

participated. The hearing officer affirmed the original Department determination of disqualification of benefits. The Appellant appealed to the Appellate Panel (Panel) on June 20, 2012. The Panel upheld the Appeal Tribunal's decision, and the Appellant sought review in this court on September 4, 2012.

FACTS

During the Appellant's employment at the United Way, she made numerous requests to the operations department to inform her how much vacation time she had accrued. The financial associate who was tasked with determining the Appellant's vacation time complained to the Director of Operations that the Appellant's repeated requests were taking too much time away from her normal duties. On February 27, 2012 the Director of Operations sent an e-mail to the Appellant informing her that she had already been given an account of her accrued vacation time and that staff members would spend no more time researching the issue for her. On that same day, however, the Appellant again approached the financial associate and asked her to research her available vacation time. The Appellant also subsequently approached her team leader and asked for an account of her vacation time.

The Director of Operations reprimanded the Appellant, explaining to her that she was being insubordinate by repeatedly asking staff members to research her available vacation time despite having been instructed not to do so again. Because of the Appellant's repeated requests to look into her accrued vacation time, the financial associate decided to review all employee time cards and vacation time. Upon a review of the Appellant's file, the financial associate determined that the Appellant was representing on her time cards that she was working on days for which she had requested vacation or sick days.

At the time of the Appellant's employment with United Way, the entity used an online time card system that employees filled out and turned in each pay period. The Director of Operations testified that United Way used an honor system, meaning that no one checked employee time cards to determine if they were accurately completed by employees. The review of time cards reflected 64.25 hours that the Appellant had falsely indicated on her time card that she had worked when she was actually on vacation. The Director of Operations testified that other employees had discrepancies between their time cards and requested vacation time as well; however, none of the other employee's discrepancies amounted to more than eight hours. Upon

the discovery of the 64.25 hours of discrepancies, United Way terminated the Appellant for falsification of her time cards and insubordination.

The Appellant applied to the Department for unemployment benefits. Upon review, the Department determined that the Appellant had been terminated for falsifying her work time and was disqualified from receiving benefits for sixteen weeks. This appeal followed.

ISSUES ON APPEAL

Whether substantial evidence exists to support the Department's finding that United Way terminated the Appellant for cause?

Whether the Department's finding that United Way terminated the Appellant for cause was affected by an error of law?

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 the Department erred in finding that United Way terminated her for cause. The court disagrees.

When the Department determines that an employer has discharged an employee for cause in connection with the worker's most recent employment, it must reduce the period in which the worker is qualified for unemployment benefits. S.C. Code Ann. § 41-35-120(2) (Supp. 2011). A discharge for cause is justified when an employee (1) wantonly and willfully disregards the employer's interests; (2) deliberately violates the rules; (3) disregards the standard of behavior

which an employer can rightfully expect from an employee; or (4) demonstrates intentional and substantial negligent disregard for the employee's interests, duties or obligations. Lee v. South Carolina Employment Security Commission, 277 S.C. 586, 291 S.E.2d 378, 379 (1982). South Carolina courts have equated 'for cause' in the current version of the statute with the term 'misconduct' in the predecessor statute. Id. A finding of misconduct does not mandate some willful or deliberate act on the part of the employee. Lee, 277 S.C. at 588, 291 S.E.2d at 379. Upon finding that an employee has been discharged for cause, the Department determines the length of the employee's disqualification period based on the seriousness of the cause for discharge. § 41-35-120(2). The disqualification period can extend from a minimum of five weeks to a maximum of twenty-six weeks. Id.; S.C. Jur. Labor Relations § 24 (Westlaw through August 2010).

In this case, the court finds substantial evidence supporting the Department's determination that United Way terminated the Appellant for cause. A careful review of the record reveals that the only material dispute below was whether there was substantial evidence to support the Department's finding that Appellant was terminated for cause. The Appellant argues that some of the evidence presented by United Way regarding the falsified time cards was inaccurate and should not have been admitted. The court finds this argument to be without merit. While the Appellant argues that some of the evidence presented by United Way was inaccurate, United Way presented ample evidence showing discrepancies between the Appellant's time cards and time the Appellant was documented to be on vacation. The Appellant's falsification of her time cards shows a disregard of the employer's interests and a violation of the rules, therefore constituting cause. Lee, 277 S.C. at 588, 291 S.E.2d at 379.

The Appellant also argues that, while her time cards did not accurately reflect the time that she actually worked, any discrepancies were error and were not done maliciously. However, the court in Lee held that a finding of misconduct does not mandate a willful or deliberate act on the part of the employee. 277 S.C. at 588, 291 S.E.2d at 379. Therefore, even if all of the discrepancies in the Appellant's time records were unintentional error, cause existed to terminate the Appellant because her repeated error benefited the Appellant and caused a loss to United Way.

The Appellant further argues that she should not have been considered insubordinate for asking to have her available vacation time researched. However, the panel held in its Appellate Panel Decision that the Appellant was terminated for inaccurately reporting her work time. The Panel did not include insubordination as a ground for termination. Therefore, the Appellant's argument pertaining to insubordination is moot. "The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigations. Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review." Because the alleged insubordination of the Appellant did not bear on the panel's decision, this court cannot consider any argument against the panel's decision based on that issue.

Finally, the Appellant argues that, although she was officially terminated for inaccurately reporting her work time, she was actually terminated because she was aware of unconstitutional acts that were occurring at United Way. The Appellant raises this issue for the first time in her brief. Because the Appellant never raised the issue below, it is not preserved for review. See Divine v. Robbins, 385 S.C. 23, 45, 683 S.E.2d 286, 297-98 (Ct. App. 2009). Because the issue was not properly raised during the hearing or preserved for review, this court cannot consider it in this appeal.

The court finds that the Department's decision was not clearly erroneous in light of the substantial evidence in the record, and that the record supports the decision. The court further finds that the Department's decision was not affected by an error of law.

ORDER

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

September 5, 2013
Columbia, South Carolina



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).



Leah E. Garland
Judicial Law Clerk

September 5, 2013
Columbia, South Carolina

FILED

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SC ADMIN. LAW COURT