

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

TENNESSEE ACTION 24/7, LLC,

Plaintiff,

v.

No. 21-0255-I

SUSAN LANIGAN,
WILLIAM CARVER,
PEARL SHAW,
ELEANOR YOAKUM,
JOHN CROSSLIN,
CHRIS PATTERSON, in their official
capacities as members of the Board of
Directors of the Tennessee Education Lottery
Corporation,
REBECCA HARGROVE, in her official
capacity as President and CEO of the
Tennessee Education Lottery Corporation,
and the TENNESSEE EDUCATION
LOTTERY CORPORATION,

Defendants.

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CLERK & MASTER
DAVIDSON CO. CHANCERY CT.
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ORDER ON TEMPORARY INJUNCTION

This matter came before the Court for hearing on March 24, 2021, by videoconference, on Plaintiff Tennessee Action 24/7, LLC's ("Action 24/7") Emergency Motion for Temporary Injunction, seeking reinstatement of Plaintiff's sports gaming operator's license temporarily suspended by Defendants Tennessee Education Lottery Corporation and members of its Board of Directors and President and CEO, in their official capacities (collectively, "TEL"). Participating in the hearing were Attorney E. Steele Clayton IV, Sarah B. Miller, and Nicholas J. Goldin, representing Action 24/7, and Assistant Attorney General Lindsay H. Sisco, Deputy Attorney General Justin Urban, and Assistant Attorney General Jonathan Shirley, representing Defendants. Also attending were Tina Hodges, Action 24/7's President, and Andrew Jack, Action 24/7's Chief Operating Officer.

Action 24/7 filed a Verified Complaint, with exhibits, against Defendants on March 22, 2021, seeking judicial review of Defendants' action indefinitely suspending Plaintiff's sports gaming operator's license under Tenn. Code Ann. § 4-51-328. Plaintiff contemporaneously filed an Emergency Motion for Temporary Injunction supported by a Memorandum of Law. The Court entered an Order setting the Motion for a temporary injunction hearing on March 24, 2021 at 2:00 p.m./central, pursuant to Rule 65.04 of the Tennessee Rules of Civil Procedure and Davidson County Local Rules of Practice § 19.03. *See* March 22, 2021 Order. Defendants filed a response in opposition to the Motion, with exhibits, on March 24, 2021.

I. FINDINGS OF FACT

The Court makes the following preliminary findings of fact for purposes of the pending request for a temporary injunction, only, based upon the Court's record at this early stage of the proceedings.

As of November 1, 2020, Tennessee residents are allowed to place online sports wagers under the recently enacted Tennessee Sports Gaming Act (the "Act"). Tenn. Code Ann. § 4-51-301, *et seq.* Action 24/7 is licensed by the State of Tennessee as an online sports wagering business under the Act. The Act authorizes the Tennessee Education Lottery Board of Directors (the "TEL Board") to enforce and supervise compliance with the provisions of the Act. *Id.*, § 4-51-306. The Act authorizes the TEL Board to control the licensing of sports wagering operators in Tennessee. *Id.*, § 4-51-317, -326. The Act also authorizes the TEL Board to promulgate rules in accordance with the Act. *Id.*, § 4-51-306. Further, the TEL Board is authorized to "investigate and conduct a hearing with respect to a licensee" that has violated the Act, in accordance with rules adopted by the TEL Board. *Id.*, § 4-51-326(a). Upon finding a violation of the Act or rule, the TEL Board may suspend, revoke or refuse to renew a license for violations of any provision of the Act or rules promulgated by the Board. *Id.*, 4-51-326(b).

The Board promulgated rules and regulations under the Act, referred to as “Chapter 15 – Sports Gaming Rules, Regulations and Standards” (“Rules”). The Rules recognize a “Sports Wagering Committee” of the TEL Board. The Rules, in turn, authorize the Sports Wagering Committee to suspend, revoke, or not renew a license for any of the reasons set forth under the Act or the Rules, upon recommendation by the CEO. Rule 15.2.3.A. The Rules grant the Sports Wagering Committee the discretion to revoke, suspend or not renew a license when it determines it is “in the best interests of the TEL, its Board, or the public policy or welfare of the State of Tennessee,” after notice and a right to a hearing in accordance with the Act and the Rules. Rule 15.2.3.B. The Rules additionally authorize the Sports Wagering Committee, or its designee, to suspend a license upon “exigent circumstances without prior notice pending any prosecution, hearing or investigation.” Rule 15.2.3.B. The Rules do not describe or provide for the size or composition of the Sports Wagering Committee, and do not specifically define what constitutes “exigent circumstances.”

