STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF MICHAEL A. NYE AND MARGARET M. SMITH, Claimants, vs. CABLE TECHNOLOGY OF MONTANA, INC., a Montana corporation, Respondent.	)	Case Nos. 1268-2006 & 1594-2006 **FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER**

I. INTRODUCTION

Respondent Cable Technology of Montana, Inc., appeals from determinations of the Wage and Hour Unit of the Department of Labor and Industry upholding the claims of Michael A. Nye and Margaret M. Smith. Hearing Officer David A. Scrimm held a contested case hearing in this matter on October 11, 2006. Nye and Smith represented themselves. William O. Bronson, attorney at law, represented Cable Technology of Montana, Inc.

Nye, Smith, Marje Rivers, William Smith, Dawn Melton, Fred Sterhan and Edward Buttrey testified. Exhibits Nye 5-22, 24-33, 35-41, 43-48, 52, 53, 56 and Smith 7 & 8 were admitted into evidence. The parties submitted post-hearing briefs on October 31, 2006.

Based on the evidence and argument presented at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Are Nye and Smith due additional wages and penalty as provided by law?

III. FINDINGS OF FACT

1. Cable Technology of Montana, Inc. (CTM), employed Nye as its quality manager from September 15, 2003 until October 7, 2005. CTM employed Margaret M. Smith as the front office manager from August 1998 until January 2006.

2. Edward Buttrey owns CTM. Fred Sterhan was the finance and human resources manager at CTM from January 2005 until May 2005. At Buttrey's request, he developed a new pay and benefits policy that took effect May 1, 2005[1] (Ex. 21 and 22). The new policy was approved by Buttrey.

3. In mid-April 2005, management held an all employee meeting about the new pay and benefits policy. The new policy was in the form of two tables, one addressing pay and the other vacation and other benefits. These documents were distributed to the employees at or shortly after this meeting.

4. The new vacation policy provided Grade 7 managers with 80 hours of annual vacation at the beginning of each year and would be pro-rated. The new policy amended the vacation policy identified in part 19 of the CTM Employee Handbook that only provided 40 hours of vacation to employees with less than 5 years of service. Under the new vacation policy, employees would not lose vacation time already accrued. The CTM Employee Handbook provided that upon termination an employee would be paid for unused vacation time.

5. Sterhan was not aware of any changes to the 5/1/2005 policy before his departure and knew of no other schedule for Grade 7 managers.

6. Marje Rivers was promoted to production manager at CTM in the late summer of 2005. She attended the April 2005 meeting and received the new vacation policy documents at that time.

7. When Rivers became a Grade 7 manager, Buttrey told her that under a revised policy Grade 7 managers would not have 80 hours accrued vacation, but could take vacation as needed.

8. Rivers did not receive any written documentation of the revised vacation policy until June 2006.

9. The only meeting where Rivers heard the revised policy discussed took place in June 2006.

[1] The vacation policy put into effect by CTM on May 1, 2005 is referred to as the "new policy" and the policy as indicated by Exhibit 37 that shows "salaried" under the Vacation column for Grade 7 managers is referred to as the "revised policy."

10. In mid September 2005, there were four Grade 7 managers at CTM: Nye, Smith, Rivers and John Yao.

11. Smith did not learn of the revised policy until Nye showed her the copy he had just received from Buttrey on September 22, 2005. Buttrey did not provide Smith with a copy of the revised policy before her departure in January 2006.

12. In August 2005, Buttrey announced that CTM would be moving its headquarters from Kalispell to Great Falls.

13. Buttrey approved all payroll unless he was unavailable.

14. Buttrey held daily meetings with his managers at 9:30 a.m.

15. In June 2005, Dawn Melton added 40 hours to Nye's vacation totals in accordance with the new policy. This change was approved by Buttrey.

16. May through October 2005 was a very confusing time at CTM.

17. Buttrey signed all payroll submissions made to CTM's accounting firm, Gundlickson & Associates, unless he was unavailable. Buttrey was Melton's supervisor when Fred Sterhan left in May and continued to be so until she left on or about June 20, 2005.

18. Buttrey assumed all human resource duties from the time Melton left in June until some time in September when Steve Moser was hired.

19. Melton was unaware of any revisions being made to the new policy regarding vacation pay for Grade 7 managers.

20. At some point, the revised policy was placed on CTM's accounting computer folder. Access to this folder was limited to accounting personnel. Other older versions of the policy were also in the accounting folder.

21. Under the revised policy, vacation time was to be tracked by Gundlickson, but no amount of hours available was to be shown on employees' pay stubs.

22. Under the new vacation policy, employees who were currently earning less than 80 hours of annual vacation time would get their existing hours plus a pro-rated amount of the 80 hours provided in the new policy. On their next anniversary date they would be given an additional 80 hours.

