STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Mary E. Spates, Appellant, vs. South Carolina Department of Employment and Workforce, and Palmetto Lake City Operating and Prime Time Healthcare, Respondents.	)	Docket No. 15-ALJ-22-0201-AP **ORDER**

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to Mary E. Spates' (Appellant) appeal from the decision of the South Carolina Department of Employment and Workforce's (DEW) Appellate Panel (Panel) finding that Appellant left her employment with Palmetto Lake City Operating and Prime Time Healthcare (Employer)[1] voluntarily without good cause.

FACTUAL/PROCEDURAL BACKGROUND

Employer, a staffing agency, hired Appellant to work as a certified nursing assistant on a contract basis for Glendive Medical Center (healthcare facility). The term of Appellant's initial contract was from September 11, 2014 to November 24, 2014. The parties agreed to extend the contract term. There is a factual dispute between the parties beyond this point. Employer asserts that it verbally offered Appellant a twelve-week extension but that Appellant declined the offer so she could return to her studies on December 8, 2014. Employer contends that Appellant instead agreed to a contract extension through December 3, 2014. Appellant was then later given permission to finish on December 1, 2014. Appellant, on the other hand, asserts that she was not offered a twelve-week extension on her contract but was instead only asked to extend her contract to December 3, 2014. She also maintains that she did not tell Employer that she could not work beyond December 3, 2014 because of school commitments; rather, she maintains that continuing work was not available to her.

[1] The Court will refer to DEW and Employer collectively as "Respondents."

Acknowledging the conflicting evidence in this case, the Appellate Panel found that "the greater weight of credible evidence establishes that the claimant quit her job in order to return to South Carolina and attend school." The Appellate Panel also found Appellant's testimony to be "inconsistent." The Panel further found that "[t]here was no substantial or material change in the claimant's conditions of employment and, had she not left to return to school, continuing work was available to her." The Panel thus concluded that Appellant voluntarily quit without good cause attributable to the employment.

ISSUES ON APPEAL

I. Is there substantial evidence to support the Appellate Panel's finding that Appellant voluntarily quit her job without good cause?

II. Did the Appellate Panel commit an error of law by admitting and relying upon inadmissible hearsay evidence?

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, a 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, -600(E) (Supp. 2014); *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). The standard used by appellate bodies to review agency decisions is provided by Section 1-23-380(5) of the South Carolina Code (Supp. 2014). That section states:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision 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.

§ 1-23-380(5); *see also* § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380).

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 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)).

DISCUSSION

I. Is there substantial evidence to support the Appellate Panel's finding that Appellant voluntarily quit her job without good cause?

Appellant argues that there is not substantial evidence that she refused an extension contract and voluntarily quit work. Rather, she argues that she did not voluntarily quit her job and that there was no available work for her to accept.[2] I disagree.

According to S.C. Code Ann. § 41-35-120(1) (Supp. 2014), an insured worker is ineligible for unemployment benefits for leaving his or her most recent work "voluntarily, without good cause." Here, Appellant's argument is largely a statement of her view of the evidence in this case.[3] However, the Court's review in this matter is not based upon its evaluation of the weight of evidence and credibility of witnesses, those responsibilities are within the province of the Panel as the finder of fact in this case. *See Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 465, 494 S.E.2d

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[2] Respondents argue that Appellant "cites absolutely no legal authority to support her assertion that the Panel erred" in its finding. However, Appellant did cite the applicable statute, as well as the law governing the standard of review. Because the facts of these types of cases are heavily factual, the law cited by Appellant was sufficient in this case.

[3] The argument referenced above is that made in Appellant's Initial Brief. Appellant's Reply Brief contains more discussion of legal authority.

835, 843-44 (Ct. App. 1997) (noting that it is for the finder of fact to weigh the evidence, determine the credibility of witnesses, and determine what parts of a witness's testimony it wishes to believe). Rather, the Court's review is limited to whether there is sufficient evidence in the Record by which a reasonable person could arrive at the same conclusion as the Panel, i.e., whether there is substantial evidence in the Record to support the Panel's decision. The Court will therefore focus to those parts of Appellant's argument that deal with this issue.