Each licensee whose license is suspended or revoked will receive written notice stating the reasons for the action and, in the case of a suspension, the term of the suspension. Rule 15.2.3.C. Upon a hearing or an appeal of a suspension of a license, the term of suspension may be delayed pending the final outcome of the hearing or appeal. Rule 15.2.3.D. Following a suspension, the Rules provide a licensee with other procedures, including a right to request a hearing before the Sports Wagering Committee, Rule 15.2.4 and 5, appeal to the TEL Board, Rule 15.2.6 and 7, and judicial review. Rule 15.2.8.

Action 24/7 was granted a license by the Board on October 31, 2020. On March 9, 2021, Action 24/7 identified suspicious transactions on certain customer accounts involving potential debit card fraud between March 8 and 9, 2021. Action 24/7 took steps to suspend customer account access and contacted its vendors to freeze or block those accounts. Action 24/7 identified a total

of 23 accounts engaging in suspicious activity, involving a potential total loss of fraudulent withdrawals of \$22,661. On March 16, 2021, Action 24/7 identified another suspicious transaction. On March 17, 2021, Action 24/7 reported the identified suspicious transactions to the Board's special investigator, Danny DiRienzo and forwarded 23 incident reports to him.

Mr. DiRienzo reviewed Action 24/7's report on March 18, 2021. After reviewing 3 or 4 of the 23 accounts, Mr. DiRienzo reported to TEL's CEO, Board Chair, and General Counsel that he believed potentially hundreds of thousands of dollars in losses had occurred involving Action 24/7. On March 18, 2021, TEL's Board Chair immediately suspend Action 24/7's license without notice or hearing. TEL's General Counsel called Action 24/7 to inform that its license was suspended immediately and indefinitely. Compl. Ex. B.

On March 18, 2021, Action 24/7 disputed the suspension and requested the suspension be lifted. On March 19, 2021, the TEL Board Chair called a special meeting of the Sports Wagering Committee for later that day at 2:00 p.m. Action 24/7 submitted materials prior to the special meeting. Compl. Exs. D and E. Action 24/7 also requested permission to address the Board. The Board's General Counsel advised that there was no opportunity to be heard unless the Board had questions. Compl. Ex. F.

At 2:00 p.m., the entire TEL Board convened for a special meeting by telephone conference. Several Board members were traveling at the time of the meeting, and it is not clear whether all Board members had access to or opportunity to review the information discussed at the meeting regarding Action 24/7. After hearing a presentation by Mr. DiRienzo, a motion was made to "ratify" the decision to suspend Action 24/7's license. Prior to the Board's vote, the Board's General Counsel stated that because the full Board was voting on the motion, it would be a "final decision" by the TEL Board. The Board voted in favor of ratifying the immediate

suspension of Action 24/7's license, and further voted not to stay the suspension pending any hearing or appeal. The TEL Board has not issued a written decision. *See* Rule 15.2.7.A.

Action 24/7, through counsel, objected to the Board's decision and requested that the temporary suspension be lifted. On March 22, 2021, the General Counsel for the Board responded by letter, sent via email, to Action 24/7's counsel. TEL's Response Ex. 4.

On March 22, 2021, Action 24/7 filed its complaint in this Court, claiming it is an "aggrieved person" by "final action" of the TEL Board and seeking judicial review of that decision under Tenn. Code Ann. § 4-51-328(a). Action 24/7 also alleges a claim under 42 U.S.C. §1983 for violation of its procedural due process rights under the federal and state constitutions based on lack of pre-deprivation notice and an opportunity to be heard.

