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2019 IL App (5th) 180268-U

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 5-18-0268

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MARK E. SWINNEY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Clinton County.
)	
v.)	No. 16-MR-143
)	
THE ILLINOIS GAMING BOARD and)	
MARK OSTROWSKI, in His Official)	
Capacity as Administrator of the)	
Illinois Gaming Board,)	Honorable
)	Kevin S. Parker,
Defendants-Appellees.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Overstreet and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court order denying the appellant's motion for sanctions against the Illinois Gaming Board is affirmed where its conclusion that the Board's efforts to discipline the plaintiff were not commenced "without reasonable cause" under the meaning of Illinois Supreme Court Rule 137 (eff. July 1, 2013) was not an abuse of discretion.

¶ 2 In this judicial review of an administrative decision, the plaintiff-appellant, Mark E. Swinney, appeals the order of circuit court of Clinton County denying his request for sanctions against the Illinois Gaming Board (Board) pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013). For the following reasons, we affirm.

¶ 3 The Board is charged with implementing the Video Gaming Act (Act), which includes promulgat[ing] such rules and regulations as in its judgment may be necessary to protect or enhance the credibility and integrity of gambling operations authorized by [the] Act." 230 ILCS 10/5(b)(3) (West 2014); 230 ILCS 40/5, 80 (West 2016). It has jurisdiction over and is responsible for supervising all gaming operations governed by the Act. 230 ILCS 40/78(a) (West 2014). Part of that responsibility includes overseeing and enforcing the provisions that are "designed to strictly regulate the facilities, persons, associations and practices related to gambling operations" in order to ensure "public confidence and trust in the credibility and integrity of the [state's] gambling operations." 230 ILCS 10/2(b) (West 2014).

¶ 4 The Board issues occupational licenses to individuals working in the video gaming industry, and it may suspend, revoke, or restrict any licensee for violation of any provision of the Act; violation of any of the rules and regulations of the Board; or "any other just cause." *Id.* § 9(a), (e). Terminal operators and licensed gaming establishments enter into a use agreement prior to placement of video gaming terminals (VGTs) at the establishment. 230 ILCS 40/25(e) (West 2014). Only terminal handlers—those who are licensed to possess or control a VGT or to have access to the inner workings of a VGT—in the terminal operator's employ may access the VGTs in order to set and change their payout percentage, install and conduct service on them, upgrade their software, and know the dates that such activities occur. 11 Ill. Adm. Code 1800.210, 1800.260. Such information is not available to the general public.

¶ 5 In August of 2012, Swinney was the holder of a Board-issued terminal handler license, employed by licensed terminal operator Grand River Jackpot (GRJ). As a GRJ terminal handler, his responsibilities included handling service calls and conducting software upgrades of VGTs at licensed video gaming locations. In August of 2013, he began working as a GRJ route supervisor; in this capacity, he responded to customer needs and delivered and set up new equipment. He was also responsible for supervising four GRJ technicians (Eric Hoelscher, Zebulun Lemonds, Christopher Hill, and David Scheller), all of whom were Board-licensed terminal handlers that were based in GRJ's Glen Carbon office.

¶ 6 In October of 2014, GRJ's compliance manager reported possible misconduct by Swinney and the four technicians to the Board. The compliance manager told the Board that these GRJ employees would complete software upgrades of GRJ-owned Spielo VGTs, set the progressive pot to the maximum allowable payout, and then would return to play those VGTs for recreational purposes in order to win the progressive jackpot.

¶ 7 On November 3, 2014, Board agents interviewed Swinney, the four technicians, other GRJ employees, and the manager of Demo's bar in Belleville regarding the complaint. The agents documented their summary accounts of those interviews in an investigative report and an incident report.

¶ 8 Swinney told the Board agent that he authorized and instructed the technicians to set the Spielo VGTs' progressive jackpots to the maximum payout amounts to increase play on them because he received complaints from an establishment about their minimal play. He stated that he could not remember the dates or times that he had given these

instructions. He was aware that the technicians were setting the VGTs' progressive jackpots to the maximum amount but denied knowing that they were playing the VGTs after doing so.

¶ 9 Swinney admitted that he had played GRJ-owned VGTs for amusement purposes with his girlfriend when he was off-duty. He stated that, in June or July 2014, he won \$106 on a Bally VGT at the Corner Bar near Carlyle, and he had played Spielo VGTs before but never won a progressive jackpot.

