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June 6, 2003

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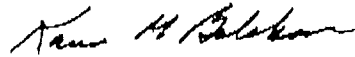
Fred Greenberg, Esquire
Fred Greenberg, P.C.
P.O. Box 629
Narberth, PA 19072

RE: **Club 2000 Health and Fitness Center, Inc. v. Hanover Area Family YMCA**
MA-001-03
Arbitration under Institutions of Purely Public Charity Act, 10 P.S. § 378

Gentlemen:

Enclosed please find my determination of a prima facie case as well as the decision on the Motion to Terminate Arbitration. My office assistant will be calling you next week to confirm your availability for a conference call on Thursday June 19th and Friday June 20th relating to the proceduros and time line for the ensuing arbitration.

Respectfully yours,



Karen M. Balaban

Enclosure

Cc: Cristal Pike-Nase, Esquire w/enc.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

IN RE:

**CLUB 2000 HEALTH AND FITNESS
CENTER, INC.,**
Complainant

Pursuant to Section 8 of the Institutions
of Purely Public Charity Act
(10 P.S. § 378)

Vs.

Docket No. MA-001-03

HANOVER AREA FAMILY YMCA,
Respondent

Determination of Prima Facie Case
and
Decision on Respondent's Motion to Terminate Arbitration

Background

On March 28, 2003, Club 2000 Health and Fitness Center, Inc. ("Club 2000") filed a complaint asserting violation by the Hanover Area Family YMCA ("YMCA") of the unfair competition with small business provisions under Section 8 of the Institutions of Purely Public Charity Act, 10 P.S. § 378.

On April 28, 2003, the YMCA filed a Response to the Complaint and a Motion to Terminate Arbitration.

The undersigned was appointed by the Secretary of State on May 19, 2003 as the arbitrator to conduct arbitration proceedings in this matter.

On June 2, 2003, arbitrator received Club 2000's Response to YMCA's Motion to Terminate Arbitration.

Under the directive of Section 8(i)(5) of the Act, the arbitrator makes the following determination on whether the complaint presents sufficient prima facie evidence that a violation of Section 378 has occurred. This determination is made in conjunction with addressing, ad seriatim, the issues raised in the Motion to Terminate Arbitration.

1. THE COMPLAINT FAILS TO SET FORTH A CLAIM UNDER § 8.

The allegation in paragraph 6 of the complaint that the YMCA is a purely public charity, which was admitted by the YMCA as being true, establishes that the YMCA is subject to the Institutions of Purely Public Charity Act, 10 P.S. § 371 et seq.

Section 8 of the Act prohibits institutions of purely public charity from using “their tax-exempt status to compete unfairly with small business”. The general rule in the Act specifically states that such institutions may not “fund, capitalize, guarantee the indebtedness of, lease obligations of or subsidize a commercial business that is unrelated to the institution’s charitable purpose as stated in the institution’s charter or governing legal documents.”

The Act defines “commercial business” as “the sale of products or services that are principally the same as those offered by an existing small business in the same community”. 10 P.S. § 373.

Club 2000 has alleged that it is “a health club that provides a variety of health and fitness services”. (See Complaint par. 4). It has also alleged that the YMCA provides health club facilities for dues-paying members including exercise equipment, private lockers, towel service, massage and whirlpool. (See Complaint par. 7 and 12). These allegations indicate that the YMCA is engaged in the sale of services which are principally the same as those provided by Club 2000.

Club 2000 is located at 28 Baltimore Street, Hanover (see Complaint par. 3) and the new branch of the YMCA where a health club facility will be located is at 1013 Baltimore Street, Hanover, approximately two miles away from Club 2000. (See Complaint par. 8). It is further alleged that both the YMCA and Club 2000 will compete for the same members. (See Complaint par. 9 – 12). These allegations indicate that they are competing for members from the same community. Collectively these averments present evidence of a commercial business as defined under the Act.

Club 2000 has alleged that it is a tax-paying small business. (See Complaint par. 3).

Club 2000 has alleged that the YMCA's operation at the Baltimore Street location, which it intends to lease, will constitute a commercial business and provide unfair competition. (See Complaint par. 13, 18 and 23).

All the components of the unfair competition provision of the Act have been pleaded except that Club 2000 has alleged that the operation of health club facilities by the YMCA is unrelated to any charitable purpose authorized or recognized under the Act. (See Complaint par. 14 & 23). One of the purposes of the YMCA stated in its charter is the improvement of the physical condition of persons by the support and maintenance of gymnasiums. Its Constitution provides that one purpose is "to aid in building a healthy society through the improvement of physical ...conditions of persons who participate in YMCA programs and the community served by this Association". (See Exhibit E par. 3 and Exhibit F Article I, Section 2 attached to YMCA's Response to Complaint). Although the averments in the Complaint indicate that the actions of the YMCA are within its stated charitable purposes, the request for an injunction is based upon the violation of the Act arising from engaging in a commercial enterprise that does not meet the charitable purposes definition under Section 5(b) of the Act or the exceptions or inapplicable situations enumerated under Section 8 of the Act. (See 10 P.S. § 378(c) through (h)).

