

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: April 19, 2022)

EDWARD TROIANO,
Plaintiff,

v.

RHODE ISLAND COASTAL RESOURCES
MANAGEMENT COUNCIL,
Defendant.

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C.A. No. PC-2018-2792

DECISION

KEOUGH, J. In this administrative appeal, Plaintiff Edward Troiano (Plaintiff) seeks judicial review of a final decision of the Rhode Island Coastal Resources Management Council (CRMC or Council). The decision effectively denied his application to maintain an oyster aquaculture lease site. This Court exercises jurisdiction pursuant to the Administrative Procedures Act (APA), G.L. 1956 chapter 35 of Title 42.

I

Facts and Travel

On May 2, 2017, Plaintiff submitted an application to the CRMC to create and maintain a half-acre aquaculture lease site (oyster farm) in upper Narragansett Bay, specifically the Nyatt Point section of Barrington, Rhode Island. (Pl.’s Ex. C, Lease Site Application, at 1-2.) Plaintiff had received support previously for the proposed oyster farm from the Town of Barrington at a March 15, 2017 preliminary determination hearing. (Pl.’s Ex. B, Preliminary Determination Meeting Report, Apr. 26, 2017). Both the CRMC and the Rhode Island Department of Environmental Management Division of Fish and Wildlife (DEM) staff participated in the hearing and expressed no concerns relative to the proposed farm’s impact on fish resources or wildlife, but

noted that the commercial shellfishing industry may have an objection. *Id.* at 3. On November 9, 2017, Plaintiff supplemented his application with photographs of the site and DEM surveys pertaining to shellfish density in the area.¹ (Compl. ¶ 9.) On December 21, 2017, David Beutel, Aquaculture Coordinator for the CRMC, issued a report in which staff concluded that Plaintiff had met all regulatory requirements and recommended approval of his application. (Pl.’s Ex. D, Staff Report, Dec. 21, 2017.)

On February 13, 2018, Plaintiff’s application came before the CRMC for a public hearing pursuant to § 42-35-9(a).² At the hearing, Mr. Beutel introduced the December 21, 2017 Staff Report relative to Plaintiff’s application. In so doing, Mr. Beutel reviewed the materials that had been considered by the staff, including letters submitted in support of and against the proposal, site assessments, and surveys. (Pl.’s Ex. E, Hearing Transcript (Tr.), 84:18-90:10, Feb. 13, 2018.) Mr. Beutel then detailed the staff’s findings, ultimately concluding that the proposed site would *not* have a significant negative impact on commercial shellfishing in the area and recommended approval of the application. *Id.*

Next, the Council invited Plaintiff to make his presentation in support of his application. Prior to beginning his testimony, however, Plaintiff asked the CRMC chairwoman about his ability to “ask questions of objectors through [the Council] as they come up.” *Id.* at 92:1-3. The Chairwoman indicated that Plaintiff could “present [questions to the objectors] to a limited extent,” to which he responded that he would “try to keep everything towards the end as best [he could].”

¹ These records were initially omitted from the certified record before the Court. On August 17, 2018, this Court granted Plaintiff’s unopposed Motion for Leave to Admit Additional Exhibits, and the supplemental materials were added to the record. (Pl.’s Ex. J, Consent Order, Aug. 17, 2018.)

² Section 42-35-9(a) provides that “[i]n any contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice.”

Id. at 92:4-7. The Plaintiff then proceeded to give a brief overview of his application and indicated that he was reserving the end of his time to present additional material as rebuttal evidence after any objectors had testified. *Id.* at 95:3-9. He then received questions from the Council regarding his application and testified that he chose the proposed site because he wanted to avoid conflicts with commercial shellfishermen. *Id.* at 95:11-99:13. He also confirmed that he would not seek any expansion of the oyster farm if his application was approved. *Id.* At the conclusion of his testimony, the Council told Plaintiff that he could “come back up afterwards” following testimony from the objectors. *Id.* at 99:14-15.

