

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES**

IN RE: PETITION FOR BINDING ARBITRATION-RECALL DISPUTE

**Villas of West Miami Condominium
Association, Inc.,**

Petitioner,

v.

Case No. 2006-00-8498

Unit Owners Voting for Recall,

Respondent.

_____ /

SUMMARY FINAL ORDER

This final order is entered pursuant to rule 61B-50.119(2), Florida Administrative Code, which allows the arbitrator to summarily enter a final order denying relief and certifying the recall if the arbitrator finds that no preliminary basis for relief has been demonstrated in the petition and where no disputed issues of material fact exist.

On February 13, 2006, Villas of West Miami Condominium Association, Inc. (petitioner or association), filed a petition for recall arbitration pursuant to rule 61B-50.105(1)(b), Florida Administrative Code, seeking affirmation of its decision not to certify a recall by written agreement. The petitioner is a condominium association consisting of 49 units, with each unit having one vote; therefore, 25 units must vote in favor of a recall for it to be effective. The recall agreement was served on the board on January 31, 2006, and sought to recall all three members of the association board: Rosa Gonzalez, Eunice Morales, and Minerva Hechavarria.

The petition for recall arbitration filed with the Division generally complied with

rule 61B-50.105(5), Florida Administrative Code, although it was not signed by an attorney or a "qualified representative." The petition was signed and submitted by the association manager, Caridad (a/k/a "Carina") Kremen. Ms. Kremen was present at the meeting held on February 6, 2006, at which the board determined not to certify the recall, and at that meeting, Ms. Kremen recorded the meeting minutes. On February 21, 2006, an Order Requiring Posting and Order Allowing Respondent to Answer was issued and the respondent, by and through its unit owner representative, Ana Somarriba, filed an answer denying all assertions made in the petition for arbitration.

At the February 6, 2006, meeting, the board unanimously voted not to certify the recall agreement. The minutes of the meeting do not indicate, however, any reason or reasons why the board voted not to certify the recall. The minutes merely provide that a motion was made and subsequently carried by unanimous vote, "to dispute the recall petition and refer it for recall arbitration with the Dept. of Business and Professional Regulation in Tallahassee."

Rule 61B-50.105(5)(h), Florida Administrative Code,¹ requires all petitions for recall arbitration to contain, among other things:

Each specific basis upon which the board based its determination not to certify the recall, including the unit number and specific defect to which each challenge applies. Any specific reasons upon which the board bases its decision not to certify the recall that is stated in the petition for recall arbitration, but absent from the board meeting minutes or attachments thereto, shall be ineffective and shall not be considered by the arbitrator. . . .

In this case, the minutes are absent any basis for the rejection of the recall agreement. Even though the petitioner included in the petition for arbitration what appears to be a meeting sign-in roster used as a recall tabulation sheet (all 49 unit

¹ Rule 61B-23.0028(4)(d), Florida Administrative Code, governing recalls in condominiums also requires the board to record in the meeting minutes the "specific reasons" why the recall was not certified.

owners are listed on the sheet, with various markings, checks, and notations next to the 30 units for which votes were cast in the recall attempt), the minutes make no reference to the tabulation sheet. Therefore, the reasons for rejection of the recall contained in the petition for arbitration or noted on the attached tabulation sheet cannot be considered by the arbitrator. Furthermore, had the tabulation sheet been referenced in the meeting minutes, it is highly questionable whether or not the cryptic notations made on the tabulation sheet meet the specificity requirements of rules 61B-23.0028(4)(d) and 61B-50.105(5)(h), Florida Administrative Code.

The purpose of requiring the reasons for rejecting a recall to be specified in the meeting minutes is to ensure that the grounds for the board's decision to reject a recall are articulated in such a way that the board's action at the meeting can be reviewed by an arbitrator. See *Hibiscus Gardens Condo., Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 2005-00-9561, Summary Final Order (March 31, 2005)(reasons contained in the petition for arbitration which are not stated in the minutes of the board meeting may not be considered by the arbitrator); *The Village of Kings Creek Condominium Association, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 99-1919, Final Order Certifying Recall (November 1, 1999)(the arbitrator's charge in a recall arbitration proceeding is to review and determine the reasonableness of the action taken by the board in voting not to certify a recall based on the evidence before the board at the time the board voted not to certify the recall and the board's reliance on that evidence); *Sterling Condominium Association, Inc. v. Group Members of the Association Voting for Recall*, Arb. Case No. 94-0126, Summary Final Order (May 4, 1994)(where the board failed to advance reasons for its decision not to certify the recall, those reasons could

not be later asserted as justification for the board's refusal to certify the recall). Furthermore, the obligation of the board to include in the meeting minutes its specific reasons for rejecting the recall promotes good faith in the board's determination of the recall effort.

