SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. BCD-25-275

PENQUIS C.A.P. INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellees.

APPEAL FROM THE BUSINESS AND CONSUMER COURT

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. DHHS and DAFS denied Penquis its right to a full and fair administrative appeal hearing.

a. Applicable constitutional and statutory law gives Penquis the right to a full and fair hearing.

i. Penquis properly raised below and pursued before this Court the deprivation of its rights to a full and fair hearing.

Continuing arguments raised in Superior Court, Appellees contend that Penquis lacks a cognizable property interest in the outcome of a competitive bidding process and, therefore, has no right to constitutional due process in connection with its administrative appeal. DHHS Red Br. 18, n.4; DAFS Red Br. 8, n.2, 33; ModivCare Red Br. 17. The sole authority cited for this proposition is *Carroll F. Look Construction Co. v. Town of Beals*, 2002 ME 128, 802 A.2d 994 (Me. 2002). That case is inapposite, however, as it addressed whether a bidder for a municipal contract, which is not subject to the purchasing statutes governing this case, had a due process claim that it could assert under 42 U.S.C. § 1983 and the Maine Civil Rights Act. *Carroll F. Look Construction Co.*, 2002 ME 128 at ¶ 10, 802 A. 2d at 997.

Here, by contrast, the competitive award from which Penquis appealed was governed by a statute that explicitly confers on bidders for a state contract the right to a fair, competitive selection process outlined in 5 M.R.S. subchapter 1-A, "Rules Governing the Competitive Bid Process," culminating in the opportunity to vindicate

that entitlement through an administrative appeal process if certain statutory conditions, which were indisputably satisfied here, are met. 5 M.R.S. § 1825-E(2).[1] Once DAFS has determined that the right to a hearing exists under this standard, the statute goes on to specify a full evidentiary hearing:

> Members of an appeal committee appointed under this section shall meet at the appointed time and place in the presence of the petitioner and such individuals as the petitioner determines necessary for a full and fair hearing. The petitioner may present to the appeal committee any materials the petitioner considers relevant to the appeal.

Id. § 1825-E(3), second paragraph.

The statutory right for bidders to have the opportunities set forth in Maine's competitive bidding statute confers a property interest sufficient to invoke the due process provisions of the U.S. and Maine constitutions. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431, 102 S. Ct. 1148, 1155 (1982) (holding that an employee's right to use the adjudicatory procedures of the Illinois Fair Employment Practices Act to address a claim regarding his employment in a private business was

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[1] Subsection 1825-E(2) provides, in pertinent part:

> Persons aggrieved by an agency contract or grant award decision under this subchapter may request a hearing of appeal. . . . . The Director of the Bureau of General Services shall grant a hearing of appeal unless:
>
> A. The Director of the Bureau of General Services determines that:
>
> (1) The petitioner is not an aggrieved person;
>
> (2) A prior request by the same petitioner relating to the same contract or grant award has been granted;
>
> (3) The request was made more than 15 days after notice of contract or grant award; or
>
> (4) The request is capricious, frivolous or without merit; or
>
> B. No contract or grant was awarded. . . . .

5 M.R.S. § 1825-E(2).

a protected property interest); *Western Maine Ctr. for Children v. Department of Human Servs*., 2003 Me. Super. LEXIS 271, *26 (holding that an "aggrieved person" under Maine's competitive bidding statute has a property interest sufficient to raise a due process issue).

Even if Appellees were correct that Penquis had no protected property interest under a due process analysis, the process required for Maine administrative agency adjudicatory proceedings is spelled out specifically in the Administrative Procedure Act, subchapter 4, 5 M.R.S. §§ 9051-9064, with judicial review of the resulting decisions governed by subchapter 7, 5 M.R.S. §§ 11001-11008. The Maine APA parallels but makes more specific the due process standard that would apply to a section 1825-E hearing even without the detailed overlay provided by subchapter 4 of the APA. The two layers of procedural protection offered by Maine's procurement and administrative procedure statutes may render the question of whether constitutional due process protections can be invoked irrelevant in a Rule 80C judicial review proceeding, where, as here, the issue is not whether those procedures are adequate but whether reversible errors were made in the effort to follow them. In any case, ModivCare's attempt to rely on a municipal purchasing appeal fails to establish that Penquis did not have a right to a full, fair hearing of its appeal.

ii. Penquis did not waive its claim that the administrative appeal process deprived it if its right to a fair hearing merely by citing different authority for that right at different stages of this litigation.