The Council next heard testimony from and asked questions of six objectors without any questioning by Plaintiff. The objectors stated that they opposed the oyster farm application because they believed it would interfere with commercial fishing activities and recreational use of the bay. *Id.* at 100:17-122:15. Subsequently, one Council member asked that any other objectors in the audience stand up and state their opposition to the application for the record. *Id.* at 122:17-124:3. Four individuals identified themselves and offered a blanket objection to the application with little or no testimony and without any questioning by Plaintiff. *Id.*

The Council then permitted Plaintiff “to come back and present anything or respond to what the objectors had to say.” *Id.* at 124:5-8. Plaintiff presented testimony from supporters, who stated that the aquaculture site would be beneficial to the State’s ecosystem and provide learning opportunities for children. *Id.* at 124:20-128:22. Plaintiff then responded generally to the objections, testifying that there was precedent for the proposed site, that he had no intention to cause any harm to neighboring fishermen, and noted that the preliminary reports stated there would be no significant adverse impact by the proposed activities. Notably, he did not cross-examine

any of the objectors. *Id.* at 129:2-138:1. After deliberation, the Council voted 4-4 on Plaintiff's application, resulting in a denial. *Id.* at 145:1-19.

On April 24, 2018, Plaintiff filed his appeal of the CRMC's decision in which he contends that CRMC's findings and decision were in violation of various statutory provisions and were made upon unlawful procedure. Specifically, Plaintiff maintains that he was not afforded the opportunity to cross-examine objectors at the hearing and that the CRMC improperly failed to consider a complete record of his application. Furthermore, Plaintiff asserts that the Council's written decision does not support a denial of his application and asks this Court to reverse the Council's February 2018 decision and remand the matter for further proceedings.

In response, the CRMC concedes that it did not initially consider the supplemental materials that Plaintiff submitted for his application, but instead reviewed a one-page summary of the materials.³ The CRMC maintains that this was sufficient as the additional materials were redundant and both legally and factually insignificant. The Council further maintains that Plaintiff was afforded the opportunity to cross-examine witnesses but chose to waive that right, presenting supporters of his application instead. Finally, CRMC argues that the written decision complies with all statutory requirements and asks this court to dismiss Plaintiff's appeal.

II

Standard of Review

Section 42-35-15 of the APA governs this Court's review of an agency decision and provides:

“The court shall not substitute its judgment for that 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

³ Of note, the summary referred to by CRMC in objection to Plaintiff's appeal was not included in the record transmitted to this Court for review.

proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

“(1) In violation of constitutional or statutory provisions;

“(2) In excess of the statutory authority of the agency;

“(3) Made upon unlawful procedure;

“(4) Affected by other error of law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Section 42-35-15(g).

This Court will make “an examination of the certified record to determine if there is any legally competent evidence therein to support the agency’s decision” and will uphold the agency’s decision if sufficient competent evidence exists on the record. *Johnston Ambulatory Surgical Associates, Ltd. v. Nolan*, 755 A.2d 799, 804-05 (R.I. 2000) (quoting *Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1138 (R.I. 1992)). In so doing, the Court will not substitute its judgment for that of the administrative agency “concerning the weight of the evidence on questions of fact.” *Environmental Scientific Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993). Questions of law are reviewed *de novo*. *Id.*

III

Analysis

It is well settled that “the due-process requirements of a fair trial apply to the procedures of administrative agencies.” *Bourque v. Dettore*, 589 A.2d 815, 823 (R.I. 1991). Procedural due process at the administrative level requires that all petitioners receive “an opportunity to be heard

at a meaningful time and in a meaningful manner.” *Id.* When reviewing the procedural fairness of an administrative hearing, our Supreme Court will look to see

“whether a fair-minded person in attendance . . . [could say] that everyone had been heard who, in all fairness, should have been heard and that the legislative body required by law to hold the hearings gave reasonable faith and credit to all matter[s] presented, according to the weight and force they were in reason entitled to receive.” *Barber v. Town of North Kingstown*, 118 R.I. 169, 176, 372 A.2d 1269, 1272 (1977) (quoting *Golden Gate Corp. v. Town of Narragansett*, 116 R.I. 552, 562, 359 A.2d 321, 326 (1976)).

A

Right to Cross-Examination

Plaintiff first contends that the CRMC deprived him of due process by denying him the opportunity to cross-examine the witnesses who testified against his application. Plaintiff maintains that both judicial precedent and statutory/regulatory provisions provide for the right to cross-examination and that he unequivocally asserted his right to do so. Plaintiff further contends that the objections were either not supported by evidence or were contradicted by the CRMC’s own report such that his inability to question the individuals severely undermined his ability to test their veracity. The CRMC responds that these assertions are “patently false” as Plaintiff was given ample opportunity to question the objectors but instead declined to do so.

