

**IN THE COURT OF COMMON PLEAS OF
DAUPHIN COUNTY, PENNSYLVANIA**

MILTON PURCELL et al,

PLAINTIFFS

v.

MILTON HERSHEY SCHOOL

ALUMNI ASSOCIATION, JOHN RICE

AND JERRY WATERS,

DEFENDANTS

CIVIL DIVISION

NO. 2005-CV-0463-EQ

(JUDGE HOOVER)

**APPLICATION FOR AUTOMATIC STAY PENDING APPEAL PURSUANT TO
PA. R.A.P. 1701, OR ALTERNATIVELY, FOR A STAY PENDING APPEAL
PURSUANT TO PA. R.C.P. 1732 OF THE ORDER DATED JUNE 6, 2005,
AND FOR EXPEDITED CONSIDERATION**

And now, come the Milton Hershey School Alumni Association (“MHSAA”), John Rice (“Rice”), and Jerry Waters (“Waters”), defendants in the above matter (collectively referred to as “Defendants”), and file the following application for an automatic stay of the order of this Court dated June 6, 2005 pending appeal of said order pursuant to Pa. R.A.P. 1701, or, alternatively,

for a stay pending appeal pursuant to Pa. R.A.P. 1732, together with expedited consideration of this Application, and in support thereof, aver as follows:

APPLICATION FOR AUTOMATIC STAY UNDER PA. R.A.P. 1701

1. By Opinion and Order dated June 6, 2005, this Court entered relief on the Plaintiffs' request for a preliminary injunction and directed that the MHSAA conduct elections on June 26, 2005, for the positions of Vice President/President Elect, Secretary, and Treasurer to the MHSAA Board of Directors (the "Elections"). The Court also ordered that Honorary and Emeritus members be given the right to vote at Board meetings, that the MHSAA Board did not have authority to not recognize a purported Chapter Representative on account of Chapter election irregularities, and that the Honorable Warren G. Morgan be appointed to conduct the election ordered for June 26, 2005 (collectively referred to as the "Order").

2. Defendants, respectfully, have filed a Notice of Appeal from the order of June 6, 2005.

3. Pa. R.A.P. 1701 provides that after an appeal is taken the trial court may no longer proceed in the matter with limited exceptions, which exceptions the Defendants aver do not apply here.

4. The Order requires that affirmative action be taken and that elections be conducted under and pursuant to the Court's supervision by the Honorable Warren G. Morgan.

5. While Pa. R.C.P. 1701(b)(1) permits the Court to take action to preserve the status quo as an exception to the rule that it may no longer proceed, the action ordered by the Court does not preserve the status quo, but rather changes the status quo.

6. The automatic stay provision under Pa. R.A.P. 1701 is self-effectuating, but Defendants have filed this application seeking an acknowledgment of that rule because the Court will have to stay its own action, including the election scheduled for June 26, 2005.

**ALTERNATIVE RELIEF IN THE NATURE OF AN APPLICATION FOR STAY
PURSUANT TO PA. R.A.P. 1732**

7. Alternatively, should the Court disagree as to the applicability of the automatic stay provisions under Pa. R.A.P. 1701, the Defendants respectfully request that a stay of the Order be entered pursuant to Pa. R.A.P. 1732.

8. Pa. R.A.P. 1732(a) provides that applications for a stay must ordinarily be made in the first instance to the lower court.

9. The criteria to establish entitlement to a stay pending appeal were first set forth in the oft cited case of *Pennsylvania Public Utility Commission v. Process Gas Group*, 502 Pa. 545, 467 A.2d 805 (1983). The grant of a stay is warranted if the applicant: a) makes a strong showing that he is likely to prevail on the merits, b) that without the requested relief he will suffer irreparable harm, c) the issuance of the stay will not substantially harm other interested parties in the proceedings, and d) the issuance of the stay will not adversely affect the public interest. *Id.*

10. The requirement that the applicant show that it is likely to prevail on the merits is not an inflexible rule, but must be weighed relative to the other criteria. *Id.* Even though it is unlikely that a lower tribunal will find it likely that its own order will be reversed on the merits, there are ample instances where the lower tribunal can find that the applicant has presented a substantial case on the merits, even though it disagrees. *Id. at 502 Pa. 554, n.8, 467 A.2d 809, n.8.* Defendants maintain such is the case here.

(a) Substantial Likelihood of Success on the Merits.

11. The Defendants aver that there is a substantial likelihood of success on the merits of their appeal so that the actions ordered by the Court under its June 6, 2005 Order will be reversed. Defendants allege numerous grounds for reversal on appeal, *supra*.