II. LEGAL ANALYSIS

At the request of Action 24/7, the Court conducted an emergency temporary injunction hearing on March 24, 2021. Defendants acknowledged during the hearing that the decision of the TEL Board on March 18, 2021 to "ratify" the prior decision to temporarily suspend Action 24/7's license was a "final action" by the TEL Board for purposes of judicial review under Tenn. Code Ann. § 4-51-328. As such, there is no dispute as to this Court's subject matter jurisdiction. Action 24/7 requests reinstatement of its license pending its appeal before this Court. Defendants oppose reinstatement of Action 24/7's license.

Pursuant to Rule 65.04 of the Tennessee Rules of Civil Procedure, "[a] temporary injunction may be granted during the pendency of an action if it clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual." Tenn. R. Civ. P. 65.04(2). The standard for determining whether

injunctive relief is appropriate, requires a court to consider the well-known four-factor test: ““(1) the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.”” *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020) (quotation omitted); *Gentry v. McCain*, 329 S.W.3d 786, 792 (Tenn. Ct. App. 2010). All factors are to be considered, and no single factor is controlling.

A. Likelihood of Success on the Merits

Action 24/7 contends that it has a likelihood of success on the merits of its appeal under both Tenn. Code Ann. § 4-51-328 and its constitutional procedural due process claims under 42 U.S.C. § 1983.

1. Appeal Under Tenn. Code Ann. § 4-5-328

Action 24/7 claims that its rights under the Act have been violated by the immediate suspension of its license for an indefinite period because the TEL Board’s decision was clearly erroneous or arbitrary and capricious. Action 24/7 argues that the TEL Board’s decision was clearly erroneous because they had access 23 incident reports, the declaration of Action 24/7’s President regarding steps taken to freeze accounts and implement additional controls and remedial measures, a timeline of events, and communication from Action 24/7’s counsel, but the Board based the suspension decisions only on the presentation of Mr. DiRienzo, who stated he had reviewed only 3 or 4 of the incident reports submitted. Mr. DiRienzo concluded that “exigent circumstances” existed based on those 3 or 4 reports, combined with a separate prior incident to

recommend suspension of Action 24/7's license. Both parties cite to the audio recording of the TEL Emergency Board Meeting on March 19, 2021.¹

TEL argues that the Court's review must be based on the record of the proceedings before the Board; however, no record has been filed. TEL argues that there is substantial and material evidence to support the TEL Board's decision to temporarily suspend Action 24/7's license until TEL staff is satisfied that Action 24/7 has "implemented mandatory minimum internal controls." TEL's Response, at p.8. TEL contends that under the Board's broad rulemaking authority, it delegated to the Sports Wagering Committee, or its designee, the ability to suspend a license for exigent circumstances without prior notice or opportunity to be heard. Rule 15.2.3.B. At the subsequent TEL Board meeting, at which the temporary suspension was "ratified," representatives of Action 24/7 were not allowed to address the Board, but TEL maintains that was not required "given that the suspension was temporary" and Action 24/7 would have the opportunity for a full hearing before the Sports Wagering Committee or the Board. TEL's Response, at p. 10.

Under Tenn. Code Ann. § 4-51-328(b), a reviewing court may reverse the decision of the board "only if the appellant proves the decision to be: (1) [c]learly erroneous; (2) [a]rbitrary and capricious; . . ." The reviewing court may also "remand the appeal to the board to conduct further hearings." Tenn. Code Ann. §4-51-328(c).

The Court concludes at this preliminary stage of the proceedings, that Action 24/7 has a likelihood of success on the merits that the action of the TEL Board was clearly erroneous or arbitrary and capricious under the Act and the Rules. Under the Rules, the Committee's designee—if designated to do so—has the ability, upon exigent circumstances to temporarily

¹ The TEL Board Meeting audio recording is available at https://tnlottery.com/wp-content/uploads/2021/03/TNLottery_EmergencySportsWageringCommitteeMeeting_2021-03-19.mp3.

suspend a license without prior notice pending any prosecution, hearing, or investigation. There is no provision in the Rules, however, for the TEL Board to convene an emergency meeting to “ratify” the temporary suspension decision of the Committee’s designee, making it a final decision, without conducting a hearing or, at a minimum, allowing the licensee to address the TEL Board upon request.