¶ 10 The Board agent presented Swinney with a copy of the GRJ employee handbook "acknowledgement of understanding" signed by him and dated August 12, 2012. It stated that he had received a copy of the handbook; understood all of the rules, policies, terms and conditions therein; and agreed to abide by them, with disciplinary action resulting from any failure to do so. He stated that he understood that he violated company policy when playing the VGTs, as section 6.06 of the 2012 GRJ handbook prohibited both employees and members of an employee's immediate household from gaming on GRJ equipment in licensed establishments for amusement purposes.

¶ 11 Board agents also interviewed the manager of Demo's bar, who stated that on September 22, 2014, around noon, Lemonds conducted an upgrade on a Spielo VGT at the bar; about five minutes later, Hoelscher and his wife walked into the bar and immediately began playing it. The couple won hundreds of dollars after 20-30 minutes of play. Hoelscher admitted that he went to the bar knowing that Lemonds was going to upgrade the VGT and set the progressive pot to maximum payout. Lemonds admitted that he saw Hoelscher in the bar but denied seeing him play the VGT. Lemonds also

admitted to playing VGTs but stated that he never won. Both Hoelscher and Lemonds confirmed that, in the summer of 2014, Swinney instructed them to set the VGTs' progressive payouts to the maximum amount.

¶ 12 In July of 2015, the Board voted to issue a complaint for disciplinary action (disciplinary complaint) against Swinney, seeking revocation of his terminal handler license, for violating the Act and the Board's regulations. Under "Facts," the Board stated that Swinney was provided with a GRJ employee handbook outlining the company policies, and that, according to the handbook, all GRJ employees were prohibited from participating in video gaming on GRJ equipment or in locations licensed by the company.

¶ 13 The Board also alleged that Swinney, during the course of his employment, played VGTs after learning that they were set to the maximum payout amount by another GRJ terminal handler; and that he misrepresented information and provided untruthful statements to the Board's agents during his November 3, 2014, interview. In counts I and II, it alleged that by playing certain GRJ-controlled VGTs directly after he learned that the VGTs were set to the maximum payout amount by another GRJ terminal handler: (1) Swinney violated section 210(e) of the Board's regulations (11 Ill. Adm. Code 1800.210(e)) by engaging in conduct that discredited or tended to discredit the Illinois gaming industry or the state; and (2) he violated section 210(f) of the Board's regulations (*id.* § 1800.210(f)) by engaging in conduct that reflected adversely on the integrity of the Illinois video gaming industry. In count III, it alleged that, by lying to the Board's agents during his November 3, 2014, interview, he violated section 310(a)(8) (*id.*

§ 1800.310(a)(8)) by engaging in conduct that reflected adversely on the integrity of the Illinois video gaming industry.

¶ 14 In count IV, the Board alleged that GRJ terminated Swinney's employment for playing GRJ-controlled VGTs after learning that they were set to the maximum payout amount by another GRJ terminal handler, warranting discipline under section 310(b) of the Board's regulations (*id.* § 1800.310(b)), which subjects a licensee to revocation when his employment has been terminated for any act that occurred while licensed.

¶ 15 In count V, the Board alleged that there existed just cause under section 9(e)(5) of the Act (230 ILCS 10/9(e)(5) (West 2014)) to suspend, revoke, or restrict Swinney's license due to his playing GRJ-controlled VGTs after learning that they were set to the maximum payout amount by another GRJ terminal handler and by lying to Board agents during his November 3, 2014, interview.

¶ 16 Swinney answered the disciplinary complaint, denying that he had violated any provisions of the Act or the Board's regulations. He denied receiving a GRJ employee handbook in 2012, stating that he did not receive one until he left the company's employment. He agreed that the handbook prohibited employees from participating in video gaming at licensed establishments but asserted that it was common practice for GRJ employees to play, noting that GRJ supervisors and managers also participated and were aware that employees played the machines. He admitted that terminal handlers occasionally set the progressive pots to the maximum payouts when servicing the machines to attract players, but stated that he never personally set the progressive pots to maximum payout and never played VGTs that were set to the maximum payout. He

denied that he misrepresented or provided untruthful information to the Board agents during his November 3, 2014, interview. He also denied that GRJ discharged him for the reasons alleged in the disciplinary complaint; rather, he alleged that he was discharged "after a pattern of harassing conduct by management at GRJ," which included being singled out for common employee practices and driving on the grass at the GRJ office.

