

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Ethylon B "E.B." Brown, Benjamin E. Myers, Robert "Bob" Scott, Shannon Hartfiel, Robert Wilson, William J. Brown, Dokor Dejvongsa, Steve Jackson, DeEtte Davis, Tamara Hardy, Lafayette Butler, Jernel McLane, Frank Essien, Kenya Weathers, and Jerry Moore,

Plaintiffs,

v.

Michael "Kip" Browne, P.J. Hubbard, Robert Hodson, Anne McCandless, Don Samuels (in his individual and official capacities), Barbara Johnson (in her individual and official capacities), Michael Martin (in his individual and official capacities), City of Minneapolis, Minnesota, Stacy Sorenson, an Unknown Minneapolis "City Attorney John Doe Defendant #1," and John Does 2-5,

Defendants.

ORDER

27 CV 09-2277

The above-entitled matter came before Judge Charles A. Porter, Jr. on February 3, 2009 for a hearing on Plaintiffs' Motion for a Temporary Restraining Order.

Jill Clark, Esq. appeared for the Plaintiffs. Albert Goins, Esq. and Damon Ward, Esq. appeared for Defendants Michael "Kip" Browne, P.J. Hubbard, and Robert Hodson. James Moore, Assistant City of Minneapolis Attorney, appeared for Defendants City of Minneapolis, Don Samuels, Barbara Johnson, and Michael Martin. Peter Mikhail, Esq. appeared for Defendant Stacy Sorenson. Ferdinand Peters, Esq. and Benjamin Loetscher, Esq. appeared for Defendant Anne McCandless. David Schooler, Esq. later associated with attorneys Goins and Ward, and substituted for attorneys Moore, Mikhail, and Peters.

Based upon the evidence adduced, the argument of counsel, and all of the files, records, and proceedings herein,

THE COURT FINDS:

Facts:

1. This case arises out of the election of officers to the Jordan Area Community Council ("JACC"), on January 14, 2009, that was allegedly done in violation of the by-laws. The JACC is a Minnesota non-profit corporation organized under Minn.Stat. §317A.
2. Plaintiffs are members of the JACC. Plaintiffs E.B. Brown, Benjamin Myers, Bob Scott, and Shannon Hartfiel¹ (hereafter, "the Myers officers") were officers of JACC who were allegedly ousted by a "rogue" team. Plaintiff Jerry Moore was employed as the Executive Director of JACC, and was removed by the alleged "rogue" team of officers.
3. Defendants are a combination of JACC members, city councilmembers, police officers, and the City of Minneapolis. Defendants Kip Browne, P.J. Hubbard, Robert Hodson, and Anne McCandless (hereafter, "the McCandless officers") are the alleged "rogue" team of officers.
4. All responses filed by the Defendants on or before February 17, 2009 are received on the merits because they were solicited by the Court and were timely submitted. The correspondence of Plaintiffs' counsel on March 4, 2009 is an untimely, unsolicited communication and is not received on its merits.
5. The content of the JACC by-laws is undisputed. The by-laws provide, in relevant part, as follows:
 - Art. III, §1: The general membership meeting in October shall be considered the Annual Business meeting. . . . Voting shall be held on offices available for election.
 - Art. V., §1(a): The Board of Directors shall be responsible for appointing officers of the organization, overseeing day-to-day business, setting and reviewing policies, preparing meeting agendas, approving expenditures within the limits of the budget, approving plans of work for standing and special committees and other duties which normally fall to a Board of Directors.

¹ In order to avoid potential "Brown" and "Browne" confusion, the group of E.B. Brown, Benjamin Myers, Bob Scott, and Shannon Hartfiel is hereafter referred to as the "Myers Board" or the "Myers officers," and the group of Kip Browne, P.J. Hubbard, Robert Hodson, and Anne McCandless is hereafter referred to as the "McCandless Board" or the "McCandless officers."

