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

IN RE: PETITION FOR RECALL ARBITRATION

CRESTVIEW TOWERS
CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

v. **Case No. 2005-05-9559**

UNIT OWNERS VOTING FOR RECALL,

Respondent.
/

SUMMARY FINAL ORDER

Rule 61B-50.119(2), Florida Administrative Code, provides: "At any time after the filing of the petition, if no disputed issues of material fact exist, the arbitrator shall 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."

BACKGROUND

On November 16, 2005, Crestwood Towers Condominium Association, Inc., (association or petitioner) 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 petition for recall arbitration did not comply in any visible respect with rule 61B-50.105, Fla. Admin. Code. The association was directed to supplement the petition with the information required by rule 61B-50.105, with the recall agreement, and with the minutes of the recall board meeting.

Thereafter, the petitioner obtained the services of an attorney and requested an extension of time in which to file the supplement, which request was granted in part.[1] On December 16, 2005, an amended petition for arbitration was filed with the required exhibits attached. The group of unit owners who voted to recall the board members was named as the respondent in accordance with section 718.112(2)(j)3., Florida Statutes (2003) and rule 61B-50.107(3), Fla. Admin. Code.

After the amended petition was filed, a case management conference was held to discuss the case on December 23, 2005. The amended petition contained a lengthy list of ballots, identified by unit, and the reasons each should be declared invalid. Some of the reasons would have been valid reasons for rejecting a ballot, other reasons were not. However, the minutes of the recall board meeting did not suggest that the board found those ballots to be invalid or rejected the recall for any of the reasons stated in the amended petition. During the conference call, petitioner's counsel suggested that the individual ballots were discussed at the meeting, but just not included in the minutes. Therefore, the petitioner was given until December 30, 2005, to file a video or audio tape of the recall board meeting. The petitioner was advised that, in the absence of proof that the board discussed the recall agreement and rejected the individual ballots for the reasons given in the amended petition, the recall would be certified.

The petitioner did not file a video or audio tape on or before December 30, 2005. Instead, on December 30, 2005, the petitioner filed a request for an extension of time in which to file the tape on the grounds that the board's president, who had the material,

[1] Petitioner requested a thirty-day extension of time and was granted a ten-day extension.

was out of town. The request for an extension of time was not granted. This proceeding had already been unnecessarily delayed due to the petitioner's inability to timely file a petition containing the necessary information and exhibits. This final order is based on the undisputed facts alleged and the materials filed by the parties.

FACTS

1. The petitioner is a condominium association with 155 voting interests, with each unit having one vote. Therefore, 78 units must vote in favor of a recall for it to be effective.

2. On November 3, 2005, the board of directors, through its president, Dolores Louzan, was served with a written recall agreement consisting of 88 separate ballots. Each of the ballots sought to recall all five board members: Delores Louzan, Jirssy Sorribes, Isaak Goldin, Juan Carlos Collazo, and Ruben Mendez.

3. Notice of the board meeting held to address the recall agreement stated, "We are under a Recall Process, and under law we have to let you know that we have 5 business days to either Certify or not Certify the Recall. We have to hold on Wednesday November 9, 2005 at 10 AM General Meeting on which we'll have to let you know our decision."

4. A board meeting was held on November 9, 2005, to discuss the recall agreement. The following statement constitutes the minutes of the meeting in its entirety:

> A quorum of the Board of Directors held today a meeting at 10 A.M. to inform all unit owners about our decision to not certify the Recall and file for Arbitration.

There was nothing else. The board did not provide any reasons the written recall agreement was not being certified.

5. The petition for arbitration was filed on November 16, 2005. The reasons given in the original petition and attachments, filed by the association without the assistance of counsel, were as follows:

a. "Since the elections have been interrupted by this recall process, we want to hold another election date on January 26, 2006."

b. "This recall was done by confusing people and trying to let them think by the people doing the Recall that they were gathering signatures for the Elections, instead of a Recall."

c. "The people that are doing the Recall are followers and friends of the people that were at [sic] the former Board that was recalled in June of this year. They are trying to come back again…that is why they are persuading this [sic] people to remove us and to obstruct the Election Process…. They couldn't wait for a normal Election…."

d. "[O]ur only interest is to give again the chance to the people that want to run in [sic] the Board through a normal Election…."

