

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE)	
AND CONSUMER SERVICES,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 93-4957
)	
SWEETWATER ATHLETIC CLUB, INC.,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled case on February 9, 1994, in Orlando, Florida.

APPEARANCES

For Petitioner: Isadore Rommes, Senior Attorney
Department of Agriculture and
Consumer Services
515 Mayo Building
Tallahassee, Florida 32399-0800

For Respondent: James S. Byrd, Jr., Esquire
Shoene, Byrd & Palmer
Post Office Box 2187
Winter Park, Florida 32790-2187

STATEMENT OF THE ISSUES

The issue for disposition in this proceeding is whether, as required by subsection 501.017(1)(b)1., F.S., and rules 5J-4.003(1) and 5J-4.012, F.A.C., Respondent, a health studio, provided its patrons a facility of equal quality, within five driving miles, at no extra cost, when Respondent's facility closed in January, 1993.

PRELIMINARY STATEMENT

In response to notice that claims for membership refunds were made, Sweetwater Athletic Club, Inc., petitioned for a formal administrative hearing on April 11, 1993. On May 7, 1993, the Department of Agriculture and Consumer Services sent a follow up letter stating the basis for its determination that upon closing, Sweetwater Athletic Club had not provided a facility of equal quality to its members.

The case was referred to the Division of Administrative Hearings on August 27, 1993.

At the hearing, Petitioner presented testimony of its consumer complaint consultant, Joseph Alexionok, and testimony of the following complainants: Christ Derato, Christine Kirkham, Ian Robertson, Ken Samsudean, James Hadley, Kent Cofoid and Alex Jack. Petitioner's exhibits #1-7 were received in evidence without objection; however, certain complaints included in composite exhibit #7 were objected to on the basis of hearsay, when the complainants did not appear at hearing to testify. Those complaints have not been considered as a basis for finding of fact in this recommended order. See subsection 120.58(1)(a), F.S.

Respondent presented the testimony of Marshall Cohn, Kim Byrd and Harry Meeks. Respondent's exhibit #1 was received in evidence without objection.

After hearing, the transcript was prepared and filed, and the parties submitted proposed recommended orders. The findings of fact proposed by each are addressed in the attached appendix.

FINDINGS OF FACT

1. Sweetwater Athletic Club was approximately thirty years old when it was acquired in July 1992 by Kim Byrd. The facility (Sweetwater) was located in Longwood, Seminole County, Florida. The facility, in its corporate capacity, registered as a health studio in accordance with sections 501.102-501.019, F.S., and it posted a surety bond, as required.

2. Sweetwater had Nautilus machines and other exercise equipment, a steam room, sauna, two racquetball courts and aerobics. The steam room and sauna were almost always broken, and Kim Byrd was continually trying to refurbish the club. Very few people, mostly five or six men, regularly used the racquetball courts, and Ms. Byrd had considered converting them to aerobics space, as there was a greater demand for aerobics.

3. Paramount Health Club, (Paramount), also a health studio under Florida law, is located within five miles of Sweetwater. It is a much larger and newer facility than Sweetwater. It has a larger aerobics room and more experienced personal trainers. Sweetwater lost many of its members to Paramount.

4. On or about January 8, 1993, Sweetwater closed, and transferred its membership obligations to Paramount. Members of Sweetwater and appropriate staff of the Department of Agriculture and Consumer Services were notified of the closing and transfer.

5. Paramount has honored all prepaid Sweetwater memberships. Paramount already had its own equipment but bought and refurbished every piece of Sweetwater's athletic equipment and has, thus, increased accessibility to its members. Paramount is a family-owned and operated facility. Its owner, Harry Meeks, affirmatively sought out Sweetwater's members to make them feel welcome and to help them understand that there was no financial obligation to use up their prior membership term. Paramount's sauna, steam room, and other equipment are all in good working order. It has more aerobics classes than Sweetwater and includes special classes for seniors and other age or ability groups. In every way, save one, Paramount's facility is equal to, or better than Sweetwater; Paramount has no racquetball courts.

6. Eleven complaints from former Sweetwater members were filed with the Department of Agriculture and Consumer Services.

7. Some members who complained did not even visit Paramount. In some cases, they felt it was too far or inconvenient; in other cases, they knew it had no racquetball and that was the only reason they went to Sweetwater. Other members visited Paramount but perceived it to be crowded or too intimidating because of a younger aged clientele and body-building focus.

8. With the exception of the lack of racquetball courts, the perception that Paramount is not equal to Sweetwater is not valid. Harry Meeks' testimony regarding the availability of equipment and broad appeal to all ages and skill levels was persuasive. Sweetwater was less crowded because it had lost its members already to Paramount.

9. Former Sweetwater members, Ian Robertson, Ken Samsudean and James Hadley, utilized the Sweetwater facility exclusively for its racquetball courts. Former member, Chris Derato, used the facility primarily for the racquetball courts, but also used the other equipment at Sweetwater. James Byrd, former co-owner of Sweetwater, has agreed to refund the unused membership fees of those members who exclusively used the racquetball courts and to refund a portion of the unused fees to Chris Derato. (transcript, p.76) This stipulation effectively resolves the only valid complaints regarding Sweetwater's closing.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to section 120.57(1), F.S.

