon separation from employment, it specifically notifies the claimant that sick time is to be used only in certain instances for himself or specified family member. It also specifies that sick time accumulates, it does not accrue. The employer also provided credible testimony that the practice of the employer has been that sick time is forfeited at separation.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed sick pay under the written policy and practice of the employer.

The claimant also sought liquidated damages on the claimed commissions and sick pay.

As no wages were found to be due, no liquidated damages can be assessed.

Even if the wages were 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 believed the claimant was not due any further commissions or any sick pay.

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 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, 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 this portion of the Wage Claim is invalid.

As RSA 275:43 V considers sick pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is due any sick pay, it is hereby ruled that this portion of the Wage Claim is invalid.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: December 9, 2016

Original: Claimant  
cc: Employer

MJD/das