1. The criteria for a preliminary injunction were not met.

12. Preliminarily, while the Court acknowledged that the May 10, 2005 proceeding was a hearing on the plaintiffs' request for preliminary injunctive relief, the Court failed entirely to consider the mandatory criteria that must be met before a preliminary injunction may issue.

13. For a preliminary injunction to be granted the movant must show: (1) that the injunction is necessary to prevent immediate and irreparable harm that could not be compensated by damages; (2) that greater injury would result from refusing the injunction than by granting it; (3) that the injunction restores the parties to the status quo that existed immediately before the alleged wrong; (4) that the wrong is manifest and the injunction is reasonably suited to abate it; and (5) the applicant's right to relief is clear. *City of Philadelphia v. District Council 33, 528 Pa. 355, 598 A.2d 256 (1991).*

14. In particular, at hearing, the plaintiffs made no attempt to demonstrate irreparable harm if the preliminary relief they sought was not granted. The Court likewise made no such finding.

15. The plaintiffs failed to demonstrate and the Court failed to find that greater injury would result by refusing the injunction than by granting it.

16. The relief requested by the plaintiffs would not restore the status quo.

17. The alleged wrong was not manifest and the plaintiffs' right to relief was not clear, and in fact was based on what the Court found to be *ambiguities* in the By-Laws, all as is demonstrated, *supra*.

2. *The Board's authority to review Chapter elections.*

18. This Court held that because the Board has the power to review and disapprove bylaws of a Chapter upon thirty days notice in advance of a meeting that this authority did not permit the Board to review, revise or reject the election of a Chapter representative. This was error by the Court, since the Defendants never made any such argument either in their briefs or at hearing before this Court.

19. The Defendants' arguments in support of the Board's right to review sham Chapter elections were as follows: Article X of the current Bylaws addresses the creation and operation of Chapters. The Board has the sole authority to approve a chapter, the procedures to organize same, and to set the territory for the chapter. Article X, Section 1. Each chapter must elect officers in accordance with any regulations set forth by the Board. Article X, Section 9. Article IV, Section 1, further provides that the affairs of the Association, including but not

limited to establishing bylaws and policies and control of Association property, shall be vested in the Board. Finally, the charter document issued to all chapters expressly provides that the chapter pledges to “conform to the Association Charter, by-laws, and regulations of the Board of Directors as now exist or hereafter amended.” *See* Plaintiff Ex. 8. This includes the right to *elect* one member of the Board of Directors of the Association. Article X, Section 9. This right can *only* be exercised by *an election*, which in this case did *not* take place prior to the November 14, 2004 Board meeting, having been wrongfully blocked by Plaintiffs. In the absence of any bylaw controlling elections, Roberts Rules of Order control to the extent they are not inconsistent with the Association Bylaws. Article III, Section 7.

20. The Defendants also pointed out that under 15 Pa.C.S.A. §5511, nonprofit corporations may establish and terminate chapters regardless of their designation, form of government, status or relationship to the corporation.

21. The Court erred by ignoring the above arguments asserted by the Defendants which were not credibly refuted by the plaintiffs.

22. The Court also erred in concluding that the Homestead and Honorary Chapter representatives were entitled to vote on June 26, 2005, since the December 19, 2004 meeting minutes reflect that the Board restored their right to vote in 2005. The minutes rather reflect that the Honorary Chapter was allowed to vote “for 2005 matters from this [that] point forward, without expanding any powers that do not exist in the Bylaws.” Thus, the Board did not grant the Honorary Chapter voting rights it did not possess under the bylaws which the Defendants have argued to this Court do not exist.

23. To the extent the Court further relied upon restoration of the Homestead Chapter to bolster its conclusion that the Board cannot review Chapter elections, the Court erred, as the Homestead Chapter was only permitted to vote after it conducted a proper election which it did in time for the December meetings. The facts surrounding the restoration of the Homestead Chapter demonstrate the authority of the Board to govern chapters contrary to the Court's reasoning.

24. The Court also erred by making fatal erroneous factual conclusions that elections were held, when in fact no bona fide elections were held at all, but the Court would not allow testimony that would have shown that what took place were not elections.

3. Error with respect to the Honorary Chapter.

25. The Court concluded that Honorary Chapter representatives were entitled to vote on the Board despite an unambiguous bylaw provision that provides that Honorary members cannot hold "elected Board positions." This was after the Court concluded that all Board members are elected.