While “[t]he right to cross-examination . . . is not absolute” in the administrative context, both Rhode Island law and the CRMC have affirmed the importance of cross-examination and provided an opportunity for applicants to cross-examine adverse witnesses. *Beauchamp v. De Abadia*, 779 F.2d 773, 776 (1st Cir. 1985). Indeed, the Rhode Island APA provides that in contested cases, “[a] party may conduct cross examinations required for a full and true disclosure of the facts[.]” Section 42-35-10(3). In addition, the CRMC’s guide to the hearing process unequivocally states that “[a]pplicants are entitled to *cross-examine* anyone who testifies in

opposition to the application.” (Pl.’s Ex. M, at 2.) *See also Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses”) (citations omitted); *Arnold v. Lebel*, 941 A.2d 813, 821 (R.I. 2007) (APA requires parties have “opportunity to respond,” “including cross-examination, if appropriate” when agency hearing officers are discussing contested adjudicatory facts); *Harris v. City of Providence*, No. C.A. 05-1247, 2006 WL 1148121, at *13 (R.I. Super. Apr. 27, 2006) (opportunity for reasonable cross-examination must be allowed at adversary proceeding before administrative board). Accordingly, the issue before this Court is not whether the right to cross-examine witnesses exists, but rather whether the Council *afforded* Plaintiff the opportunity to challenge the testimony offered by the objectors. After a careful review of the record, this Court concludes that it did not.

As the transcript from the hearing demonstrates, Plaintiff was clear from the outset that he wanted to question objectors through the Council “as they [came] up.” Tr. 92:1-3. The Chairwoman was equally clear that he would be afforded the opportunity “to a limited extent.” *Id.* at 92:5 However, as the hearing proceeded, at no point did the Chairwoman or any member of the Council ever allow Plaintiff to question the objectors himself or, in the alternative, submit a list of questions to be posed by Council members. At most, it was only after all objectors had testified and/or summarily agreed that they opposed Plaintiff’s application that the Council told Plaintiff he could “respond to what the objectors had to say.” *Id.* at 124:5-8. Allowing Plaintiff the opportunity to offer rebuttal evidence is not a substitute for the right to question the witnesses who testified adverse to his application. That fact is underscored by the CRMC’s own position that members

who voted against the application did so “primarily [on] the testimony of the objectors and issues that were raised during the hearing.”⁴ CRMC’s Mem. of Law in Opp’n Admin. Appeal, at 4.

Nevertheless, the CRMC contends that Plaintiff effectively waived his opportunity for cross-examination. This Court disagrees. Waiver requires “the voluntary, intentional relinquishment of a known right.” *Sturbridge Home Builders, Inc. v. Downing Seaport, Inc.*, 890 A.2d 58, 65 (R.I. 2005) (quoting *Lajayi v. Fafiyebi*, 860 A.2d 680, 687 (R.I. 2004)). While waiver can be implied and may not require a definitive affirmative relinquishment, such implied waiver “must be proved by a clear, unequivocal, and decisive act of the party who is alleged to have committed waiver.” *Id.* (quoting *Ryder v. Bank of Hickory Hills*, 585 N.E.2d 46, 49 (Ill. 1991)). Plaintiff’s failure to call the objectors back up for cross-examination does not constitute such an act, especially considering Plaintiff is a *pro se* litigant who may not have felt confident making such a demand of the Council. *See Gray v. Stillman White Co., Inc.*, 522 A.2d 737, 741 (R.I. 1987) (“[O]ur courts have often exhibited leniency and provided assistance to those litigants who have chosen to present their own cases.”). Simply stated, there is no competent evidence in the record that the Plaintiff waived his opportunity to cross-examination.

B

Failure to Consider Complete Record

Plaintiff also assigns error to the Council’s failure to consider the supplemental materials that he appended to his November 9, 2017 application. Those materials, which consisted of fifty-four pages of shellfish surveys, maps, charts, DEM reports, and photos were not provided to the Council prior to the hearing. Plaintiff maintains that these materials were of “critical importance”

⁴ *See Champlin’s Realty Associates v. Tikoian*, 989 A.2d 427, 442-43 (R.I. 2010) (remanding matter to the CRMC where parties were not given opportunity to appropriately respond and cross-examine additional evidence).

to CRMC’s ability to evaluate his application, question his objectors, and make informed decisions. Pl.’s Br. on Appeal, at 11. In response, the CRMC maintains that these omitted materials do not substantially affect the record and that, with or without them, its denial of Plaintiff’s application is supported by legally competent evidence. CRMC further contends that Plaintiff had the opportunity to present any additional materials at the February 13, 2018 hearing but chose not to do so, and thus, the Council’s failure to consider these materials prior to voting on his application is not reversible error.