The Court finds that the Rules establish detailed “Dispute Resolution Regulations,” providing step-by-step processes, notice requirements, and rights to hearings upon revocation, suspension or nonrenewal of a license. Rule 15.2. It appears that the TEL Board short-circuited those steps. Based on the limited record, the Court preliminarily finds there is a likelihood of success on the merits that the TEL Board’s actions were clearly erroneous when it did not follow the steps set forth in its own Rules and “ratified” the temporary suspension decision of the TEL Board Chair, but without providing Action 24/7 an opportunity to be heard.

In addition, based on the audio recording of the TEL Board meeting, it is not clear that all Board members had received the written information submitted by Action 24/7 prior to the emergency meeting or, if received, had an opportunity to review the information. The TEL Board did have the opportunity during its meeting to hear directly from Action 24/7, whose representatives were present on the call, but Action 24/7 was not allowed to address the Board. “An arbitrary and capricious decision is . . . one that disregards the facts or circumstances of the case.” *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 480 (Tenn. 2012) (citations omitted). The TEL Board could have received additional facts before making its decision but opted not to do so.

2. Procedural Due Process Claims

Action 24/7 claims that Defendants violated its procedural due process rights under the 14th Amendment to the U.S. Constitution by suspending its license without pre-deprivation notice

and opportunity to be heard. Action 24/7 alleges a claim under Section 1983, which provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United State or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. Action 24/7 argues that TEL and its Board are state actors, that Action 24/7 has a protectable property interest in its license and was unconstitutionally deprived of its license without pre-deprivation notice or opportunity to be heard. A license to engage in business activity that is subject to state regulation creates a property interest that is protected by due process. *See Martin v. Sizemore*, 78 S.W.3d 249, 262-63 (Tenn. Ct. App. 2001); *Howell v. Metro. Sexually Oriented Bus. Licensing Bd.*, 466 S.W.3d 88, 102-03 (Tenn. Ct. App. 2014). Due process protections apply to administrative proceedings. *Martin*, 78 S.W.3d at 263. Under certain emergency circumstances, a pre-deprivation hearing may not be required if state law provides an adequate post-deprivation remedy. *Parratt v. Taylor*, 451 US. 527, 538 (1981) (overruled on other grounds). Even assuming that the Board Chair properly exercised her authority under the Rules to temporarily suspend Action 24/7's license on March 18, 2021 based on exigent circumstances without prior notice pending a hearing, there was sufficient time to provide post-deprivation due process during the Board's emergency hearing conducted the following day, March 19, 2021, by allowing representatives of Action 24/7, who were in attendance by phone, to address the Board as they had requested. The State argues that Action 24/7 had both notice and an "opportunity to be heard in writing" before the TEL Board voted to ratify the suspension decision. *See TEL's Response*, at p. 12; Board Meeting Audio Recording. As noted above, it is not clear from the audio recording that all TEL Board members received or had time to review the information. The Court

finds that even though a potential post-deprivation remedy—to be heard at the Board’s meeting—was available, Action 24/7 was not allowed to address the Board before a final decision was made.

The Court concludes at this early stage of the proceedings, that the factor of likelihood of success on the merits on the procedural due process claim also weighs in favor of Action 24/7.

B. Immediate and Irreparable Harm

Action 24/7 claims it will suffer immediate and irreparable harm by the immediate and indefinite suspension of its license, which requires Action 24/7 to cease accepting any wagers from its customers and essentially shuts down its business. This suspension was imposed just prior to the first two rounds of the NCAA Basketball Tournament, referred to as “March Madness.” Action 24/7 describes the tournament as one of the biggest sports wagering events of the year and the suspension of its license has already caused it to lose revenue from wagers, customers, customer good will, and damage to its reputation. Action 24/7 claims that these economic and reputational losses are irreparable and threaten the continued existence of its business.

TEL maintains that Action 24/7 is responsible for its own irreparable harm resulting from the suspension of its license based on Action 24/7’s failure to comply with its obligations to “immediately” report suspicious wagering activities to TEL, as required under the Act and Rules. *See* Tenn. Code Ann. § 4-51-315(b)(5) and Rule 15.1.3.C. TEL argues it cannot be held responsible for harm suffered by Action 24/7 as a result of its own conduct, which is unquantified and unrealized, “when the [the TEL Board] stands ready to remove the suspension once [Action 24/7] achieves compliance and appropriate assurances are provided.” TEL’s Response, Ex. 4.

