

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

v.

CHEY INSULATION INC

Case No. 62209

DECISION OF THE HEARING OFFICER

**Appearances:** Attorney Lisa Wellman-Ally, on behalf of the claimant,  
Ms. \_\_\_\_\_  
Attorney David Cole, on behalf of the employer,  
Chey Insulation Inc.

**Nature of Dispute:** RSA 275:43 I – Weekly, Unpaid Wages / Commissions  
RSA 275:43-b – Payment of Salaried Employees, Unpaid Salary  
RSA 275:43 V – Weekly, Unpaid Vacation Pay

**Witnesses:** Ms. \_\_\_\_\_ on her own behalf  
Mr. Eben Hunt, on behalf of the employer

**Date of Hearing:** May 24, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

On the basis of the claimant's assertion that she is owed \$11,203.80 in unpaid commissions, unpaid salary and unpaid vacation pay, she filed a Wage Claim with the New Hampshire Department of Labor (DOL) on February 19, 2021; a Notice of Wage Claim was forwarded to the employer on February 22, 2021. The employer objected to the Wage Claim in writing on March 2, 2021. The claimant requested a formal hearing on March 9, 2021. Notices of Hearing were sent to all parties on April 7, 2021, and a formal hearing was scheduled accordingly.

A formal hearing was held at the Department of Labor Headquarters in Concord, New Hampshire on May 24, 2021 at 1:00pm. All parties appeared via the video conferencing platform, Webex. The parties opted to proceed with offers of proof.

Finally, during the course of the hearing, the claimant articulated that they wished to amend the Wage Claim and was actually seeking a total of \$9,342.78 in unpaid salary and unpaid vacation pay exclusively.

FINDINGS OF FACT

Ms. [REDACTED] was employed by Chey Insulation beginning in January 2018. In February 2021, Ms. [REDACTED] provided the employer a thirty (30) day written notice of resignation and was then terminated immediately. The claimant's written Wage Claim articulates that the termination date was February 12, 2021.

Ms. [REDACTED] signed an Employment Agreement with the employer, which states in part: "Chey shall pay Employee a salary of \$45,000.00 and commission of 6% of sales over \$187,500.00 per quarterly (sic) based on net billings." (ER 11)

On February 18, 2021, Ms. [REDACTED] filed a Wage Claim with the DOL for \$11,203.80, consisting of \$8,653.80 for ten (10) weeks of unpaid vacation pay and \$2,550.00 in unpaid commissions.

Subsequently, the employer remitted payment of \$7,159.43 to Ms. [REDACTED] (ER 58); the employer asserted that this represented the total commissions the employer acknowledged Ms. [REDACTED] is owed (based on \$130,170.00 in sales) minus "2 weeks draw at \$45,000 annually", plus six (6) days of vacation pay. (ER 15)

Ms. [REDACTED] asserted that she is still owed \$9,342.78, consisting of \$7,612.00 for forty four (44) days of unpaid vacation pay plus \$1,730.78 for the two (2) weeks' "draw" debited from her final commission pay.

While the claimant's evidentiary submission was disorganized, the documents appeared to demonstrate the manner in which Ms. [REDACTED] was paid by the employer historically. Ms. [REDACTED] was always paid her annual salary prorated on a weekly basis. Then, Ms. [REDACTED] was issued a commission check after the end of each month where the employer prorated the \$187,500.00 quarterly sales requirement to \$67,670.00 monthly. The employer then took the total of Ms. [REDACTED] sales for the month, reduced it by the prorated monthly amount (\$67,670.00) and issued a commission check for 6% of the remaining amount.

Both parties submitted calendars into the record to demonstrate that they have correctly calculated the amount of vacation days Ms. [REDACTED] was owed upon termination. The employer pointed to some inconsistencies in the claimant's calendar, such as personal appointments listed with an "X" hand-marked through them. The employer submitted their vacation calculations into evidence. (ER 16)

Finally, both parties' evidentiary submissions are hereby incorporated into the fact section, including but not limited to Ms. [REDACTED] employment contract, pay stubs, and the employer's check to Ms. Brown for \$7,159.43.

