

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

**IN RE: PETITION FOR ARBITRATION**

**JOAN M. SCARIATI,**

**Petitioner,**

**v.**

**Case No. 2005-02-1485**

**THE VILLAGES AT EMERALD LAKES ONE  
CONDOMINIUM ASSOCIATION, INC.,**

**Respondent.**

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**SUMMARY FINAL ORDER**

This Summary Final Order is entered pursuant to Rule 61B-45.030(3), Fla. Admin. Code, which provides that “[a]t any time after the filing of the answer, and if no disputed issues of material fact exist, the arbitrator shall summarily enter a final order awarding relief if the arbitrator finds that no meritorious defense exists, and that the petition is otherwise appropriate for relief.”

**BACKGROUND**

Joan M. Scariati, petitioner, filed a petition for arbitration on April 8, 2005, naming The Villages at Emerald Lakes One Condominium Association, Inc., (association) as the respondent. Among other things, the petition alleged that the association held a meeting on March 22, 2005, to consider a written recall agreement seeking the recall of Ms. Scariati; that the association improperly conducted that meeting in that Ms. Scariati was not permitted to examine or view the recall agreement either before or during the board meeting; that petitioner was only shown a blank form without any signatures; that the format of the written agreement did not meet the criteria of rule 61B-23.0028, Florida

Administrative Code; and that a majority of all the voting interests did not support the written recall agreement.

In response to the Order Requiring Answer, the respondent filed a motion to dismiss on May 31, 2005, which alleged that the petition should be dismissed because the petitioner had not given the association sufficient pre-arbitration notice pursuant to section 718.1255(4)(b), Florida Statutes. The motion was denied on June 7, 2005, on the grounds that pre-arbitration notice was unnecessary when a petition for arbitration challenged a board's certification of a recall, just as it was unnecessary in a recall case brought by the board pursuant to section 718.112(2)(j)3., Florida Statutes. Additionally, the board was put on notice by the petitioner prior to certification of the recall that she did not believe certification was appropriate.

On June 27, 2005, the respondent filed its answer. In its answer, the association admitted the petitioner's paragraph four, which alleged that the petitioner was denied access to the written recall agreement both before the board meeting, for the purpose of validating signatures, and during the board meeting.

Although the Order Requiring Answer specifically required that the respondent attach a copy of the written recall agreement and the minutes to the answer, and the answer stated that the written recall agreement was attached to the answer as Exhibit A, it was not. On June 30, 2005, an Order Requiring Supplemental Material was entered that required the respondent to supplement its answer to the petition with supporting documentation and factual allegations. Specifically, the association was directed to file a copy of the written recall agreement and the minutes of the recall board meeting. Further, the respondent was required to provide facts related to the recall by

written agreement including the date the agreement was served on the board, the number of board members, the name of the board member appointed to the petitioner's position, the number of voting interests in the association; the number of ballots or votes contained in the written agreement; and the number of ballots or votes the association found to be valid. On June 29, 2005, respondent's Exhibit A, a copy of the recall agreement, was faxed to the arbitration section. It was received by mail on July 5, 2005.

On July 11, 2005, the association filed its Supplement to Respondent's Answer, which contained a statement of facts. The supplemental facts did not include most of the information required by the June 30, 2005, order. It did not include the number of board members, the number of voting interests in the association, the number of ballots or votes contained in the written agreement, and the number of ballots or votes the association found to be valid. It stated that no one had been appointed to fill Ms. Scariati's position, which subsequently was found to be incorrect.

In her response to the supplemental answer and written recall agreement, petitioner alleged that the written recall agreement was deficient because a majority of the unit owners had not signed it. Petitioner alleged that there were duplicate signatures.

After the respondent and petitioner failed to comply with the deadline of August 22, 2005, for filing required supplemental information, a case management conference was held by telephone conference call on August 30, 2005. During the conference call, the association admitted that not enough voting interests had signed the written recall agreement to constitute a majority of the voting interests.

## FACTS

1. Petitioner is a unit owner at The Villages at Emerald Lakes One Condominium Association. She was a board member and the president of the association for quite a while. In January, 2005, the petitioner was again elected to the board of directors. Subsequently, certain unit owners attempted to garner support for the recall of Ms. Scariati.

2. Initially, the unit owners seeking Ms. Scariati's recall were planning a recall by vote at unit owners meeting scheduled for March 29, 2005. However, those plans changed, and they determined to recall the petitioner by written agreement.