Seeking to avoid the distraction that arose below due to the *Carroll F. Look Construction* opinion, Penquis has stressed, in reiterating its argument before this Court, the statutory fair hearing rights conferred by Maine's APA and state agency procurement laws rather than discussing the parallel constitutional due process rights. These prescribed APA rights and procedures reflect and make specific to state agencies the basic rights protected by constitutional due process. DAFS now seizes on Penquis's choice to cite and emphasize the APA instead of the underlying constitutional concepts to argue that Penquis has somehow waived its objections to unfair procedure, simply because it cited different authority for those rights in this Court as compared to earlier stages of review. DAFS Red Br. 32-34.

The administrative agency conduct of which Penquis seeks review and reversal, however, was raised with specificity in the original administrative hearing and at each stage of appellate review. C.R. 24-42; 22,003-12; 22,503-4; 22,515-6; 23190-9; A. 29, ¶¶ 35-40. "An issue is considered raised and preserved for appeal 'if there is sufficient basis in the record to alert the court and any opposing party to the existence of that issue.'" *Western Maine Ctr. for Children v. DHHS*, 2003 Me. Super. LEXIS 271, *24 (quoting *Wells v. Portland Yacht Club,* 2001 ME 20, 771 A2d 371, citing *Farley v. Town of Washburn,* 1997 ME 218, 704 A.2d 347). That standard has plainly been met here, as Penquis has consistently pointed to the same lack of access to relevant information as the conduct that deprived it of a fair hearing

before the DAFS Appeal Panel. Choices among parallel sources of authority in support of the same issue—deprivation of a fair hearing—do not amount to different "issues," one of which is waived if not presented below. Thus, the arguments presented under the APA in Penquis's main brief simply offer a more refined authority for resolution of the issue raised previously before the Appeal Panel and reiterated in the Business and Consumer Docket of the Superior Court.

iii. The Maine APA applies to both the administrative appeal proceeding and this judicial review of the decision emerging from that proceeding.

DAFS' claim that the Administrative Procedure Act does not apply to DAFS contract award appeals is both erroneous and unavailing. DAFS Red Br. 34-39. First, even if the APA did not apply, the purchasing statute itself explicitly establishes Penquis's right to a "full and fair hearing" and to "present . . . any materials the petitioner considers relevant to the appeal." These mandates within the purchasing statute were violated, as described in Penquis's main brief. Blue Br. 14-20. Second, there is no authority for the proposition that hearing rights conferred by the Legislature without specific reference to the APA are excluded from its reach, as DAFS asserts in its brief. DAFS Red Br. 33-37. In fact, Maine statute says exactly the opposite: the APA clearly provides that statutory provisions inconsistent with its provisions "yield," and applicable APA provisions govern instead, "except where *expressly* authorized by statute." 5 M.R.S. § 8003. Nothing in 5 M.R.S. § 1825-E

"expressly authorizes" or even suggests that the APA does not apply. The mere silence of the administrative appeal section in the purchasing law obviously is not an "express" authorization to deviate from the APA. The APA governs "adjudicatory proceedings," among other things, which are defined as "any proceeding before an agency in which the legal rights, duties, or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing." 5 M.R.S. § 8002(1). Since § 1825-E requires an opportunity for hearing for any facially sufficient appeal of a contract award, an appeal under that section is an adjudicatory proceeding within the meaning of the APA and thus is governed by all of the procedural protections of subchapter 4. There is no detailed hearing process laid out in the purchasing statutes that varies from and thus "authorizes" inconsistency with the APA. Accordingly, for the reasons stated in Penquis's main brief, the DAFS Appeal Panel violated Penquis's right to a full and fair hearing, and the resulting decision must be reversed.[2] Blue Br. 14-20.

[2] DAFS cites two decisions of this Court in support of its argument that the APA does not apply. Neither supports its position. In *Sanford Highway Unit of Local 481 v. Town of Sanford, Me*., 411 A.2d 1010 (1980), the question was whether the *judicial review* provisions of the APA superseded a prior enacted, very specific, and "speedier" appeal process governing a particular agency, the Maine Labor Relations Board. By contrast, the statutory scheme at issue here *specifically invokes* the judicial review provisions of the APA. 5 M.R.S. § 1825-F. In *Hale v. Petit,* 438 A.2d 226 (Me. 1981), the Court considered the CON review scheme administered by the Maine DHHS, which spells out in great detail a review and hearing process markedly different from the adjudicatory hearing provisions in the APA. The Court inferred that this detailed and very different process amounted to explicitly authorizing more limited hearing rights and more limited judicial review. No such variant details may be found in §§ 1825-E and 1825-F.

iv. Even if the APA did not apply, Penquis was still entitled to present relevant evidence pursuant to DAFS' own rules.