CONCLUSIONS

The minutes of the board meeting are not sufficient to support the allegations in the amended petition for arbitration. The minutes of the board meeting must be specific, and any reasons for rejection of a ballot set forth in the petition for arbitration that are not found in the minutes may not be considered by the arbitrator. Rule 61B-50.105(5)(h), Fla. Admin. Code; *see also, e.g.*, *Pendleton Club Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 01-3686, Summary Final Order (September

28, 2001)(the board's general conclusory allegations that the recall was illegal or otherwise invalid are not sufficient; objections to ballots must be specific); *Hibiscus Gardens Condo., Inc. v. Unit Owners Voting for Recall*, Case No. 2005-00-9561, Summary Final Order, (March 31, 2005)(reasons contained in the petition which are not stated in the minutes of the board meeting may not be considered).

In this case, the minutes failed to provide any information concerning the reasons for denying the recall. The original petition, filed by the association's president, indicated that the reasons for refusing to certify the recall were related to the association's fear that the certification of the recall would have an effect on the upcoming election. Even if that were true, which it is not, it is not a sufficient reason for refusing to certify the recall. In addition, the minutes do not indicate that any reasons for rejecting the recall were discussed at the board meeting. It appears that the refusal to certify the recall was simply announced by the board.

In *The Villages of Kings Creek Condo. Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 99-1919, Final Order Certifying Recall (November 1, 2005), the arbitrator discussed the specificity required of the board in rejecting a recall agreement, as follows:

> To provide the specificity required, the board at its meeting and in its minutes, must either list the unit identification for each unit subject to an objection, the number of units subject to each objection, or otherwise satisfy the arbitrator that the specific objections contained in the petition for arbitration fairly reflect the basis of the board's decision. The minutes in this case do neither.

Because the minutes of the November 9, 2005, board meeting did not establish that the board gave any reasons for the refusal to certify the recall, the board's action

could not be sustained unless the petitioner could establish that the specific reasons for rejecting the identifiable ballots specified in the amended petition were articulated at the board meeting, but simply were omitted by the secretary of the association in the minutes.

> The reason that a petition cannot include a reason for rejecting a recall agreement that is not set forth in the minutes is because the minutes are supposed to accurately depict what was done at the board meeting. Therefore, any reasons not in the minutes are presumably reasons the board did not consider in reaching its decision. However, when the minutes are in error, what actually happened at the board meeting is what must be considered by the arbitrator. See, e.g., The Board of Directors of Boca Cove Condo. Ass'n v. Martin, Arb. Case No. 93-0261, Final Order (November 30, 1993)(where only ground raised sufficient to support rejection of the recall agreement was not reflected in the minutes, petitioner was allowed to supplement the record with the tape recording of the meeting in an effort to allow the board to establish that the pertinent ground was raised at the board meeting).

Maya Marca Condominium Apartments, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 2004-05-5661, Order Granting Motion to Amend (January 4, 2005).

In this case, the petitioner asserted during a conference call that the ballots identified in the amended petition were specifically rejected by the board at the meeting. However, the association did not include a tape of the meeting in the attachments to the amended petition, even though the minutes were clearly inadequate to support the list of invalid ballots set forth in the amended petition, and was unable to produce a tape within the additional time provided. Further, the language used in the minutes and in other documents strongly suggests that there was no discussion of the recall agreement at the November 9, 2005, meeting. Rather, the decision not to certify the recall was simply announced.