In her Initial Brief, Appellant argues that "Employer did not submit any call logs, separate contracts, or emails that proved [Appellant] agreed to work for another twelve week contract." Appellant also argues that "Employer did not submit any call logs, emails, available schedules, testimony, or contracts proving that there was available work for [Appellant]." Appellant further asserts that the "lack of documentary evidence" presented by Employer suggests that Appellant did not breach or refuse a contract, and she provided testimony that she was not offered a contract extension or additional work. In her Reply Brief, Appellant continues to make this assertion in her attempt to distinguish *Judson Mills v. S.C. Unemployment Comp. Comm'n*, 204 S.C. 37, 28 S.E.2d 535 (1944) and *Stone Mfg. Co. v. S.C. Employment Sec. Comm'n*, 219 S.C. 239, 64 S.E.2d 644 (1951), both of which Respondent cited as analogous to the instant case. Appellant argues that unlike the employee in *Judson Mills*, Employer "at no time approached Appellant with more work during the duration of the extension contract or at the conclusion of the extension contract." As to *Stone Mfg. Co.*, Appellant argues that unlike the employee in that case, Appellant did not leave her job – her contract ended; she never told Employer that she was quitting her job or that she wanted to leave; and she did not quit her job due to a personal situation change.

First, there is no evidence of a contract extension in the Record because according to testimony provided by Employer, Appellant rejected the healthcare facility's verbal offer of a twelve-week contract extension. Appellant appears to imply that testimonial evidence that is not corroborated by documentary evidence is not substantial;[4] however, Appellant has provided no authority to the support this position. As to evidence of available work for Appellant, Employer provided testimony that the healthcare facility wanted Appellant to extend the contract for twelve

[4] In her Reply Brief, Appellant even goes so far as to state, "Unlike Respondent, Appellant produced **evidence, not just testimony,** that showed that she did not leave work early nor did she refuse available work." (emphasis added). However, testimony, though not documentary or otherwise physical in nature, is nevertheless equally evidence.

months, which she declined, agreeing instead to stay only until December 3, 2014.[5] Employer also provided testimony that Appellant later requested that her last day be December 1, 2014 so that she could be home (in South Carolina) by December 3, 2014. This request is further supported by a recording admitted into evidence,[6] in which Appellant admitted to Amiee Franco, Employer's Team Lead Recruiter, that Beth,[7] an employee of the healthcare facility, had asked her (Appellant), "Are you sure you don't want to stay until the 3rd?" In response to this statement, Franco, told Appellant, "At this point your tickets are booked. You're good. [both laughing]. . . ." Franco further testified that she had asked Appellant if she was sure that she wanted to go home because the healthcare facility "would love to keep [her] there. They really like [her]." But as Appellant clearly stated later in the same recording, her reason for leaving was to return to school, beginning December 8, 2014, to become an LPN. Indeed, while she was working, Appellant was on a leave of absence from school; and thus if she intended to further her education in South Carolina, she needed to leave Montana, where she was working. It was thus reasonable for the Appellate Panel, as the finder of fact, to infer from the totality of the evidence in the Record that there was additional work available to Appellant had she chosen to stay, but that Appellant chose to return to school in South Carolina instead. Though Appellant points to testimony that she provided at the hearing that contradicts Employer's evidence, the Appellate Panel, as the finder of fact, was entitled to reject this evidence in favor of Employer's evidence, and find Employer's witnesses more credible than Appellant. *See Small, supra.*

Appellant next argues that she did not refuse work because of school. She argues that although she told the Department that she was beginning school on December 8, 2014, she never told anyone at her Employer that she was ending the extension contract or that she wanted to leave work in order to return home. Appellant argues that the contract ended on December 1, 2014, before her classes began, and therefore she did not end the contract to return to school. She also

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[5] Appellant claims that she requested to work through December 6. Employer's witness testified that Appellant was requested to stay until December 3. The Appellate Panel weighed the conflicting evidence and found that Appellant agreed to stay until December 3 until later requesting to make December 1 her last day. There is testimony in the Record from multiple witnesses to support that finding.

[6] Appellant objected to the admission of this recording at the hearing based on a lack of consent by Appellant, and preserved the issue of that objection on appeal. But as will be discussed in more detail *infra*, the Appellate Panel properly overruled Appellant's objection, pursuant to S.C. Code Ann. § 17-30-30(C) (2014).