¶ 17 The case was assigned to an administrative law judge (ALJ) at the Illinois Department of Revenue, who heard it on cross-motions for summary judgment.

¶ 18 Swinney alleged in his motion that the Board's disciplinary complaint contained two factual allegations of wrongdoing: (1) that he played VGTs after he learned that they were set to the maximum payout amount by another GRJ employee; and (2) on November 3, 2014, he misrepresented information and provided untruthful statements to Board agents during his interview. He stated that, after requesting discovery for the specific times, dates, and locations of his alleged violation of Board rules, the Board provided the incident report and the February 2012 employee handbook. He claimed that the contents of those materials contained no facts, allegations, or suggestions that he engaged in the Board's alleged wrongdoing. He stated that the "only specific allegation of misconduct in the discovery materials" was that he played VGTs outside of work hours with his girlfriend in a social setting, in violation of the handbook, and that the complaint did not include a charge for such conduct. He also asserted that, at the time of the disciplinary complaint, Board rules did not prohibit licensed terminal handlers from playing VGTs. He requested that the ALJ recommend dismissal of the disciplinary complaint, arguing that the Board denied him due process because he had not been given

notice of the specific actions that were the basis for the proposed disciplinary action, and therefore, he could not prepare a reasonable defense; and that the Board failed to present substantiating evidence for the specific allegations of wrongdoing in the complaint and disclosed no evidence that could be the basis for discipline.

¶ 19 The Board filed a cross-motion for summary judgment. In its supporting brief, it stated that, even assuming *arguendo* that it failed to make specific allegations of misconduct or produce supporting documents, Swinney admitted that he played GRJ-owned VGTs for amusement during his employment at establishments that had use agreements with GRJ and that he directed his supervisees to set certain GRJ-owned machines to their maximum payouts. It argued that this admitted conduct discredited or tended to discredit the state and/or its gaming industry, reflected adversely on the security or integrity of its video gaming industry, and constituted just cause to revoke his license. It explained that Swinney's conduct presented security and integrity concerns and was injurious to the industry and to the public. In response to Swinney's argument, it asserted that it did specifically allege matters that were the basis for revoking Swinney's license; it pointed to its factual allegations that Swinney acknowledged his receipt of the handbook, which provided him with notice that he was prohibited from participating in gaming activities in GRJ equipment; that he admitted to played GRJ-owned VGTs; and that he knew that certain GRJ VGTs were set to maximum payout percentages. It concluded that these allegations demonstrated a violation of the Act and the Board's regulations warranting revocation of Swinney's license.

¶ 20 In reply, Swinney again stated that the Board presented no evidence to support the charges in the disciplinary complaint. He asserted that the Board was now seeking a new and alternate theory upon which to seek revocation of his license and that changing the justification for the disciplinary complaint violated his due process rights.

¶ 21 On August 9, 2016, the ALJ recommended that Swinney's motion for summary judgment be granted and the Board's motion for summary judgment be denied. He noted that there were no facts or allegations that Swinney played VGTs after he learned that they were set to maximum payout amounts by another GRJ terminal handler, as alleged in the complaint; Swinney admitted to playing GRJ VGTs in June or July of 2014, whereas the games were set to maximum payout amounts in September of 2014. He stated that the basis for Swinney's license revocation as stated by the Board in its cross-motion for summary judgment—his acknowledgment that he played GRJ-owned VGTs for amusement during his employment at establishments that had use agreements with GRJ—was never alleged in the five counts of the Board's complaint. Therefore, the ALJ concluded that it was an undisputed material fact that Swinney did not play VGTs after he learned that they were set to the maximum payout amounts, and the Board's disciplinary complaint did not support its motion for summary judgment.

¶ 22 On October 7, 2016, in its final administrative decision, the Board rejected the ALJ's recommendation and revoked Swinney's license. It concluded that "[i]t is immaterial to our analysis that it was not proven that Swinney played the VGTs after they were set to the maximum payout percentage, as he acknowledged playing them at an earlier time." It noted that Swinney violated the GRJ handbook, the terms of which he

was provided explicit notice, by playing on GRJ's VGTs, and the Board's authority to strictly regulate persons and practices relating to gambling operations includes the authority "to consider the manner in which a licensed terminal handler conducts himself while in the employ of a licensed terminal operator." It concluded that Swinney's violation of the handbook's terms and his conduct demonstrated "a flagrant disregard for the interests of his employer and of the integrity of video gaming in Illinois." It also found that Swinney was misleading and untruthful during the Board agents' investigation and determined that his conduct during his licensure "discredited the Illinois gaming industry and provides the Board just cause for revocation of this Handler License."