11. The Department of Agriculture and Consumer Services is a state agency created pursuant to section 20.16, F.S. and is responsible for enforcing the provisions of sections 501.012-501.019, F.S., regulating health studios. It is uncontroverted that Sweetwater is a health studio subject to those provisions.

12. Section 501.017(1)(b), F.S. provides that a contract for health studio services must include:

(b)1. A provision for the cancellation and refund of the contract if the contracting business location of the health studio goes out of business, or moves its facilities more than 5 driving miles from the business location designated in such contract and fails to provide within 30 days, a facility of equal quality located within 5 driving miles of the business location designated in such contract at no additional cost to the buyer.

. . .

3. A provision that if the department determines that a refund is due the buyer, the refund shall be an amount computed by dividing the contract price by the number of weeks in the contract term and multiplying the result by the number of weeks remaining in the contract term.

. . .

13. Rules adopted by the Department of Agriculture and Consumer Services to implement sections 501.102-501.109, F.S. provide, in pertinent part:

5J-4.003 Definitions. The definitions in Section 501.0125, Florida Statutes, and the following shall apply:

(1) Alternate facility - means a health studio of equal quality offered by a health studio which goes out of business or moves its facilities more than 5 driving miles from the business location designated in any contract used by the health studio.

. . .

5J-4.012 Facility of Equal Quality. For purposes of Section 501.017, Florida Statutes, and this chapter, the Department shall consider the following factors in determining equal quality among health studios:

- (1) A comparison of equipment and facilities;
- (2) The intended use of equipment and facilities by the consumer;
- (3) The availability of the equipment and facilities for use on the same days and times by the consumer;
- (4) The distance between the facilities.

14. Although certain members complained about the inconvenience of Paramount, it is plainly within the 5 mile driving distance required by the statute and rules. The testimony of complainants who never visited Paramount or who visited the facility only once or twice, very superficially assessing its quality, is outweighed by the testimony of Paramount's owner, Sweetwater's owner and one former Sweetwater member who transferred to Paramount. With the exception of the lack of racquetball courts, Paramount's equipment and facilities are of equal or better quality than Sweetwater's. In some regard, they are precisely the same, though Paramount refurbished Sweetwater's equipment. There is no requirement in the law or rules that a member should never have to wait to use equipment any time he or she patronizes the facility. There was no waiting at Sweetwater for the very reason it closed: it had too few members.

15. The Sweetwater members who testified about their exclusive use of the racquetball courts were credible. The sign-in sheets received into evidence as Respondent's exhibit #1 are not reliable evidence of non-use, as the sheets are for the last few days that Sweetwater remained open. As provided in finding of fact #9, above, Respondent has agreed to make pro-rated membership refunds to the racquetball users.

RECOMMENDATION

Based on the foregoing, it is, hereby,

RECOMMENDED:

That the Florida Department of Agriculture and Consumer Services enter a final order denying the complaints against Respondent, with the exception of the complaints by Chris Derato, Ian Robertson, Ken Samsundean and James Hadley; and granting thirty (30) days for Respondent to provide refunds to those members, before proceeding against Respondent's surety as provided in section 501.016(1), F.S.

DONE AND RECOMMENDED this 13th day of May, 1994, in Tallahassee, Leon County, Florida.

MARY CLARK
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904)488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of May, 1994.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-4957

The following constitute specific rulings on the findings of fact proposed by the parties.

Petitioner's Proposed Findings

1. and 2. Adopted in paragraph 1.
3. Adopted in paragraph 4.
4. Adopted in paragraph 6 and in preliminary statement.
5. Addressed in preliminary statement.
6. - 9. Adopted in paragraph 5.
10. - 12. Adopted in paragraph 7.
13. Adopted in substance in paragraph 9.
14. - 15. Rejected as statements in of testimony, but addressed in conclusions of law, paragraph 14.
16. Rejected as contrary to the greater weight of evidence.

Respondent's Proposed Findings

1. Adopted in paragraphs 1 and 4.
2. Adopted in paragraphs 3 and 4.
3. Adopted in paragraph 5.
4. Adopted in paragraphs 3 and 5.
5. Adopted in paragraph 5.
6. Adopted in paragraph 9.

7. - 8. Adopted in paragraphs 3 and 7.
9. & 10. Adopted in substance in paragraph 2.
11. Rejected as immaterial. Upon review of the factors in rule 5J-4.012, F.A.C. it appears that the lack of racquetball courts at Paramount is a material defect, as to those members who used the courts at Sweetwater. As noted in Mr. Rommes' letter, as long as the health studio is still in existence, its members might have a cause of action for breach of contract. The purpose of the statutes and rules seems to be the protection of those members who may otherwise be without practical recourse if the studio closed.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.