

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Avis J. Newton,

Appellant,

v.

South Carolina Department of Employment  
and Workforce and South Carolina  
Department of Health and Human Services,

Respondents.

Docket No. 12-ALJ-22-0371-AP

**FINAL ORDER**

**STATEMENT OF THE CASE**

Avis J. Newton ("Appellant") appeals the decision of the South Carolina Department of Employment and Workforce ("Department"), to dismiss her appeal from the Appeal Tribunal Decision due to untimely filing. The Appeal Tribunal denied her request for unemployment benefits upon the finding that she voluntarily left her employment without good cause. The Administrative Law Court (ALC or court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2011). Upon consideration of the record and the briefs, this court affirms the decisions of the Department.

**BACKGROUND**

The Appellant was employed by the South Carolina Department of Health and Human Services ("DHHS") from November 2, 2001 to August 29, 2011. On August 3, 2011 the Appellant was sent home from work due to health issues. The Appellant returned to work on August 16, 2011 and provided DHHS with a physician's release indicating that she could return to work on August 15, 2011 if she was able to work in a less stressful environment. On August 19, 2011 DHHS delivered a letter to the Appellant explaining that it would attempt to accommodate the Appellant's requests to be transferred to a less stressful work environment. The letter directed the Appellant to speak with a representative from Deer Oaks Employee Assistance Program to help her deal with work place stress. The letter also explained that, in

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order to accommodate the Appellant and her request to be transferred, she must fill out the Reasonable Accommodation Certification/Questionnaire form and have her physician complete the Medical Certification form. On August 24, 2011 the Appellant voluntarily resigned from her position with DHHS. She informed DHHS that her last day would be August 29, 2011. According to the Employer Statement filed with the Department, the Appellant never filled out the required forms to initiate a transfer.

On October 24, 2011 the Appellant filed her initial claim for unemployment benefits. The adjudicator for the Department determined that the Appellant voluntarily quit her job without good cause and was therefore disqualified from receiving benefits. The Appellant appealed the adjudicator's decision to the Appeal Tribunal. The Appeal Tribunal affirmed the adjudicator's decision and mailed its notice to the Appellant on January 20, 2012. The Appellant mailed her notice of appeal from the Appeal Tribunal's decision on February 3, 2012.

The Department dismissed the appeal as untimely and determined the Appeal Tribunal's decision was final. The Appellant appealed the Department's decision and the Department remanded the case to the Appeal Tribunal for an evidentiary hearing on the timeliness of her appeal. The Appellant failed to attend the evidentiary hearing and the Appellate Panel affirmed the Department's decision that the appeal was untimely filed. The Appellate subsequently appealed the Department's decision to this court.

### **ISSUES ON APPEAL**

1. Whether the Department erred dismissing the Appellant's appeal because it was not timely filed?

### **STANDARD OF REVIEW**

The Department is an agency under the Administrative Procedures Act (APA). See Gibson v. Florence, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, the predecessor of the Department, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. See S.C. Code Ann. §§ 1-23-380, 1-23-600(D) (Supp. 2011); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 533, 557 S.E.2d 644, 646-47 (Ct. App. 2006). Section 1-23-380(5) of the South Carolina

Code (Supp. 2011) provides the standard used by appellate bodies to review agency decisions. See § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). That section states:

The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-380(5).

A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). When applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 466 S.E.2d 357 (1996). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 319 S.C 348, 461 S.E.2d 388 (1995). Finally, the party challenging an agency action has the burden

of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 467 S.E.2d at 917.

### DISCUSSION

The Appellant argues that although the Department's decision was post marked on January 20, 2012, she did not receive the decision until January 26, 2012 and her Notice of Appeal, filed on February 3, 2012, was therefore timely filed. The court disagrees.

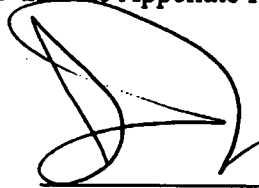
S.C. Code Ann. § 41-35-660 requires an individual to file an appeal with the Appeal Tribunal within ten days of the initial determination being mailed to the individual's last known address. An appeal must be timely filed in order to vest appellate jurisdiction in the court. Allison v. W.L. Gore and Associates, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). The same principle applies to administrative agencies hearing appeals from initial agency decisions. *Id.* If an appeal is not timely filed, the Department does not have the power to "extend or ignore the deadline for service of the notice." Elam v. S.C. Department of Transportation, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) (internal citation omitted.)

In this case, both parties acknowledge that the Appeal Tribunal's decision was mailed to the Appellant on January 20, 2012. The Appellant did not appeal the decision until February 3, 2012, more than 10 days after the decision was mailed. While the Appellant acknowledges that she did not file the notice of appeal until February 3, 2012, she argues that there is substantial evidence in the record to support that the Appellant did not receive the decision until January 26, 2012. The court disagrees with this contention. The Appellant failed to attend her evidentiary hearing regarding the timeliness of the filing of her Notice of Appeal. Therefore, the only evidence in the record that supports the Appellant's contention that she did not receive the Department's decision until January 26, 2012 is her letter of February 3, 2012 which was construed as her Notice of Appeal. (R. 55). In that letter she explains that she had been trying to call the Department since January 26, 2012. The letter does not state that the Appellant received the Department's decision on January 26, 2012. Nowhere in the record is there any evidence supporting the Appellant's contention regarding her receipt of the Department's decision. Furthermore, nothing in the record indicates that either the Department or the United States Postal Service contributed to the Appellant's untimely filing of her Notice of Appeal.

This court finds that the Appellant failed to timely file her appeal. Further, this court finds that the agency's decision was not clearly erroneous in light of the substantial evidence in the record, and the record supports the agency's decision.

**ORDER**

**IT IS THEREFORE ORDERED** that the Appellate Panel's decision is **AFFIRMED**.  
**AND IT IS SO ORDERED.**



June 28, 2013  
Columbia, South Carolina

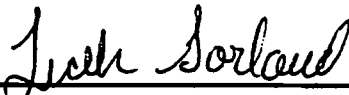
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S. Phillip Lenski  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

June 28, 2013  
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Leah E. Garland  
Judicial Law Clerk

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