Ms. [REDACTED] requested a determination that she is owed and due \$9,342.78 in unpaid salary and unpaid vacation pay.



**DISCUSSION AND CONCLUSIONS**

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that she is owed and due \$9,342.78 in unpaid salary and unpaid vacation pay. Proof by a preponderance of the 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 acknowledges that she has been paid in full all commissions owed; however, she asserts that she is still owed for the two weeks' pay debited from her commission pay and for an additional forty four (44) days' vacation pay. Ms. [redacted] relies on the calendar she submitted into evidence, along with the pay stubs and Employment agreement to meet her burden of proof. The claimant requests a finding that she is owed and due \$9,342.78, consisting of \$1,730.78 for two weeks' pay and \$7,612.00 for forty four (44) days' vacation pay.

The employer asserts that they have paid Ms. [redacted] all wages that she is owed and due. The employer argues that their interpretation of the calendar's submitted into evidence are more persuasive as they are business records. Additionally, the employer argues that Ms. [redacted] was not actually paid a salary, but rather a draw; therefore, the employer rightfully debited two weeks' pay from her final commission check. The employer requests a finding that Ms. [redacted] has been paid all wages owed and due in full.

First, it is not found persuasive that Ms. [redacted] was paid a draw. She was paid an annual salary of \$45,000 prorated weekly plus 6% of all quarterly sales over \$187,500.00 prorated monthly.

Additionally, it is found that the employer did not actually debit two (2) weeks' salary from Ms. [redacted] final commission check. A careful reading of the employer's itemized commission report for Ms. [redacted] final commission check (ER 15) indicates that the employer took Ms. [redacted] total sales for the first two (2) weeks in February 2021 (the only weeks she worked in February 2021) which is \$130,170.00. The employer then prorated the \$187,500.00 quarterly sales requirement to \$12,424.19 weekly and multiplied by two to reach \$28,848.38. The employer subtracted \$28,848.38 from Ms. [redacted]'s sales of \$130,170.00 (total \$101,321.62) and then paid her 6% of the difference in commissions (\$6,079.29) plus \$1,080.00 for six days' vacation pay for a total of \$7,159.43. The employer's practice is consistent with both the employment agreement and the historical practice of paying Ms. [redacted] her wages and commissions. It is therefore not found to be persuasive that Ms. [redacted] is owed an additional two weeks' salary.

Finally, regarding unpaid vacation pay, both parties submitted calendars into evidence to support their position. The parties seemingly submitted the same calendars into evidence, yet interpreted them differently. The calendar submitted by Ms. [redacted] showed some personal appointments on her electronic work calendar which were subsequently mark out manually. It is unclear why Ms. [redacted] would not simply cancel the appointment on her work calendar. The electronic calendar is kept by the employer as a business record. The employer submitted a clear record of Ms. [redacted] vacation days into evidence. (ER 16) Ultimately, the employer's argument that Ms. [redacted] was only entitled to six (6) days of vacation pay is found persuasive.

Overall, it is the claimant's burden to prove, by a preponderance of the evidence, that she is owed and due \$9,342.78 in unpaid salary and unpaid vacation pay. Given the reasoning explained above, it is determined that Ms. [redacted] has not met her burden of proof in this matter. This Wage Claim is invalid.

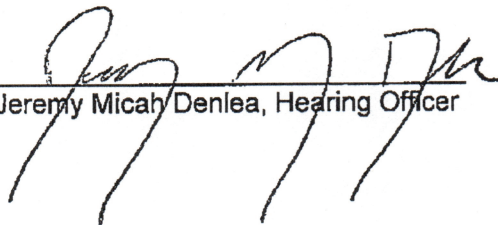
**DECISION**

Based on a thorough review of the evidence and testimony presented, and as RSA 275:43 (l) requires that an employer pay all wages owed and due to an employee, it is found that the claimant did not prove, by a preponderance of the evidence, that she is owed or due unpaid wages in the form of unpaid vacation pay; it is hereby ruled that **this Wage Claim is invalid.**

June 11, 2021  
Date of Decision

Original: Claimant  
cc: Employer

JD/sff

  
Jeremy Micah Denlea, Hearing Officer