- Art. V., §1(b): The Board of Directors shall be representative of the organization and therefore its actions shall be binding on the organization.
- Art. V, §1(c): Directors shall serve a period of two years and will be elected at the General Membership meeting in October.
- Art. V., §3(a): The Nominating Committee will be made up of at least three members of the Board of Directors and may include non board members of JACC. The members and chair of the Nominating Committee will be chosen by the Board of Directors and shall convene each year after the August Board of Directors meeting in order to research and recommend, at the October Board of Directors meeting, a slate of candidates for election to the Board. . . . The Nominating Committee shall notify the membership by mail at least five days before the annual business meeting of the candidates for office. . . .
- Art. V, §3(d): Directors shall be installed at the first Board meeting in November. All Board members shall serve 2 year terms, but are eligible for re-election.
- Art. V., §4: Any member of the Board of Directors may be removed from office “with cause”, provided that the following steps are taken in succession: [a resolution is passed by majority vote at a Board meeting, then all Board members are notified, then two-thirds of the total membership votes at a Board meeting to remove, all done at least one month apart].
- Art. VI., §1(a): The Chair shall . . . be an ex officio member of all other committees except the Nominating Committee. . . .
- Art. VI., §2: All officers shall be elected annually by the Board of Directors at the October Board meeting. No member of the Board of Directors shall serve more than two consecutive years in the same office. The outgoing Chair shall maintain his/her full Board status while serving ex-officio for a period of one year. . . .
- Art. VI., §3: A Board officer may be removed from office, “with cause”, by a two-thirds vote of the total membership of the Board of Directors following the procedures set forth in Article V, Section 4 Removal.

6. The 2008 annual Board meeting was held on October 23, 2008 and was continued to November 12, 2008. Six seats on the Board of Directors were up for election. JACC voted by majority to postpone elections for the Board of Directors until

January 12, 2009. Voting on officer elections was postponed to the November 2008 meeting. The by-laws were not amended.

7. The next meeting of the Board was held on November 12, 2008. At that meeting, the Myers Board held an election for officers, which resulted in the Myers officers being elected. Benjamin Myers became the immediate past Chair. Under the by-laws, officers do not draw a salary.
8. On January 12, 2009, as approved in the October 2008 annual meeting, the JACC held elections for the six open Board positions. Elected to fill the six vacancies were: Todd Heintz, Vladimir Monroe, Robert Hodson, Tyrone Jaramillo, Anne McCandless, and David Haddy (as a whole, hereafter, "the McCandless Board").
9. On January 14, 2009, the McCandless Board held its first monthly board meeting. At the January 14, 2009 meeting, the McCandless Board voted to re-open the officer elections, and voted the McCandless officers in to replace the Myers officers.
10. After the January 14 election took place, members of the Minneapolis City Council and the Minneapolis Police Department recognized the McCandless officers as the properly-elected officers of JACC.
11. Plaintiffs now move for a TRO declaring that the Myers officers are the proper officers of JACC. The TRO as to the city officials is apparently a request to order them to publicly recognize the Myers officers as the proper officers of JACC.

The Dahlberg Factors:

12. Courts weigh the following five factors in determining whether to issue a temporary restraining order: 1. the nature of the parties' relationship prior to the current dispute; 2. the balance of the relative harms if the relief is granted or not; 3. the moving party's likelihood of success on the merits; 4. public policy; and 5. administrative burdens on the court in supervising and enforcing the order. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). Here, an analysis of the *Dahlberg* factors weighs against issuing a TRO.
13. First, the parties' relationship. The Plaintiffs' relationship with the JACC defendants has been contentious. The JACC meetings, at least from October 2008 through January 2009, have been dysfunctional, with the participants arguing about minutiae such as how to conduct a meeting, as opposed to having serious and productive discussions about taking action in furtherance of JACC's purpose. The Plaintiffs' past relationship with the City officials, the Police, and the City itself is not as apparently contentious. The Plaintiffs now raise a concern that the City and the Police are biased against them, and would thus use their police and other official powers unfairly against them. Overall, this factor is instructive in

understanding the posture of this case, but this factor alone does not weigh strongly in favor of or against issuing a TRO.

