

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

**V**

**Primary Residential Mortgage Inc**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages/commissions  
RSA 275:44 IV liquidated damages

**Employer:** Primary Residential Mortgage Inc., 1480 N 2200 W, Salt Lake City, UT 84116

**Date of Hearing:** January 18, 2017

**Case No.:** 54190

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant originally asserted, through the filing of his wage claim, that he was owed \$12,280.75 in unpaid commissions for five loans which he originated. He argues he received 50% of the required commission on three loans, and seeks the balance as due. He also argues he did not receive any commission for two additional loans. He amended the claim to include liquidated damages.

At the hearing, he amended the amount of the claim to \$10,948.31.

The employer initially argued the claimant was not due any further commissions pursuant to the written commission policy. However, after hearing the claimant's testimony, he agreed to research two of the loans for which the claimant might be due a 50% commission payment. The employer believed that the claimant was not the originator on those loans, and therefore not due any commissions. The employer also argued that the claimant is not entitled to the remaining 50% of any of the commissions, pursuant to the written commission policy.

The hearing was left open until 4:30pm on February 1, 2017, for the employer to submit either a check for the 50% commission or a response as to why the commissions are not due. The employer submitted a check for the 50% commission for the two loans for which the origination was questioned. The claimant still argues the other 50% of the commission is due on all five loans and liquidated damages.

**FINDINGS OF FACT**

The claimant worked for the employer from June 10, 2015 through September 29, 2016.

The claimant argues he is due the remaining 50% commission of five loans for which he was the originator. He agrees the contract is "very clear" that commissions are only paid 50% commissions on loans which close and fund after an employee has separated from employment. He argues that his manager at the time explained that this provision of the contract was only for employees who "fill the pipeline" and then quit, leaving the company to "service the apps." He alleges his manager assured him that he

would be paid full commissions if he left, contrary to the written policy. He also argued two other employees were paid full commissions in a similar circumstance.

The employer argues the written commission policy is clear and the claimant has now been paid all commissions due.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer properly notified the claimant of the commission policy via the June 10, 2015, Offer and Acceptance of Employment; Compensation Provisions – Commissions Minus Hourly, executed by the parties the same date.

The policy reads, in relevant part, **“D. Termination of Employment 4. Loans in Process**, ...loans in process, which have not closed and funded, are subject to a reduction in commission percentage. Employee shall be paid fifty percent (50%) of the commission he or she would have otherwise earned if he or she had remained employed with the Employer.”

The loans in question were not closed and funded at the time of the claimant's separation. The employer initially paid the claimant in accordance with the written policy for three loans. The employer initially believed the claimant was not the originator on the two remaining loans, however, after research, he found the claimant was the originator and paid the 50% commission on those two loans.

The claimant's argument that that he had a verbal conversation with his manager, who did not appear at the hearing to corroborate his testimony, that the written policy would not apply to him, is not found credible or persuasive. His argument that the employer had made exceptions to this policy for two other employees is also not persuasive, as they did not appear to corroborate his testimony or present their contracts.

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 June 10, 2015, agreement, that he would receive a 50% commission payment on loans which closed and funded after his termination. The employer altered the general rule 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 also seeks liquidated damages.

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 held a genuine belief that the claimant was not due the 50% commission on two loans they had not believed the claimant had originated. Once they learned he had done so, they remitted payment.

Further, the balance of the wage claim was found invalid. However, even if wages had been found to be due, the employer provided credible testimony that they believed all commissions had been due pursuant to the written commission policy.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence that the employer voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed, failed to pay them.

### **DECISION**

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages/commissions 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.

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 the portion of the Wage Claim for liquidated damages is invalid.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: February 3, 2017

Original:        Claimant  
cc:                Employer

MJD/das