In *Board of Directors of Boca Cove Home Condominium Association, Inc. v. Martin*, Arb. Case No. 93-0261, Summary Final Order Certifying the Recall (November 30, 1993), the arbitrator overturned the board's refusal to certify a recall, reasoning as follows:

The board of directors of an association has the obligation to act in good faith when determining whether to certify a recall agreement. If the majority of the voting interests have signed a recall agreement and the written agreement substantially complies with the requirements of Rule 61B-23.0028, the board must certify the agreement, and the affected board member is recalled effective immediately. **If the board decides not to certify the agreement, it must have a legitimate reason for refusing to do so and the specific reasons must be set forth in the minutes of the meeting. The decision to certify the agreement or not to certify the agreement must be made by the board at the board meeting based upon legitimate grounds articulated at the meeting.** [emphasis added]

In this case, only in the petition for arbitration does the association provide reasons for rejecting the recall. They are:

1. The ballots appeared to have been pre-marked.
2. Eight votes appeared to have been signed by non-unit owners.²
3. No unit owner representative was provided in the agreement; when completing their ballots, each unit owner listed him- or herself as the unit owner representative.³

² This assertion is apparently based on a comparison of ballots to the sign-in roster on file with the association (as well as other documents such as mortgage settlement statements), although it was impossible for the arbitrator to determine from the petition and the sign-in roster which eight units were being challenged. Sign-in rosters are often incorrect and therefore an association is cautioned in reliance thereof. See *Cape Palms Condo. Assoc., Inc. v. Unit Owner Voting for Recall*, Arb. Case No. 03-07-9946, Summary Final Order (January 28, 2004)(the recorded deeds in the official county records offer the best available method of determining the owner(s) of a unit for the purposes of a recall).

³ Failure to designate a unit owner representative within the recall agreement is immaterial in this instance. See *Habitat II Condo., Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 97-0073, Final Order (April 29, 1997).

Although pre-marked ballots would certainly invalidate an otherwise effective recall,⁴ because the board failed to raise this issue at the board meeting and made no indication in the meeting minutes, the petitioner is barred from later asserting a challenge in the petition for arbitration.⁵

As no reasons for rejecting the recall agreement were raised at the board meeting, the arbitrator may only look to the facial validity of the recall agreement in deciding whether or not to certify the recall. See *Hibiscus Gardens Condominium, Inc. v. Unit Owners Voting For Recall*, Arb. Case No. 2005-00-9561, Summary Final Order (March 31, 2005)(the arbitrator may look only to the facial validity of the recall agreement to determine whether it substantially complied with the administrative rules for recall in a condominium). Here, the ballots utilized by the respondent were identical to, if not copies of, the sample recall ballot provided on the Division's website at www.myflorida.com/dbpr/lsc/arbitration. It appears that all 30 of the ballots submitted as the recall agreement were properly completed by the respective unit owners. A total of 30 votes were attained for each member sought to be recalled (25 votes are needed to successfully recall a board member). As the recall agreement served on the board consisted of 30 votes to recall Rosa Gonzalez; 30 votes for Minerva Hechavarria, and 30 votes for Eunice Morales, and because the undersigned finds that, facially, the recall agreement substantially complies with rule 61B-23.0028, Florida Administrative Code, all three board members are recalled.

Based on the foregoing, it is

⁴ See, e.g., *Maya Marca Condo. Apts., Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 2004-05-8005, Summary Final Order (February 9, 2005)(computer-generated checks in the recall spaces of the ballots that were marked before the owner was given the ballot, did not substantially comply with rule 61B-23.0028(1), Fla. Admin. Code, and therefore the recall agreement was invalid).

ORDERED:

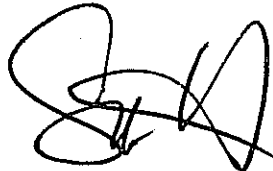
1. The recall of Rosa Gonzalez, Eunice Morales, and Minerva Hechavarria is hereby CERTIFIED.

2. Rosa Gonzalez, Eunice Morales, and Minerva Hechavarria shall step down as directors of the board, immediately.

3. Any and all official records of the association still in the possession of Rosa Gonzalez, Eunice Morales, and Minerva Hechavarria shall be turned over to the remaining board members within five (5) business days from the date of this order.

4. The replacement directors of the board shall be Ana Somarriba, Luis Dominguez, and Isabel Chambrot, who shall serve for the remainder of the term for each seat replaced, respectively.

DONE AND ORDERED this 17th day of March, 2006, at Tallahassee, Leon County, Florida.



Susan Wilkinson Harnden, Arbitrator
Division of Florida Land Sales, Condominiums,
& Mobile Homes
Dept. of Business & Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029

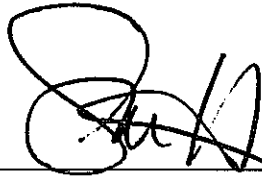
⁵ Of course, where the board fails to indicate that ballots were pre-marked in the meeting minutes but such pre-marking is evident on the face of the recall ballot(s), the arbitrator will not to certify the recall because the ballots are void *ab initio*. This is not the case here.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Order has been sent by U.S. Mail to the following persons on this 17th day of March, 2006:

Villas of West Miami Condo. Assoc., Inc.
c/o Caridad Kremen
160 NW 176 Street, Suite 406-3
Miami, FL 33169

Ana Somarriba
6690 SW 12 Street, Unit #4
Miami, FL 33144
Unit Owner Representative



Susan Wilkinson Harnden, Arbitrator