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

IN RE: PETITION FOR RECALL ARBITRATION

BAYSIDE KEY HOMEOWNERS ASSOCIATION, INC.,

Petitioner,

v. **Case No. 2005-05-7957**

HOMEOWNERS VOTING FOR RECALL,

Respondent.
_________________________________/

SUMMARY FINAL ORDER ON PETITION FOR RECALL ARBITRATION

Rule 61B-80.114(2), Florida Administrative Code, provides: "At any time after the filing of the petition, if the parties do not dispute the important facts in the case, the arbitrator shall summarily enter a final order denying relief requested in the petition if the arbitrator finds that no preliminary basis for relief has been demonstrated in the petition."

On November 4, 2005, Bayside Key Homeowners Association, Inc., (association or petitioner) filed a petition for recall arbitration pursuant to section 720.303(10)(d), Florida Statutes, and rule 61B-80.105(1)(b), Florida Administrative Code, seeking affirmation of its decision not to certify a recall by written agreement. The petition for recall arbitration generally complied with rule 61B-80.105, Florida Administrative Code. The group of unit owners who voted to recall the board members was named as the respondent in accordance with section 720.303(10)(d), Florida Statutes; the respondent

filed an answer to the petition on January 6, 2006. [1]

The petitioner is a condominium association with 142 voting interests, with each lot having one vote; therefore, 72 homeowners must vote in favor of a recall for it to be effective.

On October 25, 2005, the board of directors, through its manager Leslie Randolph, LCAM, of Sentry Management, was served with a written recall agreement consisting of 79 separate ballots. Each of the ballots sought to recall all three board members: Melvin W. Hert, Amie Greania, and Maurice Spoon.

On October 31, 2005, the board of directors met to review the recall agreement and determined not to certify the recall agreement. The minutes of the recall board meeting provide the following reasons for refusing to certify the agreement:

> A motion was made to not certify the recall for the following reasons:
> 1. No recall agreement was ever served on the board as required by Section 720.303, Florida Statutes.
> 2. A sufficient number of members who agreed to the recall revoked their agreement to recall prior to service on the board.
>
> After discussion, the motion was approved and the meeting adjourned at 8:30 PM

The petition for arbitration alleged that the recall agreement was rejected because “the delivery of the recall package to the Association’s former manager was disputed as not being proper service upon the Association.” The recall agreement was

[1] Although rule 61B-80.106(2), Fla. Admin. Code., states that “every homeowner who voted in favor of recall and who did not revoke his or her vote prior to service on the board of the recall agreements shall be deemed to be a party in the recall arbitration proceeding,” the homeowners are not parties to the arbitration proceeding individually. The homeowners, as a group, have a representative who is served with the pleadings and is authorized to respond on behalf of the group. The homeowners are not considered individual parties. None of the homeowners voting for recall may file an individual response to the petition, none may file a motion or any other paper with the arbitrator, and none can confess error or withdraw their individual ballot.

served on Leslie Randolph of Sentry Management, the association's management company, whose principal had attempted to resign as the association's registered agent on October 25, 2005, the same day the written recall agreement was served on the management company. The association had been engaged in the process of terminating the management company. Indeed, the association's notice of the recall board meeting also included the item: "Discuss Terms of Termination of Sentry Management, Inc. Service Agreement Effective October 27, 2005."

The petition for arbitration also asserted that eight (8) of the seventy-nine (79) ballots were invalid because they did not contain the signature of an owner "based upon the current enclosed unit owner roster, which was maintained by the former management company, Sentry Management, Inc." The petition did not indicate which of the 79 ballots contained a signature not on the unit owner roster, and the minutes of the recall board meeting did not mention the rejection of eight ballots as not containing a unit owner's signature.

On December 20, 2005, a conference call to define the issues was held during which it was noted that the allegation in the petition, that eight ballots were rejected for the failure to have a unit owner's signature, was not supported by the minutes of the board meeting. Counsel for the association stated his understanding that the eight ballots were discussed at the board meeting as a basis for rejecting the recall agreement, though they were not mentioned in the minutes. During the hearing, counsel for petitioner also explained that the reason the petition for arbitration did not allege any facts or argument concerning the revocation of some of the recall ballots, which was a reason set forth in the minutes for rejecting the recall agreement, was that

the rescissions were all dated *after* the date the association manager was served with the recall agreement.

