STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gary W. Stokes, Appellant vs. South Carolina Department of Employment Workforce and O'Charley's, LLC, Respondents.	Docket No. 14-ALJ-22-0015-AP **ORDER**

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC" or "Court") pursuant to the Notice of Appeal filed by Gary W. Stokes ("Appellant"). Appellant appeals from an Appellate Panel Decision dated December 17, 2013, affirming the Appeal Tribunal decision finding Appellant was discharged for misconduct connected with his employment pursuant to S.C. Code Ann. § 41-35-120(2)(a)(Supp. 2013).

FACTUAL BACKGROUND

Respondent was disqualified from receiving benefits for a period of twenty (20) weeks by a South Carolina Department of Employment and Workforce claims adjudicator determination that found Respondent was discharged by his most recent bona fide employer for use of foul or profane language while on duty. The claims adjudicator concluded that such conduct was contrary to what the employer had a reasonable right to expect. Respondent appealed the determination for a hearing before the Appeal Tribunal ("Tribunal").

On October 22, 2013, an Administrative Hearing Officer for the Tribunal conducted a de novo hearing. Appellant was the only participant. Neither an attorney nor a representative of O'Charley's, LLC, ("Employer") was present. The hearing commenced with Appellant being duly sworn and informed that he would be asked some questions and would have the right to provide additional relevant information, including offering exhibits or documents.

Appellant admitted on the record that on July 6, 2014 he was discharged for cursing while talking to the General Manager of the restaurant where he was employed in the kitchen.

Upon arriving at work, Appellant's manager asked him to leave because Appellant did not have a doctor's note for a recent absence. Shortly after leaving work, Appellant called his manager at the restaurant. During the telephone call, Appellant used profanity to describe his coworkers while discussing work related matters. At no time during the hearing did Appellant make an objection regarding the procedure of the hearing or the evidence being presented.

The Decision of Appeal Tribunal upheld Appellant's disqualification, finding that an employer has the right to expect professional and respectful conduct from workers and that the use of profanity in conversation with a supervisor under these circumstances was a deliberate disregards of the standards of behavior an employer has the right to expect. Appellant appealed to the Appellate Panel, which affirmed the Tribunal decision. Appellant now appeals to this Court.

ISSUES PRESENTED

1. **Did the Respondent South Carolina Department of Employment and Workforce err in imposing an 20 week disqualification from benefits upon a finding that the Appellant was discharged for misconduct connected with his employment thus effectively shifting the burden of proof to the Appellant?**
2. **Did the Respondent South Carolina Department of Employment and Workforce err in the imposition of this disqualification constituting a denial of due process of law in shifting the burden of proof to the Appellant?**

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 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. 2013); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). Section 1-23-380(5) of the South Carolina Code (Supp. 2013) 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:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (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.

S.C. Code Ann. § 1-23-380(5) (Supp. 2013).

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.

LAW/ANALYSIS

Appellant contends in his brief on appeal that his employer had the burden to prove misconduct by a preponderance of the evidence and the employer's failure to participate in the hearing effectively shifted this burden in violation of all constitutional and statutory principles. Appellant asserts that shifting the burden was a violation of his due process rights under the Fifth Amendment and constitutes a "taking."

As a threshold matter, however, Appellant attempts to appeal an issue that has not been properly preserved for review by this Court. The South Carolina Supreme Court has stated the following regarding the preservation of an issue for appellate review:

> It is axiomatic that an issue cannot be raise for the first time on appeal, but that must have been raised to and ruled upon by the trial judge to be preserved for appellate review. (Citation omitted). Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector.

Wilder Corporation v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). An issue is properly preserved by making a contemporaneous objection, which is at the time the testimony is offered into evidence and not at the close of testimony. State v. Simmons, 329 S.C. 154, 156, 494 S.E.2d 460, 461-2 (Ct. App. 1997). See State v. Sullivan, 310 S.C. 311, 426 S.E.2d 766 (1993) ("To preserve an issue for appellate review, an appellant must object at his first opportunity.").

Although the matter of issue preservation has not been raised by either party, this Court has the authority to do so *sua sponte*. Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285. As the South Carolina Supreme Court finds,

> Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.
> ...
> This is not a "gotcha" game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function. While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved.

Atl. Coast Builders, 730 S.E.2d at 329-330.

Hearings before the Tribunal are "de novo in nature and conducted informally in conformity with the South Carolina Administrative Procedures Act." S.C. Code Ann. Regs. 47-51 (C). Specifically, Section 1-23-320(G)(4) of the Administrative Procedures Act ("APA") sets

forth that the record in contested cases must include 'objections'. S.C. Code Ann. § 1-23-320 (2005 & Supp. 2013). See Gibson v. Florence Country Club, 282 S.C. 384, 318 S.E.2d 365 (finding that Section 1-23-320 of the Administrative Procedures Act applies to employment security cases.), citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

After reviewing the Record on Appeal, which includes a transcript of the Appeal Tribunal hearing from October 22, 2013, it is clear that Appellant failed to make any objections on the record that would preserve for appeal before this Court any of the issues contained in Appellant's brief. The Appeal Tribunal hearing was a de novo review of Appellant's appeal of the claims adjudicator determination. If Appellant had any objections that warranted review by this Court, then Appellant had an obligation to preserve those matters for review by placing his objections on the record.

IT IS HEREBY ORDERED that the Appellate Panel Decision appealed from is **AFFIRMED** and this appeal is dismissed.

AND IT IS SO ORDERED.

June 12, 2014
Columbia, SC

John D. McLeod, Judge
South Carolina Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, 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 12, 2014
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk