

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

IN RE CANNABIS DISPENSARY
LITIGATION



Case No. 21 CH 03730

Judge Celia Gamrath

Calendar 6

ORDER GRANTING LIMITED REMAND

This matter came to be heard on the Motion of Respondent Illinois Department of Financial and Professional Regulation (Department) for Limited Remand to Conduct Corrective Lotteries. After extensive briefing and oral argument, the court grants the Motion in part by remanding the matter to the Department to conduct corrective lotteries as described herein. All Petitioners, except for those who participated in the original lotteries with the correct number of entries, shall be included in the corrective lotteries in the appropriate regions. However, they each have the option to exclude themselves from the corrective lotteries by filing a Notice of Opt Out. The court finds this solution to be the most fair, equitable, and expeditious to all stakeholders, without compromising the rights of Petitioners to have their substantive claims heard on the merits.

BACKGROUND

This consolidated litigation concerns the process of granting Conditional Adult Use Dispensing Organization licenses required for the operation of cannabis dispensaries in Illinois under the Cannabis Regulation and Tax Act (CRTA), 410 ILCS 705/1 *et seq.* The CRTA provides the framework by which conditional licenses will be granted in 17 designated regions of Illinois. Initially at stake were 75 conditional licenses to be awarded on or before May 1, 2020. (R. 1). After the CRTA was amended, effective July 15, 2021, the CRTA provided for the distribution of an additional 110 licenses by lot, divided between two different lotteries. In all, 185 conditional licenses were to be distributed to qualified applicants by lottery.

Petitioners in this consolidated case each applied for a conditional license(s) in a specific region and paid a fee for each application they submitted in accordance with 410 ILCS 705/15-25, 15-30(d). Upon submission, the applications were scored on a 250-point system designated by statute. 410 ILCS 705/15-30(c). Applicants would receive points for, *inter alia*, their employee training plan, security and recordkeeping plans, business and operating plans, and demonstration of knowledge and experience. 410 ILCS 705/15-30(c)(1)-(4). Applicants could also be awarded 50 points if they qualified as a Social Equity Applicant, 5 points if they could demonstrate Illinois residency, and 5 points if they could establish veteran ownership. 410 ILCS 705/15-30(c)(5), (8), (9).

The Department began accepting applications in December of 2019 and engaged the accounting firm of KPMG to review and score the applications. (R. 175-176). After an initial review, the Department notified applicants whose submissions were missing required elements and gave them ten days to resubmit their materials. (R. 175). On September 22, 2020, well past

the May 1, 2020 deadline to distribute the initial 75 licenses, the Department announced it would conduct a supplemental deficiency notice process, giving applicants further opportunity to correct their applications. (R. 176). Applicants would have until midnight on March 5, 2021 to respond. (R. 181). In this same communication, the Department announced that the number of applicants who received the highest possible score exceeded the number of available conditional licenses; thus, the Department would conduct a lottery to determine which applicants would receive conditional licenses, as required by 68 Ill. Adm. Code 1291.

Under the CRTA, 110 additional conditional licenses were to be granted after January 1, 2021, though at that point in time, the original 75 had not yet been granted. On July 15, 2021, Governor Pritzker signed House Bill 1443 into law, which amended the way the additional 110 conditional licenses were to be distributed. P.A. 102-0098 § 10. Section 15-35 of the CRTA was amended to provide for the distribution of 55 conditional licenses by lot for those that met the statutory definition of Qualifying Applicant. Section 15-35.10 was added to provide for distribution by lot of another 55 conditional licenses by those that met the statutory definition of Qualifying Social Equity Justice Involved Applicants. 410 ILCS 705/15-35, 15-35.10. These two new lotteries gave applicants with less than perfect scores an opportunity to win a conditional license, while maintaining the existing lottery for the initial 75 conditional licenses for applicants with perfect scores. Applicants with perfect scores would also be placed in the Qualifying Applicant and Social Equity Justice Involved lotteries to the extent they were eligible. (R. 224).

The day Governor Pritzker signed House Bill 1443 into law, the Department announced, in coordination with the Illinois State Lottery, the Department would conduct three lotteries in Springfield over the course of three weeks. (R. 236). The Qualifying Applicant Lottery took place on July 29, 2021, the Social Equity Justice Involved Lottery took place on August 5, 2021, and the Tied Applicant Lottery took place August 19, 2021. For each lottery, the Department sent out a final list of all participants the day before the drawing and published the results the same day as the drawing. (R. 242, 382, 508).