At the time of the conference call, it became apparent that there was only one issue outstanding—whether service on the board was effective—unless the association could establish that the board had identified and rejected eight ballots for lack of an owner's signature. The association was given until December 30, 2005, to produce a video or audio tape of the board meeting that would establish that the board rejected the eight ballots allegedly not signed by homeowners.

The petitioner did not produce a video or audio tape of the board meeting. However, on December 29, 2005, the association submitted the affidavit of the new property manager. In the affidavit, the property manager states that there was no audio or video tape made of the board meeting. The affidavit states that the board did not have the recall ballots in its possession at the meeting; that the reason "for not being in possession of the recall ballots in the Association's records were discussed;" that the records "had been requested from Sentry Management;" that the transition between property managers had caused confusion; that "not having the actual ballots in their possession, the Board of Directors was not able to make specific findings on the record as to potential defects;" that there were allegations that the ballots had been pre-marked; that association members at the board meeting expressed their desire to "recant their ballots;" and that a motion was made at the meeting not to certify the recall on the basis of the above-mentioned concerns. The affidavit continued that the financial records have now revealed that several homeowners were delinquent in their payment of assessments as of the recall date, that the board has the authority to suspend the

voting rights of any member who is delinquent in their payment of assessments, and that, accordingly, the 17 persons listed on an attached list were not eligible to vote and their recall ballots should be rejected. [2]

The affidavit is not a video or audio tape, which is what the association was authorized to file to support its allegation in the petition for arbitration that eight ballots were identified at the board meeting as being invalid for lack of a proper signature. Additionally, the affidavit did not verify that the eight ballots alleged to be invalid in the petition were even discussed at the board meeting. Instead, the affidavit stated that defects in the ballots could not be discussed at the meeting because the ballots were not at the meeting. The affidavit also attempted to raise new issues regarding the ballots that were not mentioned in either the minutes of the meeting or the petition for arbitration.

According to the minutes, the board determined not to certify the recall because "[n]o recall agreement was ever served on the board as required by Section 720.303, Florida Statutes", and because "[a] sufficient number of members who agreed to the recall revoked their agreement to recall prior to service on the board." There were no other statements in the minutes regarding the reasons the written recall agreement was not being certified.

Because the revocations used as a basis for rejecting the recall agreement were provided to the board after service of the recall agreement, none of those rescissions

[2] Although this allegation cannot be considered by the arbitrator since it was not considered by the board, an after-the-fact revocation of voting rights, in eight cases based on delinquencies of $2.00 or less, would certainly be questionable even had it been raised at the board meeting.

are valid. Fla. Admin. Code R. 61B-81.003(5)(a); *see also, e.g., Barwood Condominium III Ass'n, Inc. v. Unit Owners Voting For Recall*, Arb. Case No. 02-4680, Summary Final Order Certifying Recall (April 11, 2002)("Arbitration precedent is clear that revocation of a recall ballot, received after the board has been served with the recall agreement is ineffective.")[3]

The minutes of the board meeting are not sufficient to support the allegations in the petition for arbitration regarding the eight allegedly invalid ballots. The minutes of the board meeting must be specific, and any reasons for rejecting 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-80.102(3)(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 mention that any ballots were being rejected because they were signed by someone other than a homeowner, let alone identify those ballots. Unless the board has indicated the specific ballots rejected or cited a reason for rejection that is clear from the face of the individual ballots, the rejection of a ballot is

[3] Cases involving condominium association recalls are cited as precedent because the statutes and rules governing homeowners association recalls and condominium association recalls are almost identical.

invalid.

> 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 *The Village of Kings Creek Condominium Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 99-1919, Final Order Certifying Recall (November 1, 1999), 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.)