Section 42-35-9 of the APA, “Contested cases-Notice-Hearing-Records” provides the procedures to be employed with respect to contested cases before an administrative agency. It states in pertinent part that

“(a) In any contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice.

“* * *

“(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

“* * *

“(e) The record in a contested case shall include:

“(1) All pleadings, motions, intermediate rulings;

“(2) Evidence received or considered;

“(3) A statement of matters officially noticed;

“(4) Questions and offers of proof and rulings thereon;

“(5) Proposed findings and exceptions;

“(6) Any decision, opinion, or report by the officer presiding at the hearing;

“(7) All staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.”

Section 42-35-10, entitled “Rules of evidence,” further provides that in contested cases “[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded.”

In this instance, CRMC acknowledges, as it must, that the Council did not possess the materials Plaintiff had appended to his November 9, 2017 application prior to the February 13, 2018 meeting. It insists however that the materials were unduly repetitious and that rather than include the redundant information in its report to Council members, “CRMC staff appropriately and adequately summarized in the materials provided to voting members of the CRMC.” CRMC’s Mem. of Law in Opp’n Admin. Appeal, at 4. However, the contents of this summary are absent in the record before the Court. Accordingly, there is no way to determine whether the Council considered *all* the information provided by Plaintiff or whether its decision was based on legally competent evidence.⁵

The omitted materials become even more critical to this Court’s review in light of the Council’s failure to allow cross-examination of the objectors who testified. CRMC maintains, and the record supports, that the four members who voted against the application did so based primarily on the testimony of the objectors, who relied on their “personal knowledge and experience.”⁶ Without a review of the summary provided to the Council, there is simply no way to determine whether this reliance was clearly erroneous or whether the Council “gave reasonable faith and credit to all matters presented.”⁷ In these instances, wherein the administrative record is incomplete or the materials considered by an administrative agency are not fully known to the Court, the remedy is generally to remand the matter to the agency. *See, e.g., Champlin’s Realty Associates v. Tikoian*, 989 A.2d 427, 448-49 (R.I. 2010) (proper remedy for Council’s consideration of *ex parte* materials was remand to agency for supplementation of the record); *Banki v. Fine*, 224 A.3d 88,

⁵ *See* § 42-35-15(d) (“agency shall transmit to the reviewing court . . . the *entire record* of the proceeding under review”) (emphasis added).

⁶ Pl.’s Ex. E, Tr. 143: 2-6, February 13, 2018.

⁷ *Barber v. Town of North Kingstown*, 118 R.I. 169, 176, 372 A.2d 1269, 1272 (1977) (quoting *Golden Gate Corp. v. Town of Narragansett*, 116 R.I. 552, 562, 359 A.2d 321, 326 (1976)).

99-100 (R.I. 2020) (remand is proper remedy for incomplete or deficient record); *Lemoine v. Department of Mental Health, Retardation and Hospitals*, 113 R.I. 285, 290, 320 A.2d 611, 614 (1974) (authority to remand case for further proceedings is declaratory of inherent power of the court to remand to correct deficiencies in the record and afford litigants a meaningful review).

IV

Conclusion⁸

Therefore, after a careful review of the entire record, this Court concludes the Plaintiff was prejudiced by the Council's failure to provide him an adequate opportunity for cross-examination during the public hearing as well as its failure to review his entire application prior to rendering its decision. Moreover, the failure to submit the summary relied upon by the Council in its deliberations has precluded this Court from properly evaluating the agency's decision. As a result, this Court vacates the CRMC's denial of the Plaintiff's application and remands the matter to the agency. The CRMC shall review Plaintiff's application *de novo* and conduct a new, properly advertised public hearing in accordance with this Decision, including providing Plaintiff with an opportunity for reasonable cross-examination and consideration of the complete application materials.

Plaintiff shall submit the appropriate judgment for entry.

⁸ Because this Court has concluded that the CRMC deprived Plaintiff of his procedural due process rights and is remanding this case for further proceedings, it will not address Plaintiff's final contention regarding the sufficiency of the written decision.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Edward Troiano v. Rhode Island Coastal Resources Management Council

CASE NO: PC-2018-2792

COURT: Providence County Superior Court

DATE DECISION FILED: April 19, 2022

JUSTICE/MAGISTRATE: Keough, J.

ATTORNEYS:

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