26. The Court's statement that the Honorary Chapter had no vote until 1999 amendments prepared by Mike Weller clarified the bylaws was in error. The hearing exhibits do not reflect that Mr. Weller authored the proposed bylaw that inserted the term "elected" into this disputed provision. Rather, the bylaw revision adopted by the Board that inserted the term "elected" was proposed after the draft authored by Mr. Weller was submitted.

27. The Court erred in determining that the bylaw provision that prohibits Honorary members from holding "elected Board positions" was ambiguous based upon differing constructions urged by the parties. A contract is not rendered ambiguous by the mere fact that

parties do not agree upon its proper construction. *Riccio v. American Republic Ins. Co.*, 453 Pa. Super. 364, 683 A.2d 1226 (1996), *aff'd* 550 Pa. 254, 705 A.2d 422 (1997), *Halpin v. LaSalle University*, 432 Pa. Super. 476, 639 A.2d 37 (1994). Moreover, a court must not rely upon a strained contrivancy to establish an ambiguity where one does not exist. *Steuart v. McChesney*, 498 Pa. 45, 444 A.2d 659 (1982). If that were not the case, scarcely an agreement could be conceived that might not be unreasonably contrived into the appearance of an ambiguity. *Id.*

28. The bylaw provision prohibiting Honorary members from holding “elected Board positions” is not ambiguous and by its clear language prohibits Honorary members from sitting on the Board who either attempt to sit by *election* from their Chapter, or as an officer *elected* by the Board.

29. The Court further erred in concluding that Honorary members could sit and vote during Board meetings based upon a course of conduct by the Board which in the Court’s opinion resolved any ambiguity in the bylaws. Bylaws are subject to the same rules governing the construction of contracts. *Constructors Ass’n of Western Pa. v. Seeds*, 15 A.2d 467 (Pa. Super. 1940). Course of dealing, or the parties’ past interactions with each other, alone cannot establish a contract. *Omaha Fish & Wildlife Club v. Cox/Johnson Corp.*, 2003 WL 1962917 (Neb. App. 2003). *See also, Bd. of Directors of Aplaca Owners & Breeders Ass’n v. Clang*, 80 P.3d 945 (Colo. App. 2003) (a court cannot declare an action of a nonprofit entity valid when it was taken in violation of existing bylaws).

30. The Court erred by determining that the Honorary member could vote based upon prior conduct since the uncontradicted testimony at hearing established that any prior votes were all done in ignorance of any bylaw provision.

31. The Court erred in failing to examine whether the Honorary Chapter qualified as a Chapter under the Bylaws as argued by Defendants by failing to address the two principal standards of qualifications, i.e., a geographical territory (it had none) and a need for fifteen active members, i.e., graduates or attendees of the school (it had none). The Board has no authority to grant Chapter status to a group of members who do not qualify and the Court erred in ordering otherwise.

4. Error with respect to Emeritus Directors.

32. The Court determined that the lack of guidance in the bylaws for terms and selection of Emeritus Directors rendered the bylaws ambiguous and that this ambiguity had to be resolved in favor of permitting these members to serve on the 2005 Board and vote based upon their participation in pre-2005 Board meetings.

33. The Court erred in finding that the bylaws were ambiguous as to the terms of an Emeritus Director, since there are no provisions in the bylaws regarding the terms of such directors. Uncontradicted evidence at hearing demonstrated that by the time the bylaws were amended in 1999, the provision for naming Emeritus Directors was eliminated from the bylaws and that remains the case under the bylaws controlling today. Rather than creating an ambiguity, the bylaws simply do not provide any longer for these positions.

34. The Court erred in determining that Emeritus Directors could vote by essentially inventing phantom bylaws to create these positions, and allow them to continue indefinitely.

35. The Court erred in determining that the two remaining Emeritus Directors could vote by ignoring 15 Pa. C.S.A. § 5724 that explicitly provides for one-year terms where no

term is stated in the bylaws. The terms of the Emeritus Directors acknowledged by the Court long ago expired before the disputed votes took place in this case, and certainly by December 31, 2004.

36. The Court erred by determining that the two remaining Emeritus Directors could vote as the effect of the Court's decision was to grant life terms to the members contrary to applicable law. There is no authority whatsoever for claiming that the position is a lifetime appointment. *See, Singh v. Singh, 114 Cal. App. 4th 1264, 9 Cal. Rptr.3d 4 (2004) (directors had one year term where bylaws did not specify term, not unlimited or lifetime terms as alleged; California statute mirrors 15 Pa.C.S.A. §5724).*

37. The Court erred by determining that the two remaining Emeritus Directors could vote in 2005 based upon prior conduct at pre-2005 Board meetings, as prior conduct cannot validate action otherwise prohibited under the bylaws. *See, cases cited at paragraph 29, infra.*

38. The Court erred by determining that the two remaining Emeritus Directors could vote in 2005 based upon prior conduct since the uncontradicted testimony at hearing established that any prior votes were all done in ignorance of any bylaw provision.