Even if this Court were to hold that the APA does not apply to the proceedings under review here, 5 M.R.S. § 1825-E itself provides that aggrieved bidders have the right to present "*any materials the petitioner considers relevant to the appeal.*" 5 M.R.S. § 1825-E(3). The rule implementing that statute likewise provides that "Exhibits relating to any issue of fact in the proceeding may be presented." A. 65; 18-554 C.M.R. ch. 120 § 4(C). Although the Court should reject the novel assertion by DAFS that APA adjudicatory hearing standards do not apply here, even if DAFS were correct, the state purchasing statute itself creates a right to present all relevant evidence, which was thwarted in this case. *See* Blue Br. 14-20.

b. The State's refusal to allow Penquis to fully present relevant information denied Penquis its right to a full and fair hearing.

i. Excluding evidence pertaining to ModivCare's prior performance denied Penquis its right to a full and fair hearing.

DAFS asserts that the documents to which Penquis was denied access before and during the hearing were irrelevant. DAFS Red Br. 40, n. 19. Although Penquis has not had the opportunity to review the unredacted versions of the FOAA documents, the visible portions of the redacted records provide glimpses of a longstanding history of ModivCare failing to meet performance metrics and a litany of complaints from providers and patients alike, all of which directly contradict Roger Bondeson's testimony that ModivCare made improvements over time. C.R.

26179, C.R. 26193, C.R. 33671-672, C.R. 36575-580, C.R. 36649, C.R. 36651- 654, C.R. 36805-807, C.R. 36,672, C.R. 36701-702, C.R. 36711-720; C.R. 350-352, Trans. 16:12-18:5; *cf.* C.R. 377-383, Trans. 43:15-49:16. Based on what can be known of the documents in their heavily redacted form, they pertain directly to whether DHHS fairly scored the bidders with regard to past performance.[3]

It is "reversible error to exclude evidence that is relevant and highly probative." *Mallinckrodt US LLC v. Dep't of Envtl. Prot.,* 2014 ME 52, ¶ 32 (citing *Berry v. Me. Pub. Utils. Comm'n*, 394 A.2d 790, 794 (Me. 1978)). Documents containing information that supports or contradicts a reviewer's personal recollections about a winning bidder's performance—especially when that bidder received a perfect score on their prior performance—are directly relevant to whether those recollections, on which other reviewers relied in the consensus scoring, were correct and, thus, whether the perfect score was fairly assigned.[4] Previous

[3] The redacted information within the complaints and reports was integral to Penquis's arguments that reviewers mischaracterized ModivCare's prior performance. The redacted information may have revealed what transportation region the complaint came from, the date that incidents occurred, and the frequency of such complaints. To deprive Penquis of the opportunity to test the accuracy of reviewers' statements during the procurement process by examining records that would confirm or contradict them was seriously prejudicial. *See Western Maine Ctr. for Children v. DHHS*, 2003 Me. Super. LEXIS 271, *36-37 (Holding that, even though a state representative "testified that she was satisfied that she had seen that which needed to be seen, an aggrieved person prevented from examining such records that are involved in the review process is clearly prejudiced."). Indeed, *"[o]nly by observing and obtaining a clear knowledge of all the records in the process, can an aggrieved person be aware whether the application of rule is in compliance with the statute*." *Id.* (emphasis added).

[4] "Relevant evidence is that which relates logically to a fact or issue at hand." *State v. Allen*, 462 A.2d 49, 52 (Me. 1983) (quoting *State v. Lewisohn*, 379 A.2d 1192, 1202 (Me. 1977).

administrative decisions have overturned contract awards that were found to be "arbitrary and capricious due to flaws in the scoring process that failed to properly captured [the winning bidder's] performance as the incumbent" because the failure to properly score prior performance, which was explicitly required to be considered in the scoring process, was a violation of competitive bidding law. *Re: Gainwell Technologies, LLC, Appeal of Contract Award of RFP # 202012169, Maintenance & Enhancement Services for WIC SPIRIT Software*, https://www.maine.gov/dafs/bbm/procurementservices/sites/maine.gov.dafs.bbm.procurementservices/files/inline-files/Decision%20Letter%20RFP%20202012169%20-%20FINAL.pdf (Apr. 19, 2022).[5]

Because the documents Penquis sought to introduce were relevant, the State's failure to allow meaningful examination and consideration of such documents at the hearing was an error of law. An error in excluding directly relevant evidence is not