The Qualifying Applicant Lottery consisted of applicants who scored at least 213 of the 250 available points, thus meeting the definition of a Qualifying Applicant under the CRTA. The Social Equity Justice Involved Lottery consisted of those who met the 213-point threshold and also qualified as a Social Equity Applicant. The Tied Applicant Lottery consisted of all applicants who received a perfect score on their applications. Each of these lotteries consisted of 17 lotteries, one for each of the designated regions, making 51 individual lotteries total.

On September 3, 2021, after a period to allow for abandonment of licenses among lottery winners who exceeded the statutory limit on licenses, the Department issued its Final Administrative Decision by publishing the names of the winners. (R. 586). That same day, the Department issued another communication announcing that some of the lotteries in certain regions did not include the correct number of entries. (R. 589). Applicants were allowed to pay multiple application fees to obtain multiple entries in the same lottery or submit different applications and obtain multiple entries. However, after posting a list of participants for the first lottery, the Department discovered that certain applicants erroneously did not receive an entry they paid for.

(R. 589). Other applicants, like Petitioners, claimed they were incorrectly excluded. The Department disagrees.

Nonetheless, to correct any errors and potential errors, the Department announced its intention to hold a set of supplemental corrective lotteries to give qualified, but wrongfully excluded applicants a chance to obtain a conditional license. (R. 590). In an effort to partake, several applicants throughout Illinois filed claims for administrative review. On October 18, 2021, the Illinois Supreme Court consolidated dozens of administrative review cases into the lead case of *High Haven Dispensary v. IDFPR*, 21 CH 03730, now titled *In re Cannabis Dispensary Litigation*, which is pending before this court. The hope was to expedite resolution of these matters involving common questions of law or fact and reduce the chances of duplicative or inconsistent rulings. Given this charge, this court believes ordering corrective lotteries at this juncture will indeed expedite resolution of matters and avoid unnecessary delay and costs, while doing justice among the parties and preserving the rights for all.

Composition of Petitioners.

This consolidated case consists of approximately 70 Petitioners, the majority of whom each filed administrative review claims, alleging their application did not receive the proper number of points it should have, which caused them to be excluded from one or more of the lotteries. Some Petitioners raise purely legal questions related to the interpretation of the CRTA. Others raise issues concerning the timing of their submissions. Still others challenge the process in its entirety, saying that even though they received perfect scores and were included in the lotteries, the entire lottery process is unfair and should be dismantled in order to make way for those with perfect scores to receive conditional licenses.

Because each Petitioner in this last group already participated in the lotteries to which they were entitled under the CRTA, these Petitioners are not afforded any relief in this Order for Limited Remand. This is not to say their claims lack merit. It simply recognizes their claims and requests for relief differ from the rest, and there are no grounds to give them another bite of the apple to obtain a license through the corrective lotteries. If they are to receive a conditional license, it will be through a different method of selection, yet to be implemented; one that is dependent on proving the entire lottery process and systematic plan codified in the CRTA is fraught with error.

ANALYSIS

Petitioners' position on remand motion.

The vast majority of Petitioners agree with the Department's proposal to conduct corrective lotteries before a hearing on the merits of their claims. They realize this outcome will provide greater certainty without undue expense or delay.

A few Petitioners have proposed parameters on how the corrective lotteries should be conducted. Some of their points are well taken and, thus far, the Department has been transparent and cooperative in explaining how it will recreate the lotteries with the same odds as the original lotteries and significant transparency and oversight.

However, certain Petitioners, led primarily by HAAAYY's counsel, have demanded better odds in the corrective lotteries as a condition of participating. This demand is untenable, for at best Petitioners are entitled to receive that which they lost in the first place; namely, the right to participate in the original lotteries at the odds set statistically at the time based on the number of entries. This means, the Department would conduct corrective lotteries, open to all participants who filed timely claims arguing they were improperly excluded from one or more of the original lotteries. The corrective process would perform each of the 51 total lotteries again, with the same number of licenses available as the original round of lotteries, 185. Participants in these lotteries would face the same odds per entry as participants in the original lottery. At this point, Petitioners would know where they stand before deciding to proceed to the merits of their claims in hope of ultimately receiving a conditional license.

If Petitioners like HAAAYY do not wish to participate in the corrective lotteries, they may opt out and put the merits portion of their case first. At that point, if the court finds they were eligible to be included in the original lotteries, the court will order another round of corrective lotteries at the conclusion of the case. Any corrective lottery will still have the same odds as the original lotteries. Not better, not worse, based on the number of entries, to make Petitioners whole without putting others at a disadvantage.

