STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Tennisha L. Douglas, Appellant, v. South Carolina Department of Employment and Workforce and Providence Hospice, LLC, Respondents.	))))))))))))	Docket No. 21-ALJ-22-0213-AP **ORDER**

This matter comes before the South Carolina Administrative Law Court (ALC Court) pursuant to an appeal by Tennisha L. Douglas (Appellant) from the decision of the South Carolina Department of Employment and Workforce (Department) Appellate Panel (Panel), which held that Appellant left her employment with Providence Hospice, LLC. (Employer)[1] voluntarily without good cause. The ALC has jurisdiction to hear this matter pursuant to section 41-35-750 of the South Carolina Code (2021) and section 1-23-600(D) of the South Carolina Code (Supp. 2020). Upon consideration of the briefs and the Record, the Appellate Panel's decision is affirmed.

BACKGROUND

Appellant worked for Employer from February 11, 2020, to March 18, 2020, as a certified nursing assistant (CNA). On March 15, 2020, Appellant requested time off for the following day, March 16, to pick up her children's assignments and laptop from their schools due to the schools closing for the COVID-19 pandemic. She was informed by her CNA supervisor, Selena Gray, that her request was denied "because she had other people off" and because "she couldn't afford for [her] to be off that day." Ms. Gray also informed her if she took the day off, she could not return to work. Appellant then took March 16 from work and returned on March 18, which was her last day of work. The next day, March 19, Appellant turned in her work laptop to Karen Ancell, Director of Human Resources.

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

Appellant filed a claim for unemployment insurance (UI) benefits with the Department on March 23, 2020. In her first application, Appellant listed Providence Care, LLC in York, South Carolina as her last employer, and indicated that she was on "layoff due to Coronavirus" as of March 18, 2020. Employer did not provide information to the Department. Consequently, the claims adjudicator mailed a determination April 15, 2020, holding Appellant eligible to receive UI benefits effective March 22, 2020, upon a finding she had been unemployed due to a lack of work. On August 10, 2020, Appellant submitted a new application for UI benefits and this time, listed Providence Hospice, LLC in Rock Hill, South Carolina as her last employer and indicated that she had been "fired, terminated, or discharged from the job" as of March 18, 2020.[2] As a result of this information, the Department issued a decision on October 27, 2020, rescinding its April 15, 2020 determination which held Appellant eligible for UI benefits.

However, the Department's claims adjudicator issued a new determination on February 4, 2021, finding that pursuant to section 41-35-120(1) of the South Carolina Code (2021), Appellant voluntary left her employment without good cause and was, therefore, ineligible for UI benefits. Appellant appealed this decision to the Appeal Tribunal (Tribunal), which held a hearing on April 7, 2021. Appellant and Karen Ancell, Director of Human Resources of Employer, both testified before the Tribunal. During the hearing, Ms. Ancell testified Appellant voluntarily quit her employment with Employer when Appellant took an unauthorized day off from work and turned in her equipment. Ms. Ancell also confirmed that Ms. Gray denied Appellant's request for the day off because of Employer's patient care needs. When Appellant dropped off her laptop, Ms. Ancell asked Appellant "why she hadn't contacted [her supervisor] that we were willing to let her come in to work late" on March 16. Appellant responded by turning in the equipment and leaving. At the hearing, Appellant admitted she did not ask if she could take part of the day off, instead she took whole day off.

