

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

MILTON PURCELL,	:	
ETHEL CAMPBELL,	:	
GRAHAM MCINTYRE,	:	
IVAN DIETRICH,	:	
RALPH FINK,	:	
HARVEY DEITRICH,	:	
GIRARD GAUGHAN,	:	
HARRY HEATH,	:	
ROBERT PATTON,	:	
GERALD LONG,	:	
JUNIOR VIA,	:	
RICHARD MATTIS,	:	
CHRISTINE COOK, and	:	
ROBERT HEIST,	:	
	:	
	:	
PLAINTIFFS	:	
	:	
vs.	:	NO. 2005-CV-0463-EQ
	:	
MILTON HERSHEY SCHOOL	:	
ALUMNI ASSOCIATION,	:	
JOHN RICE, and	:	
JERRY WATERS	:	
	:	
	:	
DEFENDANTS	:	

**SUPPLEMENTAL MEMORANDUM OF LAW  
IN SUPPORT OF AMENDED MOTION FOR PRELIMINARY INJUNCTION**

**I. INTRODUCTION**

Plaintiffs filed this action pursuant to 15 Pa.C.S.A. §5793 in order to seek judicial review of certain actions taken by the Officers and Directors of the Milton Hershey School Alumni Association, a Pennsylvania non-profit corporation. Specifically, Plaintiffs sought judicial review of the election of certain Officers and the removal of certain Directors which took place at meetings of the Board of Directors held on November 14, December 19 and December 26, 2004.

On May 10, 2005, this Court held a hearing on Plaintiffs' Amended Motion for a Preliminary Injunction. At that hearing, the parties reached a number of agreements regarding how the case would proceed.

Specifically, the parties agreed that the Court will issue an Order requiring the Association to hold a meeting of the Board of Directors on June 26, 2005, at which the Board would hold elections for the positions of Vice President/President Elect, Secretary, Treasurer and, possibly, President. Prior to that meeting, the Court will determine the status of seven disputed board members. Those seven disputed Board members include President Jerry Waters, Chapter Representatives, Ethel Campbell (Honorary), Milton Purcell (Homestead) and Graham McIntyre (Washington, D.C.) and Emeritus Directors, Ralph Fink, Ivan Dietrich and Harvey Deitrich.<sup>1</sup> It

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<sup>1</sup>Those Board members whose right to vote at the June 26 meeting is not disputed are the twelve at-large members, Robert Patton, Robert Heist, Girard Gaughan, Junior Via, Jerry Long,

was further agreed that the Court will resolve the following issues regarding those Board members:

1. Whether the Association's board of directors had the power to prevent chapter representatives of the Homestead, Honorary and Washington D.C. chapters from voting at the November 14, 2004 meeting on the grounds that they had allegedly not held proper elections for those positions?

2. If the Board had such power, did it then properly reinstate the 2005 voting rights of the Homestead and Honorary Chapters at the December 19, 2005, meeting with the result that the Homestead and Honorary Chapters should be allowed to vote in the June 26, 2005 election (subject to resolution of the legal status of the Honorary Chapter)?

3. Do the Bylaws permit the formation of an Honorary Chapter and, if so, do the Bylaws permit that Chapter to have a voting member of the Board of Directors?

4. Do the Bylaws permit Emeritus Directors to vote after their initial term of office has expired if they have not been replaced or removed from the Board?

5. Is Jerry Waters disqualified from serving as President by reason of his not having spent one year off the Board before serving in the position of Vice-President/President Elect.

Based on these agreements, a brief hearing was held at which the parties presented testimony and exhibits. This Supplemental Memorandum is submitted to address the five issues set forth above.

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Richard Mattis, Christine Cook, Francine Serafin, Donald Chappell, John Long, Sonny Jenkins and Charles Welsh, the Past President, John Rice and five Chapter Representatives, Brian Russell, Al Greer, George Russ, Robert Chalmers and Charles Hill.

## II. ARGUMENT

### A. Introduction

Most of the issues set forth above have been briefed before. Thus, in most cases the relevant facts have already been stated. They will be restated herein only to the extent necessary to a particular argument. To the extent possible, we will try to be redundant of earlier briefs.

#### 2. **The Chapter Representatives Of The Homestead, Honorary And Washington D.C. Chapters Were Improperly Excluded From Voting At The November 14, 2004 Meeting**

According to the By-Laws, the Chapters are authorized to elect Chapter Representatives. Article X, Section 9. However, at the organizational meeting held on November 14, 2004, the Board of Directors of MHSAA purported to disallow the votes of the Chapter Representatives of the Homestead, Honorary and Washington D.C. Chapters because of alleged irregularities in the election of those representatives.