23. CTM paid Nye for 15 hours of vacation pay that could only have been awarded under the policy identified in section 19 of the Employee Handbook or under the new vacation policy put into place on May 1, 2005.

24. CTM failed to properly pay Nye and Smith wages owed them.

25. On December 14, 2005, Nye filed his wage claim alleging additional wages were due to him.

26. On February 1, 2006, Smith filed her wage claim alleging additional wages were due to her.

27. On March 27, 2006, CTM filed its appeal of the determinations made in both Smith's and Nye's claims.

28. Nye was paid a salary of $55,000.00 or $26.44 per hour (Nye Ex. 24-28). Smith was paid a salary of $54,600.00 or $26.25 per hour (Smith Ex. 7 and 8).

29. Nye is owed 57 hours of vacation pay totaling $1,507.08 (57 x $26.44 per hour). The 55% penalty on $1,507.08 equals $828.89.

30. Smith is owed 120 hours of vacation pay totaling $3,150.00 (120 x 26.25 per hour). The 55% penalty on $3,150.00 equals $1,732.50.

IV. DISCUSSION[2]

Montana law requires employers to pay wages when due, and in no event later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205.

"Vacation pay which has been earned and is due and owing must be considered in the same category as wages and is collectible in the same manner and under the same statutes as are wages." 23 Op. Att'y Gen. 151, 153 (1949); *In re the Wage Claim of Sharon Langager*, (1998) 287 Mont. 445, 453; 954 P. 2d 1169, 1173-1174.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." ***Id. at*** 189, 562 P.2d ***at*** 476-77, ***citing*** *Anderson,* 328 U.S. ***at*** 687, ***and*** *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; ***see also****, Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13-14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff's wage claim failed because the plaintiff failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

[2] Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation." *Garsjo,* 172 Mont. ***at*** 189, 562 P.2d ***at*** 477, ***quoting*** *Purcell*, ***supra****,* 359 Mich. ***at*** 576, 103 N.W. 2d ***at*** 497**.**

The May 1, 2005 vacation policy governs this matter.

The critical issue in this case is what vacation policy governs wages owed, if any, to Nye and Smith. All the witnesses testified that CTM held an all employee meeting in April 2005 where a new salary and benefits package was discussed (Nye 21 & 22). Sterhan testified that this new policy was effective May 1, 2005. Sterhan further testified that Buttrey reviewed and approved the new policy. Sterhan testified that the "idea being that Grade 7 managers would start off with 80 hours after their first year rather than having to wait under the previous policy" (as identified in CTM's Employee Manual).

Buttrey testified that he changed the new policy and that he provided Grade 7 managers with the information at the daily 9:30 a.m. managers' meetings. He also testified that the revised policy document was not distributed to those managers in 2005. In fact, it was not distributed until June 2006. Smith, Nye and Rivers testified that they never saw the revised policy until September 22, 2005. Sterhan testified that he was unaware of the revised policy before he left CTM in May of 2005. Melton testified that she was unaware of the revised policy before she left CTM on or about June 20, 2005.

In *Langager v. Crazy Creek Products, Inc.,* the Montana Supreme Court held that "an employer is free to set the terms and conditions of employment and compensation and the employee is free to accept or reject those conditions." 1998 MT 445, ¶25, 287 Mont. 445, ¶25, 954P.2d 1169, ¶25, *quoting Rowell v. Jones & Vining, Inc*. (Me. 1987), 524 A.2d 1208, 1211. If CTM intended to change the terms of the vacation pay for its Grade 7 managers, it had an obligation to provide them with an opportunity for input and to accept or reject the proposed changes. Such an opportunity was clearly given to employees for the revisions that took effect May 1, 2005. No corroborated evidence shows that such an opportunity was given to Smith and Nye. Further, when Buttrey testified about his dissemination of the "revised vacation policy," he admitted that he placed the salaried vacation policy on the company's computer system's accounting folder sometime in May, but that Smith and Nye did not have access to it. Even if Smith and Nye had been able to access the revised information, Buttrey testified that other versions were in the accounting folder that could have led to confusion as to what the policy was. In such an instance, it is reasonable for Smith and Nye to believe that a

policy announced at an all employee meeting and put into effect on May 1, 2005 was still in effect throughout the year. Moreover, Buttrey's testimony about the dissemination of the revised policy is less credible as neither Sterhan, who left at the beginning of May, and Melton, who worked into late June, had any knowledge of Buttrey's revised policy even though both were intensely involved in the development and implementation of the new pay and benefits policy. CTM's payment of 15 hours of vacation time to Nye in his final paycheck is inconsistent with the policy that it now asserts was in place some time in May (Ex. 37 and 40). Those vacation hours could only have been earned under the vacation policy as identified in the CTM Employee Handbook or as amended by the new policy put into place in May 2005. Buttrey's after the fact attempt to recharacterize the payment as some sort of "severance" is not credible.

