

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SAINT PAUL CITY COUNCIL

In re the Licenses held by Health Skills, LLC St. Paul, d/b/a Anytime Fitness, for the premises located at 2501 West Seventh Street

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

This matter was heard by Administrative Law Judge Beverly Jones Heydinger, on March 12, 2008, in Room 40A, Saint Paul City Hall – Ramsey County Courthouse, 15 West Kellogg Boulevard, Saint Paul, Minnesota. The hearing was held pursuant to a Notice of Administrative Hearing dated January 30, 2008. Rachel Tierney, Assistant City Attorney, 400 City Hall, 15 West Kellogg Boulevard, Saint Paul, Minnesota, 55102, appeared on behalf of the City’s Department of Safety & Inspections (DSI).¹ Kathryn K. Smith, Sherrill Law Office PLLC, 4756 Banning Avenue, Suite 212, White Bear Lake, MN 55110-3205, appeared on behalf of Health Skills, LLC St. Paul, d/b/a Anytime Fitness (Health Skills). The record closed on April 1, 2008, following receipt of the parties’ post-hearing memoranda.

NOTICE

This report is a recommendation, not a final decision. The Saint Paul City Council will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions, and Recommendation.² Pursuant to Saint Paul Legislative Code § 310.05 (c-1), the City Council shall not make a final decision until the parties have had the opportunity to present oral or written arguments to the City Council. Parties should contact Shari Moore, City Clerk, City of Saint Paul, 310 City Hall, 15 West Kellogg Boulevard, Saint Paul, Minnesota 55102, to ascertain the procedure for filing exceptions or presenting arguments.

¹ Formerly Office of License, Inspections and Environmental Protection (LIEP).

² Saint Paul Legislative Code §§ 310.05 (c-1).

STATEMENT OF THE ISSUE

1. Did Health Skills violate Saint Paul Legislative Code § 427.07 (12) and the corresponding condition on its license by operating a health and sport club without having an employee or manager who was trained in first aid and CPR on the premises during its hours of operation?

2. If so, is the City's proposed penalty of \$500 reasonable?

The Administrative Law Judge recommends that the Saint Paul City Council affirm the determination that Health Skills violated Legislative Code § 427.07 (12), and the condition on its license by operating a health and sport club without an employee on the premises who was trained in first aid and CPR, and affirm the proposed penalty of \$500.

Based on the record and proceeding herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Ryan Manning is the President of Health Skills, which holds license number 060001202 from the City of Saint Paul to operate a health and sport club and a tanning facility at 2501 West Seventh Street, in Saint Paul.³

2. When Mr. Manning obtained space and began remodeling to open Health Skills, he was unaware that the operation would require a license from the City. Around April 2006, upon learning that licenses were required, he met with Christine Rozek, Deputy Director of DSI, and the two worked cooperatively to assure that Health Skills met the necessary building code requirements. Mr. Manning was informed of the applicable code requirements and notice was sent to surrounding property owners. The City allowed Health Skills to operate while Mr. Manning worked to comply with the code requirements.⁴

3. On January 18, 2007, Ms. Rozek sent Mr. Manning a letter about the building code and staffing requirements for Health Skills.⁵

4. On February 11, 2007, Ms. Rozek sent Mr. Manning a letter reiterating that Mr. Manning should continue to work with the building inspectors to make the necessary changes to the property, and that, so long as he did so, his license application would not be denied. The letter also reiterated "that your business may not

³ Ex. H1-2.

⁴ Testimony of Christine Rozek; Testimony of Ryan Manning; Ex. H1.

⁵ Ex. H1-1.

be in compliance with Sections 427.07 (12) of the legislative code which requires that staff be present during all hours of operation” and quoted the provision of the code. Ms. Rozek requested that Mr. Manning confirm in writing that he was in compliance with the staffing requirements and contact her by February 20, 2007, if he had any questions about the requirements.⁶ Mr. Manning does not recall seeing the sentence in Ms. Rozek’s letter stating that staff must be present at the health club.