3. On March 17, 2005, the unit owners seeking recall served the written agreement on the board by service on the vice-president of the association.

4. The recall board meeting was held on March 22, 2005. Prior to and during the board meeting, the petitioner was not given any access to the written recall agreement. The petitioner was given a blank copy of the forms that the unit owners seeking recall had signed.

5. The minutes of the March 22, 2005, board meeting reflect the following as to the written recall agreement:

Don Cooper moved and Anthony Cambria seconded the motion to certify the written agreement of the members to recall Board member, Joan Scariati. The motion carried with 3 in favor and Joan abstaining.

Don Cooper read to Joan that section of the Florida statutes requiring her to turn over to the Board any and all records and property of the association in her possession.

6. The board voted to certify the recall; however, it was not clear whether all the board members except the petitioner reviewed the recall agreement or whether the

board was just told of the agreement. It is clear that the board did not discuss the validity of the written recall agreement at the board meeting, and apparently there was no effort to check the validity of the signatures or to check for duplicate signatures prior to the board meeting.

7. Nevertheless, the recall was certified and the petitioner was removed from the board.

8. The written recall agreement that was submitted to the board consisted of several sheets of paper with the following statement on the top:

IN COMPLIANCE WITH THE 2004 FLORIDA STATUTES, CHAPTER 718.112.2.J

J. RECALL OF BOARD MEMBERS – Subject to the provisions of s. 718.301, any member of the board of administration may be recalled and removed from office with or without cause by the vote or agreement in writing by a majority of all the voting interests. A special meeting of the unit owners to recall a member or members of the board of administration may be called by 10 percent of the voting interests giving notice of the meeting as required for a meeting of unit owners, and the notice shall state the purpose of the meeting.

Therefore, the following unit owners agreeing with the decision to recall Board member, Joan Sacriati, sign this petition.

Beneath the statement were the titles "NAME," "UNIT #," and "DATE," written horizontally with spaces between the titles, and the numbers 1 through 10 written vertically down the left side of the page.

9. One of the pages submitted with the recall agreement, containing eight signatures, was clearly a part of the abandoned effort to call a unit owner's meeting to recall Ms. Scariati. It contained a statement at the top of the page saying, "We, the undersigned unit owners of units in The Villages at Emerald Lakes I request that a special meeting of the unit owners be called for the purpose of recalling Board Member

Joan Scariati.” By order dated August 15, 2005, the parties were advised that this page of signatures could not be considered part of the written recall agreement.<sup>1</sup>

10. On April 5, 2005, Sylvia Marsh Baptista was appointed to the five-member board to fill the petitioner’s seat.

11. There are 80 voting interests in the condominium. Therefore, at least 41 voting interests must vote in favor of a recall for it to be effective. The respondent concedes that less than 41 voting interests signed the written recall agreement.

### **CONCLUSIONS OF LAW**

Section 718.1255, Florida Statutes, provides for alternative dispute resolution. It requires a party to a “dispute” to petition for arbitration prior to the institution of court litigation. Section 718.1255(1), Florida Statutes, includes in the definition of a dispute “any disagreement between two or more parties that involves ... [t]he failure of a governing body, when required by this chapter or an association document, to ... [p]roperly conduct elections ... [g]ive adequate notice of meeting or other actions...[p]roperly conduct meetings ... [or] [a]llow inspection of books and records.”

The failure of a board to properly proceed after receipt of a written recall agreement may involve any or all of the above. The action of a board in certifying a defective recall agreement will always involves the failure of the board to properly conduct a meeting. The failure of the association to allow a board member access to the written recall agreement before or during the board meeting involves the failure to properly conduct the board meeting and the failure to allow inspection of association

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<sup>1</sup> Apparently, that page had not been considered to be part of the written recall agreement at the time of the board meeting in any event.

records.<sup>2</sup> The undersigned has jurisdiction over this type of dispute, commonly known as a “reverse recall,” pursuant to section 718.1255(1)(b), Florida Statutes.<sup>3</sup>

The board has a duty to meet and review the written recall agreement in good faith. As stated in the *Board of Directors of the Villages of Emerald Bay Condominium Ass’n v. Little*, Arb. Case No. 93-0074, Final Order (May 4, 1993), the purpose of the recall board meeting is to determine whether a majority of the voting interests have signed the recall agreement, and “[t]he 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, the board must certify the agreement....”

By the same token, the board has a duty not to certify an agreement that has not been signed by a majority of the voting interests. Whether the majority of the board is or is not in agreement with the recall effort should not affect the degree of scrutiny given to the written recall agreement by the board.