[5] Appellees continue to assert that this Court should disregard previous administrative appeal decisions published by the State. DAFS Red Br. 27; DHHS Red Br. 25, n.9. Penquis responds that consideration of such decisions reinforces the Legislature's unambiguous intent when enacting 5 M.R.S. subchapter 1-A, which includes the statutes prescribing the competitive bidding process at issue here, to create "clear and consistent standards governing the competitive bidding process" which are "necessary to ensure an effective competitive bidding process". *Emergency Preamble,* L.D. 2277 (114th Legis. 1990) (enacting 5 MRS subchapter 1-A); Therefore, previous administrative appeal decisions, specifically those that address appeals of DHHS contract awards, such as the decision in *Gainwell Technologies, LLC*, should be considered by this Court. Penquis argued the persuasive value of the State's previous administrative agency decisions in its main Brief, *see* Blue Br. 22-25, and, although DAFS asks this Court to afford no weight to those decisions, it cites no authority for that position. *See* DAFS Red Br. 27.

harmless, and, in this instance, it crippled Penquis's ability to impeach Roger Bondeson's testimony.[6] While the ultimate impact of this error is unknowable, other administrative appeal panels have found that, when an agency violates bidding rules, such a violation undermines the competitive bidding process even if its effect on scoring cannot be measured. *In re Appeal of Award of Enhanced 9-1-1 Services* (1996), at 3 (Reply Brief for Petitioner, Ex. K, *Penquis, C.A.P., Inc. v. State of Maine, et. al.* (BCD-APP-2024-0008)).

ii. DHHS's choice not to provide FOAA Documents pursuant to a protective order does not negate its obligation to provide the documents to Penquis prior to the Administrative Appeal Hearing.

DAFS claims that DHHS could choose not to provide information containing confidential components subject to a HIPAA protective order simply because it "did not wish to," claiming that the Freedom of Access Law does not contemplate the release of any confidential information. DAFS Red Br. 46-47. The only authority cited for this proposition is *Gov't Oversight Comm. v. HHS,* 2024 ME 81, 327 A.3d 1115, but the *Oversight* opinion did not consider the scope of FOAA requests generally. Rather, *Oversight* addressed the permitted scope of a Legislative Committee's request for especially sensitive DHHS data "relating to the deaths of four children." *Id.* at ¶ 1. Unsurprisingly, it was not an occasion for the Court to

[6] An error is harmless only if "the appellate court believes it highly probable that the error did not affect the judgment." *State v. Allen*, 462 A.2d 49, 52 (Me. 1983)(quoting *State v. True*, 438 A.2d 460, 467 (Me. 1981) quoting R. Traynor, *The Riddle of Harmless Error* 35 (1970)).

opine on the longstanding and robust practice in Maine of disclosures of public records subject to protective orders as a means of simplifying and expediating the release of such records, instead of laboriously separating public information from confidential information, where the requesting party seeks the records solely for litigation purposes. Had the Department proceeded in the latter fashion, as it could have, the process of releasing the information would have occurred far more quickly and without the iterative negotiation—never completed satisfactorily in this case—of redacting and unredacting the records until the information within became meaningful yet avoided disclosure of protected health information. Had DHHS chosen to work with counsel at the outset to share the information subject to protection—an approach that has occurred countless times in varied administrative proceedings for decades—rather than "wishing" not to do so, there is every reason to believe that the relevant records could have been examined quickly and the results incorporated responsibly into the appeal hearing record. It is not up to the agency defending its purchasing decision to determine whether a document is relevant to the merits of an appeal hearing; that determination only can be made *during the hearing* by the presiding officer. A. 65; 18-554 C.M.R. ch. 120 § 3(8). By barring Penquis from accessing the FOAA documents in an intelligible form prior to the hearing, DHHS overstepped its role in the administrative appeal process. By failing to regulate the course of the hearing in a manner that accommodated reasonable and

meaningful access to the documents, DAFS denied Penquis its right to a full and fair hearing.

II. The Administrative Decision is legally erroneous because it fails to enforce the statutory and regulatory requirements for adequate records to support the award.

a. Appellees' claims that individual review notes need not be accurate ignores the basic principle that reviewers must meaningfully participate in the review process.

ModivCare asserts that the content of individual review notes does not matter, ModivCare Red Br. 28-30, based upon the theory that the individual review is superseded by a subsequent consensus review process. Reviewers, however, cannot possibly participate in the team consensus review process meaningfully if they do not adequately review the proposals in the first place.[7] *See In re: Appeal Award by the Public Utilities Commission for RFP #201106108, Next Gen 9-1-1 Services* https://www.maine.gov/dafs/bbm/procurementservices/sites/maine.gov.dafs.bbm.procurementservices/files/inline-files/Decision_RFP_201106108.pdf (Apr. 20, 2012) at 4-5 (stating that individual evaluation notes "may help individual evaluators to remember important aspects of the bids for the purposes of their participation in scoring discussions" and holding that "there is no exception in the statute or the rule for record keeping when a consensus scoring process is used."). The suggestion by

[7] The repeated and widespread errors made by at least three of the four reviewers is especially egregious. *See,* Blue Br. 35-39.