5. On February 20, 2007, Mr. Manning signed a statement agreeing to two conditions on his license. The first reiterated the standard of the City’s legislative code that “one employee or manager, trained and qualified in first aid and CPR ...shall be on duty at all times that the licensed premises are in operation or open to members of the public.” It also contained a condition related to tanning facilities that stated: “Customer use of the tanning facilities shall be restricted to those hours when at least one individual employed by the licensee is available on-site” to assist customers and monitor the equipment.⁷

6. On November 16, 2007, Dave Schoen, a police officer assigned to assist DSI, was asked to check Health Skills to determine if it was staffed at all hours of operation. At approximately 10:00 p.m., he went to the facility and saw a person using an exercise machine. The front door was locked; the officer showed his identification, and the customer admitted the officer to the facility. No employee was present, and the customer told Officer Schoen that he had not seen an employee. There was a business card on the desk next to a locked office with the name of the manager, Mason Reinhart.⁸

7. Health Skills does not have a staff member on the premises during all hours of operation. A staff member may be contacted by telephone at any time. Two signs are posted at the business: One is approximately 4 inches by 6 inches, and another is the size of a business card. The larger one lists Kim Johnson as the “24-hour staff attendant” and contains her cell phone number. It is posted by the office door and the outside door of the club. The business card also lists Ms. Johnson, Mr. Manning and another staff member and their telephone numbers.⁹

8. Kim Johnson is a regional manager for Anytime Fitness, and she oversees Anytime Fitness facilities in several cities, including St. Paul, Maplewood, Woodbury and White Bear Lake, and shares responsibility for a facility in Fergus Falls, Minnesota.¹⁰ Ms. Johnson is trained in first aid and CPR, and she is available by cell phone 24 hours a day. When she is not available, her cell phone is forwarded to Ryan

⁶ Ex. H2.

⁷ Ex. H3.

⁸ Ex. H4 and Stipulation, dated March 12, 2008.

⁹ Exs. H8 and H9.

¹⁰ Test. of K. Johnson.

Manning, who is also trained in first aid and CPR. Ms. Johnson lives in Maple Grove, Minnesota.

9. Although Health Skills does not have an employee on the premises during all hours of operation, it does have necklaces that customers are encouraged to wear when using the exercise equipment, and panic buttons are located throughout the facility. The customer can push the button on a necklace or on the wall if he or she needs assistance. The buttons are connected to "Pro Vision," a security company that will contact 911 for police assistance and also notify Health Skills. Neither the necklaces nor the buttons on the wall are directly connected to the 911 system.¹¹

10. Health Skills also has security cameras. In the event that a person attempts to enter the facility without using a required security pass, the entry will be recorded on a computer system that is linked to the cameras. Staff members can check the computer from off-site to determine if a person has entered without the required pass and can check the recorded images from the security cameras to determine who entered and how the entry occurred. The cameras are not continuously monitored when persons are using the facility, but the computer program is checked regularly for unauthorized entry. The cameras are not linked to Pro Vision, and the security company cannot monitor the cameras. There is a coded key pad outside the building entrance to allow police and fire to gain access to the building.¹²

11. If Ms. Johnson were called by a person having a medical emergency at the facility, she would tell the caller to push the panic button on one of the necklaces or on the wall, and Pro Vision would then call 911. She has never received a call about an injury or illness at one of the facilities.¹³

12. During the process of complying with the building code, Mr. Manning gave the building inspector a tour of Health Skills and showed him the security system, including the key cards for admission, the cameras and the emergency buttons. Mr. Manning explained to the inspector that the facility was open to members 24 hours a day, and he explained the reciprocity with other Anytime Fitness clubs. Mr. Manning was certain that the inspector understood that staff would not be present during all hours of operation because of the key card access. Mr. Manning was aware that his Anytime Fitness franchise was the first 24-hour health club to open in Saint Paul.¹⁴

13. Mr. Manning acknowledged that he had received copies of the applicable ordinances and he maintained that he had fully complied with them. He did not call DSI for clarification because he did not think that the license conditions were vague. Upon

¹¹ Test. of K. Johnson; Test. of R. Manning.

¹² Test. of R. Manning.

¹³ Test. of K. Johnson.