It seems a bit ironic that these board members, who came into office as a result of a prior recall effort that was certified due to the board's failure to discuss the recall agreement at the board meeting, would fail to provide any reasons for rejecting the recall agreement directed at them. In the earlier recall case, *Crestview Towers Condominium Ass'n, Inc., v. Unit Owners Voting for Recall,* Arb. Case No. 2005-04-9941, Summary Final Order on Petition for Recall Arbitration (June 14, 2005), the arbitrator was provided with a video tape of the board meeting because the minutes were insufficient to support the reasons for rejecting the recall provided in the petition for arbitration. The arbitrator noted that "the video tape of the meeting supports a conclusion that the board called the recall meeting to *announce* that the recall had not been certified rather than to make an informed decision on the recall agreement. Neither the written recall agreement as a whole nor any of the individual ballots even appeared to be present at the meeting." The order continued:

> In *The Village of Kings Creek, supra,* the arbitrator stated,
>
> > The arbitrator's charge in these proceedings is to review the reasonableness of the action taken by the board in voting not to certify the recall. She must review the evidence before the board at the time it voted and the reasons relied on by the board in its vote. (e.s.)
>
> The minutes suggest that the board made a decision at the meeting not to certify the recall for the reasons stated, and the video tape indicates that the reasons given at the meeting were set forth fully in the minutes. As stated earlier, those reasons are insufficient to support the rejection of the 25 ballots identified in the petition for arbitration. *See The Moorings Condo. Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 2003-06-5615, Summary Final Order (June 30, 2003)(where no ballots, names or unit numbers were listed in the minutes, statement that recall was rejected because of "questionable signatures" was insufficient to support rejection of recall agreement). …

As stated in *Board of Directors of Boca Cove Home Condominium Association, Inc. v. Martin*, Arb. Case No. 93-0261, Summary Final Order Certifying Recall (November 30, 1993):

> 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 immediately. If the board decides not to certify the agreement, it must have a legitimate reason for refusing to do so and the specific reason or reasons must be set forth in the minutes of the board meeting. <u>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</u>. (e.s.)

In this case, the minutes of the board meeting were insufficient to support the board's rejection of the recall agreement. The petitioner was given the opportunity to establish that the specific reasons for rejecting the recall were articulated at the board meeting…." The petitioner was unable to do so; therefore, the written recall agreement must be certified.

As in the earlier recall case, this written recall agreement must be certified due to the failure of the board to provide legitimate reasons for not certifying the recall at the board meeting.

It must be noted that the board's concern that certification of the recall would affect the annual election, as well as being inconsequential, is also unfounded. When the majority of a board is recalled, the persons listed as replacement board members take the place of the board members recalled and stay in office only as long as the recalled board members would have stayed in office. If an election is scheduled to be held three weeks after a recall is certified, and all board seats are up for election, then the replacement board members would only be in office for three weeks. They would take over the duty of ensuring that the election is held as scheduled, assuming the

election has been properly noticed and scheduled. Thus, an upcoming election should have no effect on a board's decision concerning certification of a recall agreement.[2]

Therefore, based on the foregoing, it is

ORDERED:

The recall of board members Delores Louzan, Jirssy Sorribes, Isaak Goldin, Juan Carlos Collazo, and Ruben Mendez is hereby **CERTIFIED**. The recall is effective immediately. Any association records in the possession of any of the recalled board members shall be given to the new board within five (5) days of the date of this order. As the entire board has been recalled, the replacement board members, Michael A. Martinez, Mirtha A. Arnal, Antonio Rodriguez, Martin Rojas, and James Gilligan, shall immediately take the seats of the recalled board members in accordance with rules 61B-23.0028(3)(b)4. and (6)(d), Florida Administrative Code.

DONE AND ORDERED this 4th day of January, 2006, at Tallahassee, Leon County, Florida.

_____

Diane A. Grubbs, Arbitrator
Dep't of Business and Professional Regulation
Arbitration Section
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1029

[2] Of course, if an election is imminent, the recall may become moot before the arbitrator can determine whether the agreement should be certified or the board's decision not to certify approved.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail and facsimile copy to the following persons on this 4th day of January, 2006:

Hugo V. Alvarez, Esquire
Richard L. Barbara, Esquire
COLE, SCOTT & KISSANE
Pacific National Bank Building
1390 Brickell Avenue, Third Floor
2025 N.E. 164 Street
Miami, Florida 33131
FAX: (305) 373-2294
Counsel for Petitioner

Michael A. Martinez, Representative
2025 N.E. 164 Street, Unit 219
North Miami Beach, Florida 33162
FAX: (954) 499-9668
Unit Owner Representative

_____
Diane A. Grubbs, Arbitrator