14. Second, the balance of relative harms. The McCandless officers have assumed authority over JACC. On the most basic level, the difference between a TRO being granted or denied is whether the Myers officers or the McCandless officers are running JACC. Both groups accuse the other of harming JACC by acting not in JACC's best interest. If Plaintiffs are correct that the McCandless officers are not properly elected, then JACC is constructively without leadership. However, JACC is apparently functioning on some meaningful level with the McCandless officers, so it is not without actual leadership. Officers are not compensated for their work, so there is no financial loss for anyone not in office who is claiming to be a proper officer. The overall balance of harms favors denying a TRO, because JACC is apparently able to function in the interim while this case progresses toward a final resolution.

15. Third, the Plaintiffs' likelihood of success on the merits. The by-laws clearly provide that both officers and directors are to be elected at the annual Board meeting in October. Here, the Myers officers were elected as officers on November 12, 2008. The McCandless Board was elected on January 12, 2009. The McCandless officers were properly elected as officers on January 14, 2009 as one of the first acts of the McCandless Board.
 - a. The by-laws presume that both officers and directors are always elected at the October board meeting. The by-laws are ambiguous about who is the "Board of Directors" that elects the new officers. A corporation's by-laws establish rules for the corporation's internal governance. *Issacs v. American Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn.App. 2004). By-laws are a contract, and are governed by rules of contract interpretation. *Id.* Whether a contract is ambiguous is a question of law. *Murray v. Puls*, 690 N.W.2d 337, 343 (Minn.App. 2004). A contract is ambiguous if it is reasonably susceptible to more than one interpretation. *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 644 (Minn.App. 1985). Here, Article VI, section 2 of the by-laws, which provides for officers to be elected by the "Board of Directors," is ambiguous because officer elections are to be held at the same meeting as director elections, yet directors are formally installed at a later meeting. However, it does not make sense to have the outgoing Board elect the incoming officers. Therefore, Article VI, section 2 is ambiguous as to whether 1. the newly-elected, incoming Board assumes authority to vote as the "Board" in the officer elections even though it will be formally installed at the next month's meeting; or 2. the outgoing Board is the "Board" that votes in the officer elections as its last "act." The latter seems an improbable interpretation because it would promote chaos and dysfunction by imposing the former Board's choice for officers on the incoming Board, who may not have elected the same individuals to govern the corporation

and who may not work well with the individuals elected by the outgoing Board.

- b. The spirit of the by-laws requires that the Board election be held first in time, so that the new Board elects the new officers. Here, by a majority vote, the election of directors was postponed from the October board meeting until January 12, 2009. The by-laws do not anticipate the directors being elected at a later meeting; the postponement threw JACC off of the strict election schedule of the by-laws. The January 14, 2009 meeting was the first regular meeting after directors were elected. The new dynamic of the McCandless Board may have played a role in the sudden call for an officer re-election, in an apparent move to "remove" the Myers officers. Calling for an immediate "re-election" is not contemplated in the by-laws and does not relieve the McCandless Board members of its obligation to comply with the letter and spirit of the by-laws. However, in this case, the Myers officers were elected before the McCandless Board was elected. Since the officers serve at the pleasure of the Board, it makes no sense to bind a new Board to the election decisions of the old Board. It appears that JACC's January 14, 2009 election of the McCandless officers shortly after electing the McCandless Directors was in (accidental) compliance with the spirit of the by-laws.
- c. The by-laws do not contemplate officer and director elections taking place other than at the annual October meeting. The absence of a provision on this issue creates an ambiguity in the by-laws and forces the Court to speculate on the duration of the terms for the McCandless Board members and McCandless officers, who were elected in January 2009. One reading would say the election cycle is permanently adjusted, moving the October election cycle to January, so that the McCandless Board members and McCandless officers are afforded the full duration of their terms as provided in the by-laws. Another reading would say the *ad hoc* change in election dates affects only the year in which the dates were altered, giving the McCandless Board and McCandless officers only the unexpired portion of the terms for their respective elected offices, which under the by-laws end in October of any given year. Either reading alters the by-laws without making a formal, written amendment. The latter reading is more appropriate because keeping the election cycle in October more closely conforms with the spirit of the written by-laws and preserves the integrity of the annual election cycle in the face of the Myers Board's decision to postpone the scheduled elections.
- d. Plaintiff Benjamin Myers argues he is the proper Vice Chair both by the November 2008 election and *ex officio* by his past-Chair status. The by-laws clearly provide that the current Chair is an *ex officio* member of all committees except the Nominating Committee, and that the past Chair is an *ex officio* member of the Board of Directors. It may have been the