¹⁴ Test. of R. Manning.

learning of the first aid and CPR requirements, he arranged training for Ms. Johnson and two other employees and faxed their training certificates to the City. He understood that an employee must be on the premises when the tanning facilities were available, but he understood that an employee must only be “on duty,” which he interpreted to mean available by telephone, when the health center was open to members.¹⁵

14. The Anytime Fitness business model provides low-cost access to health facilities 24 hours a day. Mr. Manning is concerned that he can not operate the model successfully if the facility must be staffed at all times. Moreover, he believes that the staffing requirement is out-dated because of the new security features and because the benefits of allowing low-cost access to health clubs at any time of day outweigh the small health risks of operating without a staff member present.¹⁶

15. The Anytime Fitness franchisor is working with regulators in many states to educate them about the benefits of its business model, including greater access and affordability. Anytime Fitness stresses the security at its facilities, and the required training for staff and members, including training about the benefit of wearing a necklace with a panic button while exercising. There are 101 Anytime Fitness franchises in Minnesota, and all but three are open 24 hours a day. In no instance has a client suffered medical problems because of a delay in receiving medical treatment.¹⁷

16. The City first regulated health clubs in 1989. Since the City added the requirement for first aid and CPR training to the legislative code provision in approximately 1992, the City has consistently interpreted the term “on duty” in the code provision to mean that an employee or manager with the required training must be on the premises during all hours of operation. The ordinance was amended when CPR training became the standard of care for health and fitness facilities. The purpose of the safety requirement is to assure that a trained person is on hand to render emergency assistance in the event that a customer is injured or suffers a heart attack while using the facility. Although there is a contact number posted at Health Skills, and customers may push a button in an emergency, neither is sufficient to provide immediate medical assistance.¹⁸

17. William Gunther, the City’s Environmental Health Director, explained the importance of immediate administration of CPR to keep oxygen circulating to the brain, and the damage from loss of oxygen, including some brain damage in four minutes, permanent brain damage in seven minutes, and the poor chance of survival after twelve minutes without oxygen. If a patron were to call the number of the staff attendant rather than 911, the call would delay the emergency response. A person off-site would be

¹⁵ Test. of R. Manning.

¹⁶ Test. of R. Manning.

¹⁷ Test. of Mark Daly, National Media Director, Anytime Fitness.

¹⁸ Test. of C. Rozek; Test. of W. Gunther.

unable to render the required assistance, and there would be no reason to require that person to have first aid or CPR training.¹⁹

18. In addition, the City is concerned that unauthorized persons may enter the fitness club, which could pose a safety risk to its customers. An on-site employee would be available to immediately check the identity of such a person and take the appropriate steps to remove the individual.²⁰

19. Exercise rooms in hotels and condominiums do not require a health/sport club license because hotels and condominiums are not in the business of operating a health or sport club.²¹

20. The City Council has authority to impose a fine upon any licensee as an adverse action, in an amount that is reasonable and appropriate. To that end, it has established presumptive penalties for violations. The City Council may deviate from the presumptive fine if there are substantial and compelling reasons to do so.²²

21. On December 6, 2007, the DSI sent a Notice of Violation to Health Skills stating that Health Skills had violated St. Paul Legislative Code § 427.07 (12) and Condition One of its license. The notice stated that DSI would recommend a \$500 fine to the City Council for the violation.²³

22. Health Skills requested a hearing to challenge the violation.²⁴ The City issued a Notice of Administrative Hearing on January 30, 2008, initially scheduling the hearing for February 29, 2008.²⁵ At the request of Health Skills, and with the agreement of DSI, the hearing was rescheduled for March 12, 2008.

23. There is no substantial or compelling reason to deviate from the presumptive penalty of \$500.00

24. Any Finding of Fact more properly termed as a Conclusion is hereby adopted as a Conclusion.

¹⁹ Test. of W. Gunther.

²⁰ Test. of C. Rozek.

²¹ Test. of W. Gunther; See Saint Paul Legislative Code § 427.01.

²² Saint Paul Legislative Code § 310.05 (l) and (m).

²³ Ex. H5-2.

²⁴ Ex. H6.

²⁵ Ex. H7.

CONCLUSIONS

1. The Administrative Law Judge and the Saint Paul City Council have jurisdiction in this case.²⁶

2. The Applicant received timely and proper notice of the hearing, and the City has complied with all relevant substantive and procedural requirements of statute and rule.²⁷

3. The City Council has authority to deny, suspend, or revoke a license and to impose penalties for the violation of applicable statutes and rules.²⁸ The presumptive penalty for a first violation is a \$500 fine.²⁹

4. DSI has the burden of proving that the Licensee violated the applicable provisions of state law and city ordinance by a preponderance of the evidence.