39. The Court erred by determining that the two remaining Emeritus Directors could vote until a successor is named, since Emeritus Directors are honorary positions not to be succeeded, and successors are not authorized under the By-Laws.

(b) Irreparable harm will be caused by not granting a stay.

40. If the Order is allowed to take effect substantial disruption to MHSAA operations and governance will occur as officers presently serving may be displaced.

41. New elections under the bylaws for members at large for 2006 are scheduled to take place in approximately 90 days, with new officers to be elected in November. Greater harm will come to MHSAA by disruption of its present officers by not one, but two elections in this short period of time than by allowing these officers to serve out their terms.

42. If the Order is allowed to take effect the crucial reform litigation currently being pursued by the present Board may be irretrievably compromised, as many of the plaintiffs have conflicts of interest that leave them willing to compromise the reforms sought by MHSAA, as a result of their material relationships with the Milton Hershey School, an entity which opposes the reform litigation and the current MHSAA and which has devoted vast resources to undermining MHSAA reform efforts, at times acting unlawfully and at times acting in coordination with certain conflicted Plaintiffs.

43. If the Order is allowed to take effect the Board may lose any control whatsoever over the conduct of its various chapters, as the Court's decision places them outside any Board supervision no matter how egregious the conduct at issue. The Court's decision establishes a long-term precedent that would invite a free-for-all at the Chapter level, allowing control groups to impose Chapter Representatives and override Chapter member wishes in the absence of any bona fide elections.

44. If the Order is allowed to take effect the Board's bylaws will be rendered meaningless, as the Court's decision establishes that bylaws can be disregarded and in effect amended outside the provisions provided for under the bylaws and applicable law by mere

conduct of the parties. To determine rights and obligations, the Board will have to examine years of past conduct instead of its own By-Laws.

45. If the Order is allowed to take effect the Board will be forced to recognize and remove or replace Emeritus Directors who otherwise under the Court's decision will have lifetime terms. The Court's Order in effect grants more rights and permanent security in these honorary positions than it does for all other duly elected board members.

46. If the Order is allowed to take effect, it is of such finality that the defendants will be deprived of their right to conduct discovery guaranteed under the rules and to have a full and fair hearing prior to the Court issuing a determination as required under section 5793.

(c) A stay would not substantially harm other interested parties.

47. A stay would not substantially harm the plaintiffs, as all the plaintiffs are currently able to physically attend Board meetings and many possess voting rights, so that the views of this group will be represented.

48. Plaintiffs cannot allege any irreparable harm to support their request for preliminary relief, nonetheless if a stay is granted, irreparable harm will be imposed on Defendants and those elected officers who will be replaced in the middle of their terms.

(d) A stay would not adversely affect the public interest.

49. Nothing in the relief requested by the plaintiffs furthers per se the public interest.

50. To the contrary, several rulings by the Court create new precedent, which if allowed to stand, may significantly change and affect the governance of many other non-profit corporations in Pennsylvania.

51. If the public interest is to be considered, the public interest must fall on the side of the current Board, who has been successful in fighting for and securing statewide precedent on the issue of standing, and for continuing to fight for necessary child-protecting reforms opposed by many of the plaintiffs, in certain cases for glaring personal material reasons that have tainted their conduct, and which Defendants could have showed had they been permitted by the Court to do so.

REQUEST FOR EXPEDITED CONSIDERATION

52. Implementation of the Court's Order will be substantially completed with the Officer elections directed by the Court for June 26, 2005.

53. The Court's decision dated June 6, 2005, was only received by Defendants on June 9, 2005.

54. In light of the very short timeframe within which the Order is to be implemented, expedited consideration of this Application is requested in order to timely determine if the June 26 elections will occur or be stayed pending appeal by Defendants.

WHEREFORE, Defendants respectfully request that this Court enter an order: a) recognizing the automatic stay applicable to its Order pursuant to Pa. R.A.P. 1701; b) alternatively, entering a stay of its Order pending appeal pursuant to Pa. R.A.P. 1732; and c)

granting expedited consideration of the instant Application in advance of the June 26, 2005
Court-ordered meeting.

Respectfully submitted,

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