practice of JACC for the immediate past Chair to become the Vice-Chair *ex officio*, but it is not mandated in the by-laws. Under the by-laws, the immediate past Chair is *ex officio* a member of the Board of Directors, so that he or she does not have to be elected to the Board immediately after serving as Chair. Benjamin Myers does not have any *ex officio* right under the by-laws to be the current Vice-Chair of JACC. Consistent with the analysis in paragraph 15(c) above, Benjamin Myers' *ex officio* term as a Board member expires in October 2009 (notwithstanding the fact that technically, E.B. Brown is the current, immediate past Chair).

- e. Based on the Court's interpretations of the ambiguous provision regarding officer elections, and the unambiguous provision regarding the past-Chair's *ex officio* Board status, the Plaintiffs are not likely to succeed on the merits. This factor is the most significant factor in deciding whether a TRO should issue in this case, and it favors denying a TRO.

16. Fourth, public policy considerations. The general theme of the public policy concern is "chaos." An outcome that is inconsistent with upholding the letter and spirit of the by-laws would diminish the integrity and enforceability of the by-laws. The result would be chaos because people would make material changes with assumed authority, and this group cannot even agree on how to enforce the letter of the by-laws. Another concern is that, given the history of disagreements within JACC, granting a TRO would force another sudden change in leadership, which would likely promote chaos by disrupting any stability the McCandless officers have had, and by forcing everyone having business with JACC to redirect focus to the Myers officers while this case plays out. The public policy factor weighs in favor of enforcing the letter and spirit of the by-laws by placing the greatest weight on the "likelihood of success" factor and denying a TRO.

17. Fifth, administrative burdens. The administrative burdens on the Court in granting and subsequently enforcing a TRO would be unreasonably high. Granting a TRO would require the Court to order and oversee the immediate re-installation of the Myers officers. The dynamics between the McCandless Board and the Myers officers would suggest that the McCandless Board would almost surely effect a change of officers. In accordance with the by-laws, the McCandless Board would be faced with either waiting until October 2009 (see paragraph 15(c) above), or formally removing the Myers officers under Article VI, section 3 of the by-laws. Given the current dynamic between these two groups, the McCandless Board would more likely choose the removal process. The Myers officers' renewed tenure would thus be relatively brief, fraught with conflict, and potentially ineffective. As such, an Order to re-install the Myers officers could be seen to violate the principle "the law abhors a useless act." It is also likely that every action by the Myers officers would be opposed, undermined, or ignored by the McCandless Board during the pendency of a TRO and any concomitant process for removal of officers, thus forcing the Court into the role of

arbiter over these disputes. These heightened administrative burdens strongly favor denying a TRO.

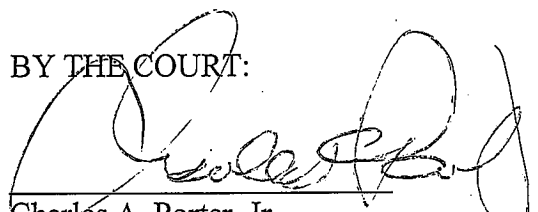
18. Based on the above analysis of the *Dahlberg* factors relative to this case, and especially in light the JACC by-laws, a TRO re-installing the Myers officers is not appropriate. If Plaintiffs wish to pursue a temporary injunction prior to a trial on the merits in this case, they should contact the Court, and an evidentiary hearing date will be set and a Scheduling Order consistent with that decision will be issued.

IT IS ORDERED:

1. Plaintiffs' Motion for a Temporary Restraining Order is hereby **DENIED**.

Dated: 3-11-09

BY THE COURT:


Charles A. Porter, Jr.
Judge of District Court