5. Saint Paul Legislative Code § 427.07 (12) states:

At least one (1) employee or manager, trained and qualified in first aid and CPR according to standards established by rule by the department of safety and inspections shall be on duty at all times that the licensed premises are in operation or open to members or the public. Such standards shall be in conformity with standards and guidelines established by the American Red Cross with respect to water safety instructors or by the American Heart Association for similar purposes.

6. DSI has reasonably interpreted the term “on duty” to mean that the employee or manager must be on the premises in order to give effect to the requirement that such an employee or manager must be trained in first aid and CPR. In light of the language of the provision as a whole, this is a reasonable interpretation that gives meaning to each part of the provision and is consistent with the obvious intent of the requirement.

7. DSI has proved by a preponderance of the evidence that Health Skills failed to have an employee or manager trained and qualified in first aid and CPR on duty while the licensed establishment was in operation and open to the public, in violation of Saint Paul Legislative Code § 427.07(12) and its license condition.

8. DSI’s proposed fine of \$500 is reasonable and consistent with the City’s penalty matrix.

²⁶ Saint Paul Legislative Code §§ 310.05, 310.06; Minn. Stat. § 14.55.

²⁷ See Minn. Stat. §§ 14.57 – 14.61; Saint Paul Legislative Code §§ 310.05; 310.06.

²⁸ Saint Paul Legislative Code §§ 310.05(l), 310.06.

²⁹ Saint Paul Legislative Code § 310.05(m).

9. The City Council may impose the costs of a contested case hearing on a party if its position was “frivolous, arbitrary or capricious, made in bad faith, or made for the purpose of delay or harassment,” and for other reasons that would not be applicable to the alleged violations in this case.³⁰ There is insufficient evidence to support an award of costs in this matter. Health Skills’ appeal of the violation of its license was taken in good faith and was not frivolous, arbitrary or capricious, or made for the purpose of delay or harassment.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the City of Saint Paul impose the presumptive fine of \$500 against Health Skills.

Dated: April 17th, 2008

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER

Administrative Law Judge

Digitally Recorded:

A-bjh-03122008

MEMORANDUM

The Saint Paul Legislative Code and the condition placed on Health Skills’ license both required that an employee trained in first aid and CPR shall be “on duty” at all times that the facility was in operation or open to its members.³¹ DSI has interpreted “on duty” in this context to mean that the employee must be on the premises. Health Skills does not deny that it operates its facility when no employee is on the premises who is trained in first aid and CPR. Health Skills claims that it complies with the requirement by posting the name and telephone number of a trained employee who is on duty and may be contacted at all times.

DSI’s interpretation is consistent with the plain meaning of the ordinance. In order to give meaning to the full text, a person must be on the premises to perform first

³⁰ Saint Paul Legislative Code § 310.05(k).

³¹ Saint Paul Legislative Code § 427.07 (12); Ex. H3.

aid or CPR as needed. Persons who are ill or injured may not be able to assist themselves, and the time that it would take to summon a staff member who is away from the health club or to push a button that triggers a request for a police officer defeats the purpose of having a trained person available. A call to 911 will bring help with equal speed, regardless of whether a staff person trained in first aid or CPR were called first. If Health Skills' argument were logical, the ordinance would require posted notice to call 911 or push one of the panic buttons in an emergency. Moreover, as the Health Skills' regional manager, Ms. Johnson, testified, the security company calls the police rather than placing a call for emergency medical assistance. Although a police officer may be trained in first aid and CPR, this adds a step to obtaining the necessary medical care. Ms. Johnson also stated that if she were ever called by a person facing a medical emergency, she would direct the person to push one of the panic buttons at the facility. Thus, the meaning Health Skills gives to the ordinance is unreasonable and fails to accomplish the purpose for which it was enacted. It also fails to give effect to the language of the ordinance as a whole by rendering the first aid and CPR training requirement meaningless. Health Skills' claim that CPR training includes instructing another person to perform CPR is not persuasive since there may not be a person on hand to take direction, and no way for the person giving direction to observe whether the directions were followed. Ordinances should be interpreted to give full effect to all the provisions, and not to interpret them in a manner that would lead to an unreasonable result or defeat the purpose for which they were enacted.³²

Moreover, DSI's interpretation of the ordinance is entitled to some deference because it is reasonable, consistent with the plain language of the ordinance, and is an interpretation of long-standing.³³ DSI's witness, Mr. Gunther, testified that since the first aid and CPR requirements were added to the ordinance, DSI has consistently required that an employee be on the premises.