[7] The transcription of this colloquy refers to "Beth," but it likely should have read "Bev," the ADON (Assistant Director of Nursing) at the healthcare facility at which Appellant was employed.

argues that the healthcare facility scheduled her last day on December 1, which is why she ended before December 3. Appellant thus concludes that she did not voluntarily quit or refuse work but instead completed her obligations under the original and extension contracts.

First, at the hearing, Ronald Spencer, the managing partner for Employer, testified that when Appellant was offered a contract extension and turned it down on November 20, 2014, they immediately booked her flight home. Thus, Appellant's flight home was booked as of November 21, 2014 based upon her rejection of a contract extension. This evidence is contrary to Appellant's assertion that she did not tell anyone that she was leaving to return home. And though these actions may not have communicated when she was ending her employment (indeed, she ended up initially agreeing to work through December 3, 2014), they certainly communicated that she would not be working much longer.

Moreover, as discussed above, Employer provided both testimonial and documentary evidence that supports the Appellate Panel's finding that Appellant requested December 1, 2014 to be her last day (after initially agreeing to work until December 3) so that she could return to school. In addition to the recording of the conversation between Appellant and Franco, in which Appellant affirmed that the reason she was leaving was to further her education, Employer also stated on DEW's "Request for Information from the Employer" form that the reason why Appellant quit was that she had declined an extension of her contract on November 20, 2014 because "she got into nursing school and can no longer work." Moreover, in Franco's notes from November 20, 2014, which was admitted into evidence over Appellant's objection,[8] she recorded that Appellant was "actually really happy and would love to stay but got into nursing school and wants to do that first." Further, the fact that Appellant had taken a leave of absence in August 2014 in order to work under the original and extension contracts suggests that Appellant did not feel that she could attend classes and work, which conversely supports the finding that Appellant decided to quit work because she desired to return to school. Appellant also admitted in the

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[8] This document was contained in Employer's Exhibit 1. Appellant's timely objected based on hearsay and the best evidence rule. She argued that Franco was available to testify and should have done so. First, the best evidence rule did not apply in this section. But more importantly, Appellant only raised her objections to the recording and the emails on appeal and not to the notes contained in Employer's Exhibit 1. Therefore, Appellant's objection to the notes contained in Employer's Exhibit 1 is not preserved and deemed abandoned on appeal. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating the failure to provide arguments or supporting authority for an issue renders it abandoned).

recording of her conversation with Franco that she had been given an opportunity by the healthcare facility to stay until at least December 3, which she declined.

Based on the totality of the evidence, it was reasonable for the Appellate Panel to find that Appellant had requested permission to make December 1, 2014 her last day after originally agreeing to December 3 in the extension contract, and that her reason for leaving early and not extending her contract was that she desired to return to school, which she did on December 8, 2014. Though Appellant provided conflicting evidence, the Appellate Panel, as the finder of fact, was entitled to find, as it did, that Employer's evidence more credible than Appellant's. Therefore, I conclude that there is substantial evidence to support the Appellate Panel's findings in this case. *See Nucor Corp. v. S.C. Dep't of Employment and Workforce*, 410 S.C. 507, 517, 765 S.E.2d 558, 563 (2014) ("Under the deferential substantial evidence standard of review, [an appellate court is] constrained to affirm the . . . factual findings when supported by some evidence in the record.").

II. Did the Appellate Panel commit an error of law by admitting and relying upon inadmissible hearsay evidence?

Appellant argues that the Appellate Panel erred by entering into evidence a recording of a phone call involving a conversation between Appellant and Franco without first laying a foundation. However, this objection was not raised by Appellant at the hearing and is therefore not preserved on appeal. *See State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 130-31 (Ct. App. 2005) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. . . Failure to object to comments made during argument precludes appellate review of the issue.") (internal citations omitted).