Appellees that the standard for individual evaluation notes is their mere existence would render meaningless the recordkeeping requirement in competitive bidding law, 5 MRS § 1825-D(2).

b. The Team Consensus Notes do not sufficiently document how scores were awarded.

Repeatedly, Appellees invoke the decision in *Pine Tree Legal Assistance, Inc. v. Dep't of Hum. Servs.*, 655 A.2d 1260 (Me. 1995), which held that a precise mathematical formula need not be employed in awarding a competitively bid contract under Maine's purchasing statute, and which accepted the use of a consensus decision-making process. *Id*. 1263-4. The Appellees attempt to expand the meaning of this opinion to erase the requirement that there be some substantive connection between what reviewers record (or, for that matter, remember at hearing by way of further explanation of their notes) and the scores assigned in the consensus process. *Pine Tree,* however, does not go so far. Rather, it holds only that the use of a consensus scoring rubric is not in itself a violation of 5 M.R.S. §§ 1825-B through 1825-E, not that the requirement of substantive support for scoring can be eradicated by cloaking the scores through a collective conversation among reviewers. *Pine Tree*, 655 A.2d at 1263-64.

Appellees assert that the lower scores assigned to Penquis relative to ModivCare can be explained by notes and testimony relating to the formatting of Penquis's proposal and responsive information that was misplaced relative to the

numbering conventions prescribed by the RFP. ModivCare Red Br. 10; DAFS Red Br. 29. Yet, nowhere in the evidence cited by Appellees can be found any records that show how these observations translate into, or even explain, the number of points deducted from Penquis's scores in the consensus process. Pursuant to Chapter 110, which implements the requirement of 5 M.R.S. § 1825-D(2) that reviewers keep "written records," the reviewers must "document the scoring [and the] substantive information that supports the scoring." A. 60; 18-554 C.M.R. ch. 110 § 3(A). The record shows that this legal requirement was violated in this case, in which reviewers testifying at the appeal hearing refused or were unable to explain why the Penquis scores were reduced.[8] This failure to explain what actually contributed to Penquis's loss of points is a fundamental basis of Penquis's complaint—it is impossible to decipher what contributed to Penquis's lower score in the Proposed Services Subsection.[9]

The rules governing contract award appeals establish that a violation of law is a basis for invalidating an award. 18-554 C.M.R. ch. 120 § 3(2)(A). The evidence in

[8] The formatting and misplacement concerns highlighted by Appellees do not in fact explain the scoring. Reviewers were permitted to, and did, disregard formatting requirements, and there is no record evidence to support a claim that Penquis received a reduced score due to its proposal's format. Instead, reviewers repeatedly refused to state how scores were awarded. Blue Br. 26-28.

[9] *See Intralot, Inc. v. Schneiter*, 2011 Me. Super. LEXIS 200, in which the Superior Court upheld an administrative appeal decision that struck down an award even though reviewers created an "'extensive line of documentation comprised of both individual and group analysis of each vendor's proposal' leading up to the final consensus scoring," finding that the documentation was not enough to meet the requirements of Chapter 110 § 3, because "the documentation does not reveal . . . how [the] notes and comments translated into the final scores calculated." *Id.* at *15.

this case shows that the records maintained by the reviewers failed to provide substantive support for the scores assigned, yet the DAFS Appeal Panel did not invalidate the award. In fact, there is no evidence of any substantive support or cognizable linkage between the scores and the vague critiques found in the notes or the hearing testimony. On such a record, there is no substantial evidence to support the Appeal Panel's failure to recognize a plain violation of the applicable rules and to respond by invalidating the awards. This failure was a legal error requiring reversal of the decision to validate the awards to ModivCare in the districts at issue in this appeal.

CONCLUSION

For the reasons stated above and in Appellant's Brief, the Appeal Decision must be reversed, and the contract awards must be invalidated.

Dated: December 15, 2025

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CERTIFICATE OF SERVICE

I, Alfred J.F. Morrow, certify that, on the date indicated below, I delivered the above to each of the parties listed below by electronic delivery, with delivery by U.S. Mail, first-class, postage-prepaid, addressed as listed below, to be made at a later date:

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