¶ 23 On November 7, 2016, Swinney brought a complaint against the Board and its administrator for judicial review of its decision, requesting that the circuit court order the Board to reinstate his license.

¶ 24 On February 2, 2017, Swinney filed a motion for summary judgment, asserting that he was denied due process during the administrative proceedings because the Board revoked his license based on a changed theory that was only introduced to the ALJ and was not alleged in the disciplinary complaint. He argued that this prevented him from showing that the handbook provision prohibiting employee play was commonly violated with the knowledge of GRJ management, and that the revocation of his license was an excessive penalty for this violation.

¶ 25 That same day, Swinney filed a motion for attorney fees and costs against the Board pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013), asserting that, during the administrative proceedings, the Board changed the theory of the disciplinary

action. He noted that the ALJ found that there were no facts in evidence supporting the allegation that he played VGTs after learning that they were set to the maximum payout amounts, and the Board admitted in its final administrative decision that the disciplinary complaint allegations were not proven when they found this "immaterial to [their] analysis." He requested attorney fees and costs because the Board's allegations "were made without reasonable cause and found to be untrue by the evidence gathered by the [Board] and submitted to the [ALJ]."

¶ 26 The Board responded, asserting that, pursuant to *Benz v. Department of Children & Family Services*, 2015 IL App (1st) 130414, Rule 137 does not apply until litigation begins at the circuit court level; thus, Rule 137 does not allow sanctions for the Board's actions solely at the administrative level, as Swinney requested. It also asserted that, even if Rule 137 did apply, the requirements for an award for sanctions were not met.

¶ 27 On June 6, 2017, the circuit court entered a judgment on both the merits of the action and Swinney's request for Rule 137 sanctions. On the merits, it ruled to reinstate Swinney's license, stating that he was entitled to due process protections and that the revocation of his license was clearly erroneous. However, it denied Swinney's request for sanctions, noting that "[t]he statute gives the [Board] broad authority that is at least arguably applicable to this case."

¶ 28 Swinney filed a motion to reconsider the ruling on the motion for sanctions, claiming that the circuit court had mistakenly applied the standard in Rule 137(a) instead of Rule 137(c). He again requested that the court find that the Board made untrue allegations against him at the administrative level and award him attorney fees.

¶ 29 On April 17, 2018, the circuit court denied Swinney's motion to reconsider.¹ It clarified that Rule 137(c) requires that an allegation by a state agency at the administrative level must be made "without reasonable cause *and* found to be untrue" before the court, in its discretion, grants a request for sanctions. (Emphasis in original.) It stated that it was clear from both the record and the June 6, 2017, judgment that the allegations brought against Swinney were found to be untrue. However, it explained that "this court cannot now, upon review of the record, conclude that the [Board's] initial or alternative efforts to discipline [Swinney] were commenced 'without reasonable cause' and further that the court, in its earlier ruling, denied attorney fees by misapplying Supreme Court Rule 137 or failing to properly exercise its discretion."

¶ 30 Swinney appeals from both circuit court orders denying his request for Rule 137 sanctions. The Board did not appeal from the portion of the judgment granting Swinney relief on the merits of the administrative review action; therefore, the only issue before us is whether the court erred in denying his request for sanctions.

¶ 31 Swinney argues that the circuit court erred in determining that the Board's efforts to discipline him were not commenced without reasonable cause. He asserts that the Board had completed its investigation before it made the allegations and thus knew or should have known that the allegations were false, yet continued its pursuit of the revocation of his license rather than withdrawing the allegations. He reasons that, by

¹The motion to reconsider was heard by a different circuit court judge, as the judge who initially denied the request for sanctions had subsequently retired.

knowingly bringing false allegations, the Board could not possibly have brought the allegations with reasonable cause.