Ms. Ancell also explained that Employer has a grievance procedure in place which provided Appellant an opportunity to dispute her supervisor's decision. Nevertheless, Appellant

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[2] Appellant had exhausted the twenty (20) weeks of Ul benefits she was entitled to receive under state law and was attempting to obtain federal Pandemic Emergency Unemployment Compensation (PEUC) under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). *See* S.C. Code Ann.§ 41-35-50 (2021); 15 U.S.C. A. § 9025 (Westlaw Edge through Pub. L. No. 117-50). Prior to processing a PEUC application, states are required to verify that an individual did not qualify for any other state UI program, which was why Appellant completed a new state UI application. *See* United States Department of Labor Unemployment Insurance Program Letter 17-20, Attachment I(D)(3).

did not exercise that opportunity to remedy her concerns. Instead, without attempting to make any alternate arrangements with her child's school district, Appellant took the unauthorized day off, turned in her equipment without talking to anyone else at Providence Hospice about her situation, and left. Based upon these facts, the Tribunal affirmed the claim's adjudicator's determination and determined that Appellant voluntary left her employment without good cause and was thus disqualified from receiving UI benefits.

Thereafter, Appellant appealed to the Department's Panel. In her appeal, Appellant offered documentation consisting of a printed email from Rock Hill Schools District that provided notice to parents that all public schools were closed indefinitely due to the public health emergency and gave an opportunity to pick up laptops for remote learning. Appellant also made additional arguments relating to the Tribunal's decision and the testimony it relied on. On May 25, 2021, the Panel affirmed the Appeal Tribunal's determination, finding that:

> The record establishes the Claimant initiated the separation with the Employer when she decided not to report to work and returned her equipment to the Employer. The Claimant did not take reasonable steps to remain employed. While the Claimant may have needed to obtain her children's assignments and laptops from their school, the Claimant had an opportunity to make other arrangements with upper management or her children's schools, but failed to do so. The Claimant did not provide the Employer with the opportunity to remedy her concerns. Therefore, we find the Claimant voluntarily left work without good cause attributable to the employment.

The Panel also denied Appellant's request to submit additional evidence because it was confined to the record developed before the Tribunal.

On June 24, 2021, Appellant filed a Notice of Appeal with this Court challenging the Panel's decision.

ISSUES ON APPEAL

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

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

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 Department decisions. *See* S.C. Code Ann. §§ 1-23-380, 1-23-600(D) (Supp. 2020); *Gibson*, 282 S.C. at 386, 318 S.E.2d at 367; *McEachern v. S.C. Emp't 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. 2020) 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 section 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.

§ 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, 519, 466 S.E.2d 357, 359 (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, 353, 461 S.E.2d 388, 391 (1995). The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." *Kearse v. State Health & Human Serv. Fin Comm'n*, 318 S.C. 198, 200, 456 S.E. 2d 892, 893 (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*, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

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

Appellant raises multiple arguments relating to hearsay in her brief. Specifically, her main argument is that the Panel erred by basing its decision solely upon inadmissible hearsay. She also argues the Panel erred by failing to address a hearsay issue raised and a witness statement issue that she raised. Lastly, she argues her substantial rights were prejudiced because of administrative findings, administrative inferences, administrative conclusions and/or administrative decisions based upon inadmissible hearsay testimony. The Department, on the other hand, argues Appellant is raising the issue of hearsay for the first time on appeal and, thus, the issue is not preserved. The Department further argues that even if the issue is preserved, the Panel's decision was not based solely on inadmissible hearsay.

In this case, the hearing officer questioned the witnesses individually, allowed the parties to cross-examine each other, provided the parties with the opportunity to raise objections and ask procedural questions, and offered a final opportunity to provide new or rebuttal testimony. Nevertheless, Appellant failed to object to any testimony provided during the Tribunal hearing. Indeed, Appellant never communicated to the hearing officer, in any way, that any of Ancell's testimony should be disallowed.[3] Therefore, the issue of hearsay is not preserved on appeal. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

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[3] Upon review of the Tribunal's decision by the Department's Panel, Appellant raised some hearsay arguments. However, in UI appeals, the Department's Tribunal is primarily tasked with hearing the testimony and evidence presented to the Department, and making findings of fact regarding that evidence. *See* S.C. Code Ann. Regs. 47-51(C)(1), (E) (Supp. 2020).; *see also* S.C. Code Ann. Regs. 47-52(B)(1) (Supp. 2020).("Except as provided in Appeal regulation 47-52, D for the hearing of appeals removed to the Appellate Panel from an Appeal Tribunal, all appeals to the Appellate Panel shall be heard solely upon the evidence in the record before the Appeal Tribunal.").