In *Fosca Condominium Association, Inc. v. Unit Owners Signing the Recall Agreement*, Arb. Case No. 93-0373, Summary Final Order (December 29, 1993), the arbitrator noted that if a board of directors

> decides to reject the recall effort, it carries the burden of meeting the strict requirements of the statute and rules. One of these requirements is that the minutes must state the specific reasons why the board rejected the recall effort. Previous arbitration decisions have underscored this requirement and barred from the complaint any allegations of deficiencies in the recall petitions which were not also set out in the board meeting minutes. (citations omitted)

In this case, the minutes state that the board made a decision at the meeting not to certify the recall for two reasons. The association was unable to provide a video or audio tape of the board meeting establishing that the board rejected ballots for any other reason. The affidavit of the association manager did not support the allegation in the petition that eight ballots were rejected by the board based on invalid signatures, and the association could not use the affidavit of the association manager to propose new reasons for rejecting the recall agreement.

Obviously, members of the board, the attorney for the board or anyone else so designated may review the written recall agreement *prior* to the board meeting to determine whether the agreement meets the statutory and rule requirements and to ensure that each ballot has been signed by the person with authority to vote for the particular unit. However, the persons so designated must then report their specific findings to the board at the recall board meeting, and the board must then review those findings and determine whether to accept them in whole or in part. The action of the board at its meeting is the action that is reviewed by the arbitrator. According to the manager's affidavit, at the board meeting the board "was concerned about the accuracy of the ballots and referred them to the Association's attorney for review." The board cannot reject a recall agreement because it has "concerns" about the validity of the ballots and then assign the task of determining what the concerns are to an attorney or property manager. 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>. <u>The board cannot decide not to certify the agreement and then assign counsel the task of coming up with the reasons</u>. (e.s.)

Based on the minutes of the board meeting, the only remaining reason for not certifying the recall is that service of the recall was ineffective. However, from the pleadings and the documents submitted, it is undisputed that the recall agreement was served on the property manager on October 25, 2005. There is no dispute that the person and agency served was the association's manager as of October 25, 2005. Indeed, the notice of the recall board meeting also contained notice that the termination of the property manager's services as of <u>October 27,</u> 2005, would also be discussed. Rule 61B-81.003(1)(g), Florida Administrative Code, provides that

> The written agreement or a copy shall be served on the board by certified mail or by personal service. …Service of the written agreement on an officer, **association manager**, board director or the association's registered agent will be deemed effective service on the association. (e.s.)

The minutes of the board meeting do not explain why the board found service to be ineffective, but from the comments in the petition and in the affidavit, it appears to be due to the fact that the association was in the process of terminating the services of Sentry Management and that James W. Hart, "principal of Sentry Management," had sent to the Department of State his resignation as the association's registered agent.

Nevertheless, the recall agreement was served on the association's manager, Leslie Randolph. Service on an association's manager is effective service on the association. The statement in the minutes that "[n]o recall agreement was ever served on the board as required by section 720.303, Florida Statutes" is lacking any facts to explain the basis for the board's belief that service was not in compliance with section 720.303, Florida Statutes. Additionally, there were no allegations in the petition for arbitration, the minutes, or the affidavit stating that Ms. Randolph and Sentry Management had refused to deliver or failed to deliver the recall agreement to the board. The only allegations were that Sentry Management had not provided the new management company with all of the association's records at the time of the board meeting and that the ballots were not present at the meeting.

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 supplement the record with a video or audio tape of the board meeting to support the contention in its petition that eight ballots were rejected for improper signatures, but the petitioner was unable to do so. Since the board's reasons for rejection of the written recall agreement articulated in the minutes are insufficient, the recall must be certified.

Therefore, based on the foregoing, it is

ORDERED:

The recall of board members Melvin W. Hert, Amie Greania, and Maurice Spoon 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, David Tyre, Lee Stefanakos, and Joe Federsol, shall immediately take the seats of the recalled board members in accordance with rules 61B-80.003(3)(b)4. and (6)(d), Florida Administrative Code.

DONE AND ORDERED this 24th day of January, 2006, at Tallahassee, Leon County, Florida.

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

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 24th day of January, 2006:

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