¶ 32 The Board responds with two arguments. First, it asserts that the circuit court could not grant Swinney's request for sanctions because Rule 137(c) does not apply in this case, as his request is based solely on allegations made during the administrative proceedings and not during the circuit court proceedings. It cites *Benz*, 2015 IL App (1st) 130414, for the argument that Rule 137(c) "does not provide a vehicle for a sanction order that is independent of the proceedings in the trial court," rather, "this provision allows that a sanction order for an improper *court* filing may also include expenses incurred at the administrative level." (Emphasis in original.) *Id.* ¶ 47.

¶ 33 However, we need not decide whether Rule 137(c) provides Swinney with an avenue to pursue sanctions on the Board for conduct solely engaged in at the administrative level. We may assume *arguendo* that it does because Swinney cannot demonstrate that the circuit court's denial of his motion for sanctions was an abuse of discretion.

¶ 34 This court reviews a circuit court's decision to deny a motion for sanctions for an abuse of discretion. *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 13. An abuse of discretion occurs when no reasonable person would agree with the circuit court's decision. *Id.* ¶ 16. If a party violates Rule 137, it is not mandated that the circuit court impose sanctions on that party, but rather, it has the discretion to do so. *Id.* ¶ 15. Therefore, this court must affirm unless we find both that the Board violated Rule 137

and the violation occurred under circumstances where no reasonable circuit judge would have denied a motion for sanctions.

¶ 35 Illinois Supreme Court Rule 137 provides that:

"The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Ill. S. Ct. R. 137(a) (eff. July 1, 2013).

Subsection (c) makes clear that the rule applies in judicial reviews of administrative determinations:

"This rule shall apply to the State of Illinois or any agency of the State in the same manner as any other party. Furthermore, where the litigation involves review of a determination of an administrative agency, the court may include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level an allegation or denial made by the State without reasonable cause and found to be untrue." Ill. S. Ct. R. 137(c) (eff. July 1, 2013).

The rule is designed to discourage frivolous filings, not to punish parties for making losing arguments. *Lake Environmental*, 2015 IL 118110, ¶ 15. Moreover, if a party violates Rule 137, it is not mandated that the circuit court impose sanction on that party, but rather, it has the discretion to do so. *Id.*

¶ 36 The circuit court's finding that the Board did not pursue revocation of Swinney's license "without reasonable cause" was not an abuse of discretion. We note that an administrative agency's procedural missteps or inability to prove a charge does not render its allegations "without reasonable cause," as Rule 137 is designed to discourage

frivolous filings, not to punish parties for making losing arguments. See *Lake Environmental*, 2015 IL 118110, ¶ 15.

¶ 37 In the disciplinary complaint's "Facts" section, the Board stated that Swinney was provided with a GRJ employee handbook outlining the company policies, and that, according to the handbook, all GRJ employees were prohibited from participating in video gaming on GRJ equipment or in locations licensed by the company. Once the Board realized that these were the facts upon which they were going to proceed with disciplinary charges against Swinney, a sounder course of action would have been to amend the disciplinary complaint to reflect this. However, the Board instead continued, in the same action, to pursue disciplinary action pursuant to Swinney's admitted conduct—playing GRJ-owned VGTs recreationally—and arguing that such conduct violated its standards by discrediting and reflecting adversely on the Illinois gaming industry (11 Ill. Adm. Code 1800.210(f), 1800.310(a)(8)). This court agrees with the ALJ and the circuit court that the Board's pursuit of the revocation of Swinney's license under a new theory, rather than the one detailed in the five counts of the complaint, was beyond the scope of its power and a violation of his due process rights. However, that does not mean that the Board's actions were illogical or done in bad faith, as Swinney's admitted conduct could reasonably be the subject of discipline. The court's conclusion that the Board's efforts to discipline Swinney were not commenced "without reasonable cause" in violation of Rule 137 was not an abuse of discretion.

¶ 38 Moreover, we note that, even if the circuit court had concluded that the Board violated Rule 137, there still was no obligation for it to impose sanctions. *Lake*

Environmental, 2015 IL 118110, ¶ 15. Swinney notes that there are no cases where a reviewing court in our state has reversed a circuit court's order denying a motion for sanctions but asserts that this is the case where justice requires the reviewing court to do so. Based on our review of the record, applicable law, and foregoing explanation, we disagree.

¶ 39 For the foregoing reasons, we affirm the decision of the circuit court to deny Swinney's motion for Rule 137 sanctions against the Board.

¶ 40 Affirmed.