Issue preservation is obviously an important appellate criterion because, by failing to object on the grounds of hearsay, Appellant deprived Employer the opportunity to argue the reasons it offered the testimony and whether the testimony was admissible hearsay. *See State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (holding that in order to preserve an issue for review, there must be a contemporaneous objection that is ruled upon by the trial court); *see also State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented . . . and with sufficient specificity to inform the [hearing officer] of the point being urged by the objector."). But, in UI cases, it is even more important because it affects the application of regulation 47-51(C)(3) of the South Carolina Code of Regulations (Supp. 2020).

Regulation 47-51(C)(3) provides that in UI cases before the Department, "[e]vidence will not be excluded solely because it may be hearsay." Reg. 47-51(C)(3). "Hearsay, including information provided to the Department through telephone conversations and written statements, may be considered. However, findings of fact cannot be based exclusively on hearsay evidence unless that evidence is admissible under the South Carolina Rules of Evidence." *Id.* In other words, the Department's findings may be based solely upon admissible hearsay pursuant to the South Carolina Rules of Evidence but not solely upon hearsay which is not subject to a hearsay exception. Thus, Appellant is required to object to the admission of hearsay evidence, in order to lay a foundation that the evidence supporting her termination was based on inadmissible hearsay. Without an objection or ruling to explain the reason for the admission of the evidence, this Court cannot evaluate whether the hearsay evidence was exclusively inadmissible hearsay evidence. *See Johnson*, 363 S.C. at 58, 609 S.E.2d at 523.

Furthermore, even if Appellant had made timely objections to Ancell's testimony, Appellant's arguments would still fail because the Panel's decision is not based solely on inadmissible hearsay. The Panel made factual findings that relied on Appellant's own testimony to determine that Appellant voluntarily quit without good cause. Accordingly, Appellant's own testimony, which is clearly not hearsay, supports the Panel's decision. Specifically, the Panel found (1) Appellant did not report to work as scheduled; (2) she returned her equipment to Employer; and (3) she did not take reasonable steps to remain employed. These findings were supported by Appellant's admissions. For instance, Appellant admitted she took an unauthorized day off and that she turned in her laptop and equipment to Employer's human

resources director, Ms. Ancell. Appellant also admitted she did not seek reasonable remedies such as requesting a partial day off, discussing her concerns with human resources or others, or finding an alternate time to pick up her children's school materials. She also did not utilize the grievance process Employer had in place to dispute her supervisor's decisions. The Panel thus applied the law to the facts as admitted by Appellant to conclude that she voluntarily quit her employment without good cause.

In conclusion, I find that the Panel did not rely exclusively on inadmissible hearsay evidence. Consequently, the Court also need not consider any prejudice arising from the admission of any hearsay evidence.

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

From the outset, nearly all of Appellant's arguments attack the evidence relied upon by the Panel because it was based upon inadmissible hearsay evidence but not the substantiality of the remaining evidence. However, because the Court finds that the allegedly inadmissible hearsay evidence was admitted without objection, and thus became competent evidence. *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 266, 442 S.E.2d 611, 616 (1994) ("Evidence received without objection is competent."); *State v. White*, 215 S.C. 450, 454, 55 S.E.2d 785, 787 (1949) ("The rule is well settled that evidence even though incompetent, if admitted without objection or motion to strike, is to be given the same probative force as that to which it would be entitled if it were competent."). Moreover, even if she did make timely objections, the Panel's decision is not based solely on inadmissible hearsay. The Panel, as the trier of fact, was entitled to give that evidence the weight it deemed proper. *See Hanna v. Palmetto Homes, Inc.*, 300 S.C. 535, 537, 389 S.E.2d 164 (Ct. App. 1990) ("[T]he credibility and weight to be accorded evidence is solely for the fact finder to determine. They are not matters with which an appellate court is at all concerned.").