Health Skills also challenges the applicable ordinance because exercise rooms in hotels and condominiums are not subject to the same license requirements. William Gunther explained that hotels and condominiums are not in the fitness business and offer exercise as an amenity to their customers or owners. A health club license is required only for persons in the business of operating a health/sport club.³⁴ In addition, members of a condominium association are using equipment that they own, and the City does not regulate private, personal use of exercise equipment. Governments may

³² See e.g. Minn. Stat. § 645.17 (1 and 2) (principles of statutory construction).

³³ *Arvig Tel.Co. v. Northwestern Bell Tel. Co.*, 270 N.W.2d 111,114 (Minn. 1978); *In the Matter of the Cities of Annandale and Maple Lake*, 731 N.W.2d 502, 512-513 (Minn. 2007).

³⁴ Compare Saint Paul Legislative Code § 427.01 (definition of health/sport club) with § 407.01 (definition of hotel).

regulate part of an activity or address part of a problem without regulating the entire field. It is not required to “strike at all the evils at once.”³⁵

Health Skills compares the use of the term “on duty” in the ordinance regulating health clubs with the more specific “on duty on the premises” language in the ordinance governing “game rooms.” Although the provision applicable to game rooms is more specific, it is also included in a provision that would not otherwise imply such specificity, unlike the requirement for health clubs that the employee on duty be certified for first aid and CPR. The City is not required to employ identical language throughout its ordinances, nor are the health club and game room provisions so likely to be read together that the different choice of words would cause confusion.

Health Skills also argues that the ordinance is out of step with updates in technology and fails to take into account that the benefits of being available at a low cost and at hours that serve many schedules outweigh the risks of using the exercise facility without a staff member present. These arguments are more appropriately brought to the City Council for its consideration. Occasionally, in applying a law or rule, factual situations that were not considered during the legislative process come to light that may yield a harsh or undesirable result in a particular case. However, this does not make the law invalid so long as the law as applied is rationally related to the result that the enactment was intended to achieve. It would be invalid only if its application lacked a rational relationship to the objective it was enacted to address.³⁶ In this case, it is clear that the continued application of the ordinance would in fact benefit the health club’s patrons. Health Skills claims otherwise, because it contends that it cannot charge its low rates if it must have staff on the premises during all hours of operation. Although it may be more costly for Health Skills to comply with the ordinance, the reasonableness must be viewed from the end sought to be achieved and not in light of the ordinance’s application to a particular party.³⁷

Appropriateness of the Penalty

DSI proposed a fine of \$500, the presumptive penalty for a first violation.³⁸ Health Skills was on notice of the requirement and DSI’s interpretation of it. It is doubtful that a warning would have the desired deterrent effect. Based on the facts presented, the presumptive penalty is reasonable.

DSI’s request for costs

³⁵ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S.Ct. 715, 725 (1981); *Essling v. Markham*, 335 N.W.2d 237, 240 (Minn. 1983).

³⁶ *Mammenga v. Dep’t of Human Services*, 442 N.W.2d 786, 789 (Minn. 1989), citing *Wickard v. Filbion*, 317 U.S. 111, 129-130, 63 S. Ct. 82, 91 (1942); *In the Matter of the Lawful Gambling License of Thief River Falls Amateur Hockey Ass’n*, 515 N.W.2d 604, 606-607 (Minn. App. 1994).

³⁷ *Broen Memorial Home v. Dep’t of Human Services*, 364 N.W.2d 436, 441 (Minn. App. 1985).

³⁸ Saint Paul Legislative Code § 310.05(m).

DSI may request costs if the Licensee's appeal was frivolous, arbitrary or capricious. No such award of costs is justified in this instance. Health Skills sincerely believes that the ordinance should not be applied to it, and those arguments, although unpersuasive, were not specious or advanced solely to delay or harass enforcement.

B.J.H.