Appellant next argues that her counsel made a contemporaneous objection to the admission of the phone call recording into evidence based on Appellant's lack of consent. I agree that Appellant's counsel made this contemporaneous objection. However, South Carolina law permits the use of recordings made by one party (excluding attorneys) to a conversation of another party to that conversation. *See* S.C. Code Ann. § 17-30-30(C) (2014) ("It is lawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception."); *see also Mays v. Mays*, 267 S.C. 490, 229 S.E.2d 725 (1976) (holding 18 U.S.C.A. § 2511(2)(d), which provides a similar exception for parties not acting under color of law, "makes it clear that one party to a telephone conversation may lawfully

tape the conversation without the other's knowledge or permission and subsequently disclose it.") (*cited in State v. Andrews*, 324 S.C. 516, __, 479 S.E.2d 808, 811 (Ct. App. 1996)).[9]

Finally, citing S.C. Code Ann. § 1-23-330(1) and Rules 801, 803, and 804 of the South Carolina Rules of Evidence (SCRE) in her Initial Brief, and *S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 705 S.E.2d 425 (2011) in her Reply Brief, Appellant argues that the Appellate Panel erred in allowing into evidence, over a contemporaneous objection by Appellant's counsel, inadmissible hearsay in the form of emails from Bev Hellman and Jessica Johnson (collectively, Employer Exhibit 3), neither of whom were present at the hearing.[10] I agree that the Appellate Panel erred in admitting these emails.

"The admission of evidence is within the trial court's discretion." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000). The ruling on the admission of that evidence "will only be reversed if it constitutes an abuse of discretion amounting to an error of law." *Id.* "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

The contents of these emails constituted hearsay, which is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." South Carolina Rules of Evidence: Rule 801(c), SCRE. Neither of the parties involved in writing the emails were present to testify at the hearing, and the content was offered to prove the truth of the matter asserted therein, specifically that Appellant requested to make December 1, 2014 her last day of work for the healthcare facility. Appellant's counsel

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[9] Appellant also argues against the lack of personal knowledge that the witness who offered the recording had of Appellant or her contract. However, this objection was not raised at the hearing and is not preserved for review. *See Walker, supra.* For the same reason, the Court will not entertain the objection raised for the first time on appeal by Appellant in her brief that the recording only represented a part of the conversation and did not accurately reflect the context of the portion played.

[10] It is noteworthy that DEW failed to address this specific argument in its brief. DEW did make an initial blanket objection that Appellant cited no law other than an ALC opinion, *Blandshaw v. DEW and GCA Servs. Group*, 15-ALJ-22-0016-AP (May 28, 2015). Though I agree with DEW that ALC opinions are not binding on subsequent ALC cases, Appellant, as discussed above, cited more authorities than that case to support its argument concerning admission of the emails, specifically S.C. Code Ann. § 1-23-330(1) and Rules 801, 803, and 804 of the South Carolina Rules of Evidence (SCRE).

timely objected to the admission of these emails as hearsay. No exception to the hearsay rule was offered by Employer. Therefore, the Appellate Panel erred in admitting these emails into evidence.

The question then becomes whether the admission of the emails into evidence prejudiced the outcome of Appellant's case. I conclude that the Appellate Panel's error of law did not prejudice Appellant's case. The purpose of the emails was to demonstrate that Appellant requested to leave early – on December 1, 2014. However, any prejudice to Appellant by admission of these emails is negated by previous testimony from Franco that Appellant was happy that December 1 was her last day because she wanted to get home by December 3. This information is independent of the content of the emails and reflects Appellant's desire and motive for requesting December 1 as her final day of employment. This was sufficient for the Appellate Panel, as the finder of fact to infer that Appellant had requested December 1, 2014 to be her last day of work. And again, there is substantial evidence in the Record that prior to her agreement to extend the original contract to December 3, 2014 and her subsequent request to make December 1 her last day, Appellant was initially offered a twelve-week extension to that contract, which she declined so she could attend classes beginning December 8, 2014, reflecting available work had her classes not worked out. Therefore, in light of the evidence in the Record as a whole, I conclude that reversal is not warranted.

ORDER

IT IS THEREFORE ORDERED that the Department's final agency decision is **AFFIRMED.**

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

July 31, 2015
Columbia, South Carolina

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SC Court of Appeals

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, 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).

E. Harvin Belser Fair
Judicial Law Clerk

July 31, 2015
Columbia, South Carolina