While authorizing the Chapters to elect Representatives to serve on the Board of Directors, the By-Laws are silent as to how those elections are to be held. And, nothing in the By-Laws or the relevant statute gives the Board of Directors of MHSAA the power to review, reverse or reject the election of a Chapter Representative by an approved Chapter.

It is a little difficult to anticipate Defendants' arguments to the contrary but, at the hearing, counsel suggested that the Board's power to review and reject elections arises from its power to approve and disapprove chapter bylaws. However, no such power appears in the bylaws except as implicit in Article X, Section 5 which allows revocation of a charter by the Board of Directors of the Association "provided that the Officers of the Chapter shall be given notice of the proposed action thirty (30) days in advance of the meeting of the Board . . . ." No such notice was given in

this case.

In addition, Article X, Section 9 requires that Each Chapter shall elect [such officers] as it may require and shall function in accordance with any regulation set forth by the Board of Directors.” However, there is no evidence of any regulation set forth by the Board of Directors which governs the conduct of elections by the chapters.

Finally, there is no apparent standard for the exercise of judgment by the Board of Directors in rejecting the elections of the Honorary, Homestead and D.C. chapters. For example, the D.C. election was apparently rejected because the nomination process was purportedly not sufficiently open. However, nothing in the bylaws of the Association or that chapter govern the manner in which nominations are to be made for chapter representative. Plaintiffs’ Exhibits 1, 2 and 6.

What Defendants really seek is a blank check for the incumbent majority to maintain its majority status by randomly eliminating any potential opponents selected by the Chapters. Nothing in the Bylaws or the statues explicitly provides that power and no such power should be implied.

**C. Even If the Board Had the Power to Review and Reverse the Chapter Elections, the Homestead and Honorary Chapter Representatives Should be Allowed to Vote on June 26, 2005 Because the Board Restored Their Right to Vote in 2005 at the Meeting on December 19, 2005**

According to the minutes of the December 19, 2004, meeting, the Board of Directors voted at that meeting to restore the right of the Homestead and Honorary Chapter representatives to vote in 2005. Plaintiffs’ Exhibit 3. Apparently, the Board concluded that the Honorary Chapter election had been proper and that the Homestead Chapter had remedied any defects in its election process. Id.

Now Defendants argue that the Court should allow the rejection of their votes but disallow the restoration. Again, Plaintiffs can only guess at the purported basis for this somewhat convoluted result.

Apparently, the Defendants are claiming that the only Board members that can vote in June of 2005 are those that were qualified to vote at the November meeting. That is absurd. If the Board was empowered to take away the right of chapter representatives to vote, it was also empowered to restore that right. There is no sound basis in law or equity to allow the rejection but ignore the restoration and exclude the votes of two chapter representatives whom the Board has found are entitled to vote on 2005 matters. **B. There Was No Basis In Law Or Fact For**

**The Exclusion Of Honorary Chapter  
Representative Campbell From Voting At  
The November 14, 2004 Meeting For 2005  
MHSAA Officers**

**1. Honorary Members Are Permitted To Be Members Of The Board**

Honorary Members are permitted to be members of the Board. Unlike Associate Members who cannot vote and may not be Board members under any circumstances, Article II, Section 4, Honorary Members have all voting rights of active members and are prohibited only from holding “elected Board positions.” Article II, Section 3.<sup>2</sup> Thus, the question here is not whether Honorary Members can serve on the Board but, rather, whether the Board position held

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<sup>2</sup>The later provision that “[a]ny active member of the Association shall be eligible to be a member of the Board of Directors” does not purport to be exclusive and therefore does not contradict Article II, Section 3.

by a Chapter Representative is an elected position.

Admittedly, all members of the Board are “elected,” either by the membership at large, the members of a Chapter or, in the case of officers and Emeritus Directors, by the Board of Directors. However, since the By-Laws clearly contemplate that Honorary Members (unlike Associate Members), can serve on the Board in “unelected” positions, those same By-Laws must also contemplate that one or more of those types of Directors, members at large, Chapter Representatives or Officers, do not serve in elected positions.

The most logical conclusion is that the term “elected position” refers only to those Directors elected by the membership at large. Obviously, Honorary Members are highly regarded members of the Association, chosen for their extraordinary service to the Milton Hershey School or the Association. It is unlikely, given the importance attached to such members and the broad voting rights which they are granted, that the By-Laws intended to be overly exclusive of their right to serve on the Board in some position.