The remaining Petitioners object entirely to conducting corrective lotteries and challenge the court's authority to order a limited remand for such purpose. For the following reasons, the court finds it has authority under section 3-111(a)(6) of the Administrative Review Law to remand the matter to the Department for purposes of conducting corrective lotteries as the first step of a process aimed at resolving these consolidated cases fairly and efficiently.

The court has authority to order remand.

The Department brings its Motion for Limited Remand pursuant to section 3-111(a)(6) of the Administrative Review Law, which states: "(a) The Circuit Court has power: (6) where a hearing has been held by the agency, to reverse and remand the decision in whole or in part, and, in that case, to state the questions requiring further hearing or proceedings and to give such other instructions as may be proper." 735 ILCS 5/3-111(a)(6).

Petitioners who contest the remand argue that, because no hearing was held, the court lacks authority to order a limited remand to conduct corrective lotteries. Not so. Section 15-175 of the CRTA makes a final decision reviewable under the Administrative Review Law, even though there is no formal adversarial hearing process provided for.

In an administrative context, procedural due process does not require a hearing in every case. In such instances, due process is a flexible concept and the level of procedural protections depends on the particular situation. Here, in the absence of an agency hearing, the court is well within its authority to remand for further proceedings and give proper instructions. It has been done before. *See Sahara Coal Co., Inc. v. Ill. Dep't of Mines & Minerals*, 103 Ill. App. 3d 115, 123-24 (5th Dist. 1982); *Jones v. Bd. of Fire & Police Comm'rs of Village of Mundelein*, 127 Ill. App. 3d 793, 801 (2d Dist. 1984). Otherwise, Petitioners would be left with a hollow victory were

they to prevail on the merits. Reversal would be meaningless without the ability to remand for a remedy to conduct corrective lotteries.

Further, although the filing of the administrative record is still in process, this does not prevent the court from directing the agency to correct its mistakes or conduct a necessary step by remanding for corrective lotteries as a matter of procedure. A full and complete administrative record consisting of millions of pages and hundreds of applications is not required for purposes of the limited remand. The vast majority of documents have no bearing on the corrective lotteries, save for information concerning the lottery odds, process, and procedures. This information is contained in 590 pages of public documents related to the application process, which is already on file and labeled R.001–R.590 of the administrative record.

Contrary to the objectors' arguments, the court's order of a limited remand does not deprive Petitioners of their right to present arguments on the merits. Nor does it prevent the Department from filing a more complete administrative record. In accordance with the Administrative Review Act, the court will review the proceedings and administrative record thoroughly, not perfunctorily, before deciding the merits. However, a case such as this with nearly 70 parties in all, demands a swift resolution, one that is malleable based on the law and in equity, to safeguard all parties' interests.

As explained below, obtaining a conditional license is a two-step process whereby an applicant must be qualified by meeting a threshold number of points *and* prevail in the lottery. The court's order of processing the lotteries first is within the statutory framework of section 3-111(a)(6) and gives willing Petitioners the valuable opportunity of knowing in advance whether it is worth their time, expense, and effort to proceed on the merits.

A limited remand to conduct corrective lotteries is required.

It is undisputed that to receive a conditional license under the CRTA, an applicant must meet two criteria: (1) qualify as an applicant by receiving a sufficiently high score for placement in a particular lottery; and (2) win the lottery. Ordering a limited remand does not change the criteria; just the order. It lets Petitioners know where they stand so they may decide if it is prudent to carry on with the merits of their claims. However, nothing prevents Petitioners from simultaneously working on their briefs now, so that the court may promptly decide the merits as soon as the administrative record and briefs are filed. The court cannot decide the merits until these steps are complete.

The court is mindful there has been criticism in the delay and lack of certainty surrounding the conditional licenses. Not just the 185 already awarded, but potentially dozens more that are eligible to be awarded. This single consolidated case includes approximately 70 different Petitioners with individual and multiple claims. Directing the Department to conduct corrective lotteries now keeps this case moving to achieve justice for all and provide greater certainty to Petitioners who wish to partake in the process. It also serves the dual purpose of prioritizing the cases that will proceed on the merits while fulfilling the statutory mandate to distribute licenses "by lot." *See* 410 ILCS 705/15-35(a), 15-35.10(a).