Given the departure of Sterhan, Melton, and Vicky Nelson and the pending move from Kalispell to Great Falls, it is not surprising that the implementation of a revised vacation policy for Grade 7 managers was not effectively communicated to those who would be affected by it. Nonetheless, substantial evidence in the record shows that the vacation policy governing vacation pay for those managers was the one articulated to CTM employees in April 2005. The fact that Rivers was told of the revised policy does not indicate that it had become policy for all Grade 7 managers. The testimony of Buttrey, Melton, Nye, Peggy Smith and Rivers provides clear evidence that communication of any revised policy was hit or miss at best. CTM was planning a major move to Great Falls and had significant turnover in human resource staff. Under such circumstances, a failure to communicate a revised policy is understandable but does not relieve CTM of the responsibility to clearly articulate proposed changes in its benefits to its Grade 7 managers so that they could accept or reject them.

Under such circumstances, the hearing officer finds that the new policy put in place in May of 2005 was the one in effect when Smith and Nye left CTM.

Under that policy, Grade 7 managers would be provided 80 hours of vacation time instead of the 40 provided for in the CTM Employee Manual. Sterhan's testimony makes clear that the intent was to allow those managers to reach that level of vacation pay in one year instead of five. Melton's directive to Gundlickson to add 40 hours to Nye's accrued vacation time is consistent with that policy. Testimony also showed that Buttrey approved this adjustment. Whether or not he realized the effect of that approval, he was in a position to deny it if it was in conflict with the revised vacation policy he states was in effect for Grade 7 managers. Increasing Smith's accrued vacation by 40 hours would not be consistent with the new policy because she was already receiving 120 hours of annual vacation time. Sterhan and Melton both testified that under the new policy Smith and others who had more than 80 hours would not lose time.

Smith and Nye provided substantial evidence that the new vacation policy was in place when they left CTM. Under the new policy and the CTM Employee Handbook they are owed wages for unused vacation time.

Smith is due payment for 120 hours of unused vacation time.

Consistent with the new policy and the Employee Handbook, Smith was provided 120 hours of annual leave on her August 3, 2005 anniversary date. Although Melton submitted a request to Gundlickson to add 40 hours of vacation time to Smith's account, testimony at hearing does not support giving Grade 7 managers who were already receiving 80 hours or more of annual vacation time an additional 40 hours. Sterhan's testimony indicates that he was not sure that those already receiving 120 hours of vacation time would receive an additional 40 hours, but was sure that they would not lose any time under the new policy. Sterhan stated that anything above 120 hours would be up to Buttrey. While Melton's action of adding the 40 hours to Smith's vacation time was apparently approved by Buttrey, Sterhan's testimony about the overall intent of the new vacation policy indicating that it was aimed primarily at increasing the vacation benefit of those Grade 7 managers who were only receiving 40 hours of annual vacation leave is more compelling. Melton also testified that Smith was "concerned that it [the new policy] wasn't going to mean an extra 40 for her" and that this time period at CTM was very confusing. There is no evidence on record that indicates that Smith used any of her accrued vacation time. Accordingly, she is owed for 120 hours of unused vacation time.

Nye is due payment for 57 hours of unused vacation time.

Consistent with the new policy and the Employee Handbook, Nye had 32 hours of vacation pay as of September 17, 2005 and should have been provided an additional 80 hours on his September 15, 2005 anniversary date. He took 40 hours of that time in September and October 2005 leaving a balance of 72 hours. Nye's final paycheck included payment for 15 hours of unused vacation time, leaving a balance of 57 hours unpaid.

The hearing officer does not find that any of the special circumstances justifying the 110% penalty identified in Admin R. Mont. 24.16.7556 are applicable. Accordingly, the administrative penalty of 55% is assessed on the wages owed Smith and Nye. Admin R. Mont. 24.16.7566.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 ***et seq.***; *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. CTM owes Nye $2,335.97 representing wages in the amount of $1,507.08 (57 x $26.44 per hour) plus a 55% penalty of $828.89.

3. CTM owes Smith $4,882.50, representing $3,150.00 (120 x 26.25 per hour) in unpaid wages and a 55% penalty of $1,732.50.

4. Appropriate taxes should be withheld from the unpaid wages portion of the award, but not from the penalty.

VI. ORDER

Cable Technologies of Montana, Inc., is hereby ORDERED to tender the following cashier's checks or money orders: (1) a cashier's check or money order, representing $1,507.08, less appropriate withholding of taxes, and $828.89 in penalty, made payable to Michael A. Nye, and (2) a cashier's check or money order representing $3,150.00 in wages, minus appropriate withholding of taxes, and $1,732.50 in penalty, made payable to Margaret M. Smith. These checks and/or money orders must be mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 18th day of January, 2007.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.