In this case, the association has conceded that a majority of the voting interests did not sign the recall agreement. Apparently certain voting interests signed on more than one page of the multi-page agreement. Therefore, what appeared at a glance to be the signatures of forty-one voting interests, in reality consisted of 39 or 40 voting interests. Had Ms. Scariati been permitted to inspect a copy of the recall agreement at the time it was submitted to the board, which was her right and responsibility as a board member to do, she would have noticed the problem with the recall agreement at that

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<sup>2</sup> The written recall agreement becomes an official record of the association when it is served on the board. Rule 61B-23.0028(1)(h), Fla. Admin. Code.

<sup>3</sup> Petitioner has standing to bring this case because she is the board member that was purportedly recalled.

time, as she did when she finally received a copy of the written recall agreement during the course of this arbitration proceeding. Thus, had the board proceeded properly in considering the recall agreement, it could have avoided this proceeding and the attendant expenses to the association.

A written recall agreement that on its face reflects that it is not signed by a majority of the voting interests of the association is ineffective to recall a board member and cannot be certified. Such an agreement is considered void *ab initio*. Therefore, even if an association fails to timely have a board meeting or fails to timely file for arbitration after refusing to certify the agreement, acts that normally would result in automatic certification of the recall agreement, the recall of a board member cannot be certified if less than a majority of the voting interests have signed the recall agreement. See, e.g. *Grand Vista Condominium Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 00-1214, Recall Arbitration Final Order (September 27, 2000)(where it is clearly evident that the recall agreement was not signed by a majority of the voting interests, procedural errors committed by the association will not cause the recall to be certified); *Fosca Condominium Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 93-0373, Summary Final Order (December 29, 1993)(recall would not be certified, despite failure of board to include in its minutes the reasons for not certifying the recall, where less than a majority of the voting interests voted in favor of the recall).

Section 718.112(2)(j), Florida Statutes sets forth the procedures that must be followed to effectively recall a board member. That section begins: "Subject to the provisions of s. 718.301, any member of the board of administration may be recalled or removed from office with or without cause by the vote of agreement in writing by a

*majority of all the voting interests.*" (e.s.) Thus, the basic requirement for a successful recall is that a majority of the voting interests vote to recall that board member. The purpose of all the other rule and statutory requirements is to safeguard the integrity of the process, *i.e.*, to ensure that a recall agreement actually reflects the will of the majority and to ensure that a board cannot not thwart a valid recall effort supported by the majority.

In this case, the failure of the association to follow the proper procedures and properly conduct the recall board meeting resulted in the board certifying a recall agreement that was not signed by the majority of the voting interests. The recall should not have been certified, and Ms. Scariati should not have been removed from the board.

Therefore, based on the foregoing, it is

ORDERED:

Since the recall agreement did not contain the signatures of a majority of the voting interests, the recall of Joan Scariati was not effective and cannot be certified. Joan Scariati shall remain on the board of directors. Sylvia Marsh Baptista, who was appointed to take Ms. Scariati's seat on the board of directors, shall immediately return to the board any and all association records and property in her possession.

DONE AND ORDERED this 2nd day of September, 2005, 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, where indicated, to the following persons on this 2nd day of September, 2005:

Joan M. Scariati  
7806 Emerald Circle #104  
Naples, Florida 34109  
Petitioner

Joshua M. Bialek, Esquire  
PORTER, WRIGHT, MORRIS & ARTHUR, LLP  
5801 Pelican Bay Blvd., Suite 300  
Naples, Florida 34108  
FAX (239)-2990  
Attorney for Respondent

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Diane A. Grubbs, Arbitrator

Right to Appeal

As provided by section 718.1255, F.S., a party who is adversely affected by this final order may, within 30 days of the entry and mailing of this final order, file a complaint for a trial de novo in a court of competent jurisdiction in the circuit in which the condominium is located. This order does not constitute final agency action and cannot be appealed to a district court of appeal.

Attorney's Fees and Costs

As provided by section 718.1255, F.S., the prevailing party in this proceeding is entitled to have the other party pay its reasonable costs and attorney's fees. A party that represents herself or has a qualified representative is entitled to recover her costs, including the filing fee. Rule 61B-45.048, F.A.C., requires that a party seeking an award of costs and/or attorney's fees must file a motion seeking the award not later than 45 days after rendition of this final order. The motion must be *actually received* by the Division within this 45-day period and must conform to the requirements of rule 61B-45.048, F.A.C.