Under the CRTA, “‘by lot’ means a randomized method of choosing between 2 or more Eligible Tied Applicants or 2 or more Qualifying Applicants.” 410 ILCS 705/1-10. To participate in either lottery, an applicant must be either a Qualifying Applicant or Qualifying Social Equity Justice Involved Applicant. To be awarded a conditional license, the applicant also must win the lottery. Thus, the question is not whether there will be corrective lotteries, but when they should be held. Holding corrective lotteries now provides the best path forward for fairly and efficiently resolving these cases and has the potential of awarding corrective licenses to applicants as soon as possible. To wait until approximately 70 merits claims are heard and decided would add untold months to an already protracted process, forcing every Petitioner to wait with bated breath to the very end to know whether they satisfied both conditions that would entitle them to a conditional license.

Again, no Petitioner is forced to be a part of the corrective lotteries at this stage. But every wrongfully excluded Petitioner who prevails on the merits will be subject to a corrective lottery eventually, unless the statutory mandate of random selection by lottery is upended by the courts. A possibility, yes. A foregone conclusion, no. For these reasons, the court finds it appropriate to afford the opportunity to proceed in a logical, expeditious manner to eligible Petitioners who prefer it, in a concerted effort to expedite the receipt or denial of a conditional license.

Lottery structure.

A critical question is how the corrective lotteries will be conducted. To the greatest extent possible, they should be conducted as they were originally. The Department shall conduct a Qualifying Applicant Lottery, a Social Equity Justice Involved Lottery, and a Tied Applicant Lottery for each of the 17 BLS regions, following the process outlined in the administrative record (R. 233-35, 589-90) and described in open court by the Department’s attorney Doug Rees on April 22, 2022. Petitioners who choose to participate shall receive as many entries as they claim in their petitions that they ought to have received, in the lotteries where they claim they ought to have received them.

Above all, and to the greatest extent possible, participants shall face the same odds in a given lottery, on a per entry basis, as applicants faced in the corresponding original lottery. For example, in the original Qualifying Applicant Lottery for Bloomington, BLS Region 1, there were 70 application entries and 1 conditional license available, for odds of 1/70 for any given entry being drawn. Participants in the Corrective Qualifying Applicant Lottery for BLS Region 1 shall likewise face 1/70 odds for each entry they claim was erroneously excluded. Recreating these odds is aimed at ensuring fairness across the entire process.

Contrary to HAAAYY’s assertion, Petitioners are not entitled to odds based on the number of applicants rather than entries. This proposal would yield substantially better odds for applicants who filed petitions for administrative review. Recreating the odds based on the number of entries puts Petitioners on the same footing as all others who participated in the original lotteries.

As a practical matter, the Department has proposed to recreate these odds through the use of blank entries. In order to replicate the odds, the Department would add blank entries to each of the 51 drawings. Taking the above example, if Petitioners in the BLS Region 1 Corrective

Qualifying Applicant Lottery make up 5 entries, then the Department would add 65 blank entries so that each entry would face the same 1/70 odds as the original lottery. If a blank entry wins a drawing, Petitioners' entries do not.

Some Petitioners have urged the court to reject the use of blank entries, contending that the use of blank entries would put Petitioners in a significantly disadvantageous position by putting them in a "one-sided competition" where they are to compete against applicants from the original lotteries. The court rejects this contention. There is no opportunity for participants in the original lotteries to win a conditional license through these corrective lotteries. Core to most Petitioners' claims is that they were improperly excluded from being an entry in one of the original lotteries. What this preliminary corrective lottery process assumes is that their claims are meritorious, and that they should have been included in the original lotteries. It follows then that they should receive the same odds as if they were, in fact, included in the original lotteries. Blank entries are merely a tool by which the Department is able to achieve the same odds that participants in the original lotteries faced to ensure that all applicants, not just Petitioners, faced uniform conditions in the drawings.

The court agrees with Petitioners like High Haven who have urged the Department to account for license abandonments that took place in the original drawings. Under the CRTA, applicants who drew winning lottery positions for beyond a certain limit on licenses had to abandon any number of licenses beyond that limit. *See* 410 ILCS 705/15-30.20. As a practical matter, only three licenses were abandoned for this reason. The Department contends that these abandonments had an immaterial impact on the odds. Nevertheless, in an abundance of caution and concerted effort to recreate the same odds and conditions of the original lotteries, the Department is directed to recreate the abandonment of licenses that actually occurred, with that license passing to the next-drawn, non-winning entry.