The loss of business, customers, good will, and reputational damage can constitute irreparable harm that cannot adequately be compensated with money damages. *See Performance Unlimited, Inc. v. Questar Publisher, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995) (finding that impending loss or financial ruin constitutes irreparable injury) (citations omitted). The Court

concludes at this early temporary injunction stage of the proceedings that Action 24/7 has clearly shown it will suffer immediate and irreparable losses of its customers, good will, and reputation by having its license suspended indefinitely and all wagering operations stopped.

C. Balance of Relative Harm

Action 24/7 argues that the balance of relative harm weighs in its favor. Action 24/7 maintains that its internal controls detected the suspicious transactions, it self-reported the incidents, and has strengthened its monitoring, all of which reduces any potential harm to TEL if the temporary injunction is granted reinstating the license. On the other hand, to continue the suspension of its license for an indefinite period of time risks substantial harm to Action 24/7 if the TEL Board's decision was clearly erroneous or arbitrary and capricious.

TEL argues that granting the injunction would prevent it from performing its statutory responsibility to enforce and supervise compliance with the Act and its Rules if gaming operators are allowed to conduct business, but the TEL Board cannot suspend licenses for failure of licensees to meet minimum internal control and standards.

The Court concludes at this stage of the proceedings that the balance of relative harm weighs fairly evenly between the parties. Action 24/7 stands to lose its business, customers, and reputation; TEL has significant responsibility to protect the public's safety and welfare from criminal activity incidental to online sports wagering.

D. Public Interest

Action 24/7 argues that granting injunctive relief and reinstating its license pending this appeal promotes the public interest by requiring the TEL Board to comply with the requirements of Act and its Rules in the state's emerging online sports wagering industry. Where a governmental entity is authorized to promulgate rules, it is in the public interest to require that entity to comply with its own rules.

TEL argues that the public interest weighs in its favor given the TEL Board's statutory enforcement and compliance responsibilities to protect the public's safety and welfare and to mitigate the risk of cheating and money laundering in the online sports wagering industry. Tenn. Code Ann. § 4-51-310(5).

The Court concludes that the public interest factor weighs in favor of TEL, given the importance of protecting Tennesseans from the risk of criminal activity in the online sports wagering industry.

III. CONCLUSION

Based on Plaintiff's Verified Complaint and exhibits, Motion for Temporary Injunction, Response to Motion, arguments of counsel and the entire record in this cause, the Court concludes that the balance of factors discussed above weight in favor of granting Plaintiff's request for temporary injunctive relief to reinstate its sports gaming license pending this appeal. The Court concludes the injunctive relief should be granted in order to maintain the status quo of the parties during the pendency of this appeal. Under Rule 65.04(2), the Court finds, at this preliminary stage, that Action 24/7 has clearly shown the likelihood that its rights are being violated and it will suffer immediate and irreparable injury pending a final judgment, or that the acts of TEL will tend to render a final judgment in this appeal ineffectual.

It is, accordingly, ORDERED, that Action 24/7's Motion for Temporary Injunction is GRANTED.

It is further ORDERED that, in order to maintain the status quo during the pendency of this action, Defendants are hereby directed to: (1) reinstate Action 24/7's sports gaming license; and (2) notify Action 24/7's vendors and suppliers of the reinstatement. This temporary injunction does not enjoin Defendants from their ongoing duties to regulate and supervise Action 24/7's compliance with the Tennessee Sports Gaming Act and the TEL Board Rules. Nor is Action 24/7

excused from complying with all requirements of the Tennessee Sports Gaming Act and the TEL Board Rules upon reinstatement.

It is further ORDERED, that this temporary injunction shall be binding on all parties to this action, and their respective board members, officers, agents and attorneys, and on other persons in participation with them who receive actual notice of the injunction. Tenn. R. Civ. P. 65.02.

It is further ORDERED that this injunction shall become effective upon the posting of an injunction bond by Action 24/7, with surety, in the amount of \$25,000, for the payment of costs and damages as may be incurred or suffered by any person who is found to have been wrongfully enjoined.

All other matters are reserved.

ISSUED this 26th day of March, 2021 at 12:30 p.m.


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