Club 2000 has alleged that the purpose of "promotion of health" or "building healthy bodies" no longer qualifies as a charitable purpose under the Act since the phrase "promotion of health" was in the repealed provision of the Nonprofit Corporation Law of 1988 and not included in the Act when it was adopted in 1997. (See 10 P.S. § 375(b)). The substance of the violation alleged by Club 2000 in its complaint is that the proposed health club facilities to be located on Baltimore Street are unrelated to a charitable purpose authorized under Section 5(b) of the Act.

Under the *Selfspot*¹ standard, "promotion of health" may be a charitable purpose under Section 5(b)(6) of the Act if circumstances warrant. A YMCA providing health-club facilities primarily to paying customers in competition with similar small businesses may give rise to a valid claim under the Act.

¹ *Selfspot, Inc. d/b/a The Fitness Factory v. The Butler County Family YMCA*, 818 A.2d 5887 (Pa. Cmwlth. 2003)

Conclusion

Club 2000 has stated a claim under Section 8 by challenging the lease and operation by the YMCA of additional health-club type facilities which it alleges are unfairly competing with Club 2000's existing fitness club facilities.

2. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE THE FACILITY IDENTIFIED IN THE COMPLAINT HAS NOT BEEN OPENED BY THE YMCA.

The YMCA stated in paragraph 7 of its Response to the Complaint that it intends to lease a facility and that a part of the services to be provided include fitness education and a rehabilitation cardiovascular/aerobic center. It further admits in paragraph 26 of its Response that it will be opening a South Hanover Branch at the Baltimore Street location. Whether the level of these services rise to that of unfair competition between the YMCA and Club 2000's fitness programs or health club facilities is an issue to be decided at the arbitration.

Additionally, attached to Club 2000's Response to the YMCA's Motion to Terminate Arbitration is a page from a flyer announcing that the South Hanover YMCA Branch is opening in early Summer 2003 and will offer fitness programs in cardio kickboxing, body sculpting, cross training, cycle reebok, and circuit interval training, as well as various local newspaper articles indicating that the lease arrangement has occurred.

Conclusion

The issue raised is ripe for this preliminary determination contemplated by Section 5 of the Act. (See also *Racquetball Centers L.P. v. Cedar Crest College* Docket No. MA-001-01).

3. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE THE COMPLAINT FAILS TO ALLEGE FACTS THAT CONSTITUTE UNFAIR COMPETITION.

This contention is similar to the issues raised under the first reason stated in its Motion to Terminate Arbitration and the discussion under that issue are applied to this reason.

The general rule regarding unfair competition under Section 8 specifically prohibits an institution of purely public charity from funding, capitalizing, guaranteeing the indebtedness of, leasing obligations of or subsidizing "a commercial business that is unrelated to the institution's charitable purpose as stated in the institution's charter or governing legal documents."

Conclusion

The arbitrator finds that the allegation in paragraph 23 of the Complaint that the rule has been violated along with the factual averments of any proscribed actions (see the discussion above of the first issue of Motion to Terminate Arbitration) is sufficient to state a cause of action relating to unfair competition.

4. THE ISSUE OF WHETHER SPECIFIC ACTIVITIES OF AN INSTITUTION OF PURELY PUBLIC CHARITY CONSTITUTES A COMMERCIAL BUSINESS UNRELATED TO THE INSTITUTIONS CHARITABLE PURPOSE IS PREEMPTED BY FEDERAL LAW.

The conduct regulated under the Act and challenged by Club 2000 is unfair competition by a public charity with a small business. The Act does not determine a charity's tax exempt status, nor does a determination that a charity competes unfairly with a small business result in any state sanction against a charity's ability to maintain its tax-exempt 501(c)(3) status.

Conclusion

The enforcement of Section 8 under the Act and the remedies authorized are not pre-empted by Section 501(c)(3) of the Internal Revenue Code,

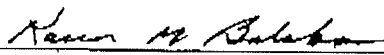
5. THE LEGISLATURE INTENDED THAT ARBITRATORS DISMISS MERITLESS COMPLAINTS AT THE EARLIEST POSSIBLE STAGE IN THE PROCEEDING TO PROTECT CHARITIES FROM INCURRING NEEDLESS EXPENSE.

The Arbitrator is cognizant of its obligation to address whether the Complaint contains sufficient averments to present prima facie evidence that a violation of Section 378 has occurred. The Act directs that such determination occur within 30 days of the appointment of the arbitrator. This determination has been timely presented and the arbitration session will be timely conducted to resolve the issue within the one year time period prescribed by the Act.

Conclusion

The Complaint submitted by Club 2000 sets forth prima facie evidence that a violation of Section 8 of the Act has occurred.

Date: 6.6.03



Karen M. Balaban, Arbitrator

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DEPARTMENT OF STATE

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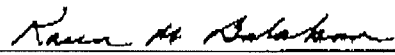
Docket No. MA-001-03

HANOVER AREA FAMILY YMCA,
Respondent

DETERMINATION

And now this 6th day of June, 2003,

1. The Motion to Terminate Arbitration is Denied; and
2. The Complaint submitted by Club 2000 sets forth prima facie evidence that a violation of Section 8 of the Act has occurred.



Karen M. Balaban, Arbitrator

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

IN RE:

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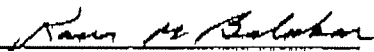
CERTIFICATE OF SERVICE

I certify that the attached document was served upon the following persons at the listed
address by 1st class mail on June 6th, 2003.

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