The question, then, is whether the evidence in the record, including that which Appellant considers to be inadmissible, was cogent enough for a reasonable person to be able to reach the same conclusion as the Panel. *See Friends of the Earth*, 387 S.C. at 366, 692 S.E.2d at 913; *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) ("Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion

that the administrative agency reached or must have reached in order to justify its action.") (internal quotation marks and citations omitted).

Section 41-35-120(1) of the South Carolina Code (2021) provides that an insured worker is ineligible for unemployment benefits for leaving his or her most recent work "voluntarily, without good cause." Moreover, the Legislature determined that

> no claimant shall be eligible to receive benefits or waiting period credit following the completion of a temporary work assignment unless the claimant shows that he informed the temporary employment agency that provided the assignment of the assignment's completion, has maintained on-going weekly contact with the agency after completion of the assignment, and that the agency has not provided a subsequent assignment for which the claimant's prior training or experience shows him to be fitted or qualified

S.C. Code Ann. § 41-35-110(3)(c) (2021). "[A]n employee may be charged with quitting a job by action or inaction with unavoidable ramifications." *Samuel v. S.C. Emp't Sec. Comm'n*, 285 S.C. 476, 477, 330 S.E.2d 300, 301 (1985).

Here, the record contains sufficient evidence from which the Panel could reasonably decide that Appellant voluntarily quit her job without good cause due to her own action. As stated above, the Panel relied on Appellant's own testimony, which is clearly not hearsay, to make factual findings that Appellant voluntarily quit. Indeed, Appellant admitted that she did not report to work as scheduled on March 16, 2020, even though her supervisor had explicitly denied her leave request due to its patient care needs. Appellant nonetheless argued she had no choice but to take care of her children, because her children's school was closing. However, Appellant admitted she did not attempt to make alternative arrangements with her children's school district. Also, after taking the unauthorized day off, Appellant turned in her laptop and other equipment to her employer. Appellant took those actions, without talking to anyone at Providence Hospice other than her supervisor prior to turning in her equipment. These facts were confirmed by Ancell as well.

The Panel also had Ancell's firsthand testimony as the human resources director that Employer has a grievance process allowing an employee to dispute their supervisor's decisions or actions. Although, Appellant admitted to not utilizing this process, she nevertheless contends in her Reply brief that the Panel improperly inferred from Ms. Ancell's testimony that she had an opportunity to make other arrangements with upper management. Specifically, she contends that inference was not supported by the Record because Employer did not provide a copy of the

grievance procedure or any written statements from her supervisor or other management into evidence. However, as stated above, Appellant could have objected to Ancell's testimony but failed to do so. Moreover, Ancell's testimony was clearly probative. Ms. Ancell is the human resources director and thus, has personal knowledge of the grievance policies in place. Indeed, statements of personal knowledge are not hearsay and are legally competent evidence upon which to rely. *See* Rule 801(c), SCRE (defining "hearsay" to be "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"). Finally, even if Appellant's supervisor had improperly told her that she could not return to work if she took March 16th off, that admonition does not alter the outcome of this case because Appellant voluntarily acted in such a way as to bring about the unavoidable ramification of her separation from employment. Just as in *Samuel*, the Employer informed Appellant of the consequence if she took the action of not reporting to work as scheduled, and Appellant acted with full knowledge of the ramifications and also did nothing to save her job. *Samuel,* 285 S.C. at 478, 330 S.E.2d at 301.

Therefore, there is substantial evidence upon which the finder of fact relied in reaching its decision and was such that it would allow a reasonable mind to arrive at the same conclusion, specifically that Appellant voluntarily left her job without cause.

ORDER

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

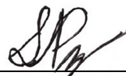
AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

November 2, 2021
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Perez, 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, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Stephanie Perez
Judicial Law Clerk

November 2, 2021
Columbia, South Carolina