Finally, the court disagrees with the contention raised at oral argument, although not in the briefs, that the corrective lotteries should not mimic the original lotteries because the original lotteries ran afoul of the Illinois Lottery Law, 20 ILCS 1605/1, *et seq.*, and the Illinois Gambling Act, 230 ILCS 10/1 *et seq.* This is a red herring. The relevant statute is the CRTA, not these other laws. The Lottery Law is concerned with the establishment and regulation of the Illinois State Lottery, and lotteries "established and operated pursuant to *this Act*," not the CRTA. *See* 20 ILCS 1605/3 (emphasis added). Likewise, the Gambling Act is concerned with the establishment and strict regulation of gambling so as to ensure public trust. The Act's only mention of "lotteries" is to say that it does not apply to lottery games authorized under the Lottery Law. It has no bearing on the method of selection and distribution of government-issued licenses, even where the selection and distribution is random by lot.

IT IS ORDERED: The Department's Motion for Order of Limited Remand to Conduct Corrective Lotteries is granted in part. The Department's request that the claims of those Petitioners who do not win one or more of the corrective lotteries be automatically dismissed is denied without prejudice. While some claims may in fact be mooted, it is premature for the court to decide this now. The matter is remanded to the Department to conduct corrective lotteries as follows:

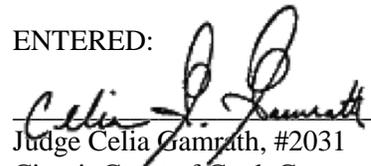
1. By June 3, 2022, the Department shall publish and file a plan to conduct 51 corrective lotteries, in an open and transparent manner, and in a form consistent with the prior lotteries, for each of the Qualifying Applicant Lottery, Social Equity Justice Involved Lottery, and Tied Applicant Lottery for each of the 17 BLS regions. (R.233-35, 589-90). Every lottery shall have an independent auditor on hand for oversight to ensure the odds are fair, and replicate the original odds to the greatest extent possible, based on the number of entries, not applicants, in each round.
2. Only Petitioners who claim that they were improperly excluded from one or more lotteries shall be eligible to participate in the corrective lotteries. Petitioners who received perfect scores and participated in all the prior lotteries they were eligible for may not participate in these corrective lotteries.
3. By June 10, 2022, any eligible Petitioner who does not wish to participate in a corrective lottery shall file a Notice of Opt Out with the court. Otherwise, they will be included.
4. By June 17, 2022, the Department shall publish and file a final list of all participants in the corrective lotteries, broken out by lottery and BLS region, and shall commence the first lottery no later than June 24, 2022, upon notice to Petitioners and the public at large.
5. The lotteries shall take place over a period not longer than 21 days, with the Qualifying Applicant Lottery first, the Social Equity Justice Involved Lottery next, and the Tied Applicant Lottery last. The Department shall publish the results for each lottery as they become available. Upon completion of the last corrective lottery, the Department shall publish the results and file with the court a list of the winners of each corrective lottery.
6. Petitioners participating in any of the 51 corrective lotteries shall face the same odds on a per entry basis as participants in the respective original lottery. The Department may use blank entries in any corrective lottery to recreate these odds. The Department shall recreate the abandonments pursuant to statute that actually took place in the original lotteries.
7. The corrective lottery process is binding on all Petitioners who participate, absent a showing of fraud or illegality. Those who obtain winning positions in any of the lotteries shall be awarded conditional licenses, but only if they prevail on the merits of their substantive claims, or if the Department agrees they constitute qualified applicants with the threshold number of points.
8. Petitioners shall receive the same number of entries they would have received in the original lotteries had they not been excluded.
9. Although this Order extends only to Petitioners in the instant consolidated case, nothing prevents the Department from inviting into the fold applicants like Heartland Leaf, LLC, who erroneously did not receive an entry they paid for and identified in their application in the prior round of lotteries. (R. 589). Nor does it prevent another court from ordering similarly-situated Petitioners in separate cases to partake. This poses no disadvantage to the instant Petitioners, for their odds do not change. Again, every participant in the

corrective lotteries shall receive the same odds as those applicants who were included in the original lotteries, with adjustments made for abandonment of licenses to best replicate the same odds and achieve parity among lottery participants and eligible applicants.

10. During the period of limited remand, this court maintains concurrent jurisdiction with the administrative agency and will continue to oversee the Department's filing of the administrative record and set briefing schedules on the merits of Petitioners' claims, which is independent of the randomized lottery process.
11. Status on completion of the lotteries and filing of the administrative record and briefs is set for July 26, 2022, at 10:00 AM via ZOOM on Calendar 6, using courtroom 2508 protocols.

Judge Celia G. Gamrath
MAY 17 2022
Circuit Court - 2031

ENTERED:



Judge Celia Gamrath, #2031
Circuit Court of Cook County, Illinois
County Department, Chancery Division