Moreover, as Defendants note, the by-laws of an association constitute a “contract” among its members. While prior dealings or practice do not create or amend a contract or the by-laws of a non-profit corporation, it is appropriate to consider course of conduct or performance in determining the meaning of an ambiguous contract. Pennsylvania Engineering Corp. v. McGraw-Edison Co., 500 Pa. 605, 459 A.2d 329, 332 (1983), Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 376 n. 6, 390 A.2d 736, 741 n. 6 (1978); see also Restatement (Second) of Contracts §§ 202(4)a, 212 & comment b (1981). To say the least, the MHSAA By-Laws are ambiguous on the status and rights of Honorary Members and many other issues.

Here, for many years, MHSAA allowed the Honorary Chapter to exist and to have a

representative serve on the Board. That course of dealings easily resolves the ambiguity concerning the term “elected Board position.” Under the By-Laws, as interpreted by MHSAA over the years, Honorary Members can serve on the Board as the representative of the Honorary Chapter.

**D. The Honorary Chapter Representative is Entitled to Vote on June 26**

**1. The Honorary Chapter Satisfies the Requirements of Article X of the Bylaws**

Under the By-Laws:

A chapter may be organized in any territory in which fifty percent (50%) of the Alumni or fifteen (15) members, whichever is the least, are active members of the Association.

Article X, Section 3. Under its Bylaws, the Honorary Chapter is a national chapter because there is no geographical limitation on membership. Plaintiffs’ Exhibit 5. In fact, according to its President, the Chapter actually has members outside of the Hershey area and outside of Pennsylvania.

Moreover, it was the undisputed testimony of Michael Weller that he was Executive Director at the time the Honorary Chapter was approved and that, at that time more than 50% of the Alumni were considered active members of the Association because dues were no longer required and **all** alumni were (and are) considered active members of the Association. Thus, the Honorary Chapter was and is qualified under Article X, Section 3.

In any case, the By-Laws provide a procedure for withdrawing the approval of a Chapter. Article X, Section 5. That procedure was not followed here. Absent such action, the Honorary Chapter is a proper chapter.

**2. Honorary Members Are Permitted To Be Voting Members Of The Board**

The evidence now fully supports the arguments made by Plaintiffs in their earlier briefs.

The Honorary Chapter was approved in March of 1998 with the proviso that “they would have no vote at the Board meeting until the Association By-Laws are clarified.” Plaintiffs’ Exhibit 9. Shortly thereafter, Michael Weller, the Executive Director of the Association, drafted an amendment to the By-Laws which he intended to clarify the issue by letting the Honorary Chapter have the right to elect a voting representative to the Board.

The first amendment he prepared provided that “Honorary members have all voting privileges but may not hold Board positions.” Subsequent versions provided that “Honorary members have all voting privileges but may not hold **elected** Board positions.” (Emphasis added). In either case, Mr. Weller was clear that the intent was to grant the Honorary Chapter a voting representative on the Board. it would not be allowed to vote pending a clarification of the Bylaws. Honorary Members are permitted to be members of the Board. Unlike Associate Members who cannot vote and may not be Board members under any circumstances, Article II, Section 4, Honorary Members have all voting rights of active members and are prohibited only from holding “elected Board positions.” Article II, Section 3.<sup>3</sup> Thus, the question here is not whether Honorary Members can serve on the Board but, rather, whether the Board position held by a Chapter Representative is an elected position.

Admittedly, all members of the Board are “elected,” either by the membership at large, the members of a Chapter or, in the case of officers and Emeritus Directors, by the Board of Directors. However, since the By-Laws clearly contemplate that Honorary Members (unlike

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Associate Members), can serve on the Board in “unelected” positions, those same By-Laws must also contemplate that one or more of those types of Directors, members at large, Chapter Representatives or Officers, do not serve in elected positions.

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Moreover, as Defendants note, the by-laws of an association constitute a “contract” among its members. While prior dealings or practice do not create or amend a contract or the by-laws of a non-profit corporation, it is appropriate to consider course of conduct or performance in determining the meaning of an ambiguous contract. Pennsylvania Engineering Corp. v. McGraw-Edison Co., 500 Pa. 605, 459 A.2d 329, 332 (1983), Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 376 n. 6, 390 A.2d 736, 741 n. 6 (1978); see also Restatement (Second) of Contracts §§ 202(4)a, 212 & comment b (1981). To say the least, the MHSAA By-Laws are ambiguous on the status and rights of Honorary Members and many other issues.

Here, for many years, MHSAA allowed the Honorary Chapter to exist and to have a representative serve on the Board. That course of dealings easily resolves the ambiguity concerning the term “elected Board position.” Under the By-Laws, as interpreted by MHSAA over the years, Honorary Members can serve on the Board as the representative of the Honorary Chapter.

**D. The Votes Of The Emeritus Directors Were Improperly Disallowed**

During the meeting held on December 19, 2004, Defendant John Rice announced that the votes cast by the Emeritus members of the Board of Directors at the November 14, 2004 organizational meeting were void ab initio because those three members served terms of only one year and their terms had expired. As a result, those Directors were not allowed to vote at the December 19, 2004 meeting and their votes at the November 14 meeting were disallowed.

Under statute, 15 Pa.C.S.A. §5724:

Each director shall hold office until the expiration of the term for which he was selected and until his successor has been selected and qualified or until his earlier death, resignation or removal. Directors, other than those selected by virtue of their office or former office in the corporation or in any other entity or organization, shall be selected for the term of office provided in the Bylaws. In the absence of a provision fixing the term, it shall be one year.

There has been no successor selected or qualified for the Emeritus Directors, Plaintiffs Harvey Deitrich, Ralph Fink and Ivan Dietrich. Accordingly, under 15 Pa.C.S.A. §5724, Deitrich, Fink and Dietrich continue to serve in their positions as Emeritus Directors with full voting rights until a successor has been selected and qualified.

Apparently recognizing that the original basis for Rice's ruling was invalid, the Defendants now claim that the Bylaws do not provide for Emeritus Directors. While, admittedly, the Bylaws are ambiguous on this issue, properly interpreted, giving due weight to past practice, it is clear that the Bylaws must be interpreted to allow the Emeritus Directors to vote.

There is no question that the By-Laws contemplate Emeritus Directors. Article V. Section 2. There is also no question that under Pennsylvania law, those Directors, as do all other Directors, serve until replaced. There is, however, ambiguity about their qualifications and the

manner of their selection.<sup>4</sup>

Here, as is noted above, the Court should look to prior conduct and practice to resolve the ambiguity. In the past, over a period since at least 1988, MHSAA has had the Board of Directors select former Directors for the status of Emeritus Director. It has never deemed one such Director to be replaced by another. Rather, each has retained the right to vote each year after their selection.

There is no question that the Board could remove or replace those Directors. It has not. Until it does, under the statute, they remain members of the Board with full voting rights.

**F. Jerry Waters Was Not Eligible to Serve as Vice-President/President Elect and Since He is President Only by Reason of his Election to That Position, He Cannot Serve As President**

Jerry Waters served a three-year term on the Board, which ended December 31, 2003. On December 31, 2003, Waters was replaced by a newly-elected Board member.

In November of 2003, Waters was elected to the position of Vice-President/President Elect. He served in that position in 2004. He took the position of President in 2005 only because he served in the position of Vice-President/President Elect in 2004.

The MHSAA By-Laws provide that:

Each member of the Board of Directors shall serve for a period of three (3) years, or until his/her successor shall be elected and qualified, except as otherwise provided by these By-Laws and provided further, that the President and past President shall be members of the Board without regard to the term for Directors provided in these By-Laws.

Article IV, Section 4.

The MHSAA By-Laws also provide that:

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<sup>4</sup>There is also ambiguity about the length of their terms but that issue is moot since they continue to serve until replaced. 15 Pa.C.S.A. §5724.

Any active member of the Association shall be eligible to be a member of the Board of Directors, provided however, that **no member of the Association shall be eligible for re-election or appointment to the Board of Directors, except the Secretary, the Assistant Secretary and Counsel, a Chapter Representative and the Treasurer, until after the lapse of one (1) year from his/her term as a Director unless he/she has served less than thirteen (13) months.**

Article IV, Section 3 (emphasis added).

Under Article IV, Section 3, Waters was not eligible to serve on the Board or to serve as Vice President/President Elect in 2004 because there had not been a lapse of one (1) year from the expiration of his previous three-year term as a Director. The office of Vice President/President Elect is not exempt from that requirement.

Since Waters is presently serving as President only by reason of his having been illegally elected Vice President/President Elect in 2004, he cannot serve as President in 2005 without being separately elected to that position. There is nothing illogical about this result. A second year board member can be chosen by the Board to be President Elect; a third year member may not. The By-Laws are unambiguous on this point and must be enforced. Jerry Waters must be removed as President.