

**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 LAKE ONE
CONDOMINIUM ASSOCIATION, INC.,**

Respondent.

_____ /

ORDER DENYING MOTION TO DISMISS

On April 8, 2005, Joan M. Scariati, a former member of the board of directors of The Villages at Emerald Lake One Condominium Association, Inc., filed a petition for arbitration challenging the respondent's decision to certify her recall from the board of directors. On May 9, 2005, an Order Requiring Answer was entered. The order was received on May 10, 2005, and directed the respondent to file an answer to the petition for arbitration, or a qualified motion, within 20 days. On May 31, 2005, the respondent filed a motion to dismiss on the ground that the petition did not contain the allegations required by section 718.1255(4)(b), Florida Statutes.

Section 718.1255(4)(b) provides as follows:

(b) The petition must recite, and have attached thereto, supporting proof that the petitioner gave the respondents:

1. Advance written notice of the specific nature of the dispute;
2. A demand for relief, and a reasonable opportunity to comply or to provide relief; and
3. Notice of the intent to file an arbitration petition or other legal action in the absence of a resolution of the dispute.

Failure to include the allegations or proof of compliance with these prerequisites requires dismissal of the petition.

In the vast majority of arbitration cases brought pursuant to section 718.1255, Florida Statutes, the failure to make appropriate allegations regarding pre-arbitration notice would result in the petition for arbitration being dismissed. However, there are exceptions. In recall cases pre-arbitration notice is not required.

Section 718.112(2)(j)3., Florida Statutes, provides that if a board of directors determines not to certify a recall, the board must “file with the division a petition for arbitration pursuant to the procedures in s. 718.1255.” Although the pre-arbitration notice arguably is a procedural requirement of section 718.1255, the requirements of section 718.1255(4)(b) have never been applied by the division in an recall case brought by an association pursuant to sections 718.1255 and 718.112(2)(j)3., Florida Statutes.

Although this case has not been brought by the association, it has been brought by the board member who was recalled, and it is focused on the recall process. In this case, the issue is the validity of the board’s action certifying the written recall agreement; in a recall arbitration case brought by the board, the issue is the validity of the board’s refusal to certify the recall. In either case, the question is whether the board has acted properly in fulfilling its responsibilities in accordance with the statutes and rules relating to the recall of board members.

Because of the nature of a recall and the finality of the decision by the board, subject, of course, to review by an arbitrator, it is questionable whether a pre-arbitration notice in a recall case would serve any purpose. The purpose of the pre-arbitration notice is to advise an offender (either the unit owner or the association) of the violation

he has committed and give the offender the opportunity to cure the violation. The offender must be advised of the nature of the violation, exactly how the violation can be corrected, and a reasonable time period for correction of the violation. Further, the offender must be advised that, if the violation is not corrected within the time period provided, a petition for arbitration will be filed or other legal action will be pursued. The purpose of the notice is to allow the offender to correct his errors and cure the violations without the necessity formal legal proceedings, which would subject the offender to paying the other party's attorney's fees and costs.

In recall cases brought pursuant to section 718.112(2)(j)3 and 718.1255, Florida Statutes, pre-arbitration notice is not required because filing the petition for arbitration is mandated and because there is no remedy that could be afforded by the unit owners voting to recall the board members. Once the written recall agreement has been served on the board, it becomes an official record of the association, rule 61B-23.0028(1)(h), Fla. Admin. Code, and cannot be changed.

Rule 61B-23.0028(5)(a), Fla. Admin. Code.¹ Further, once the board determines that the recall agreement cannot be certified, the board must file a petition for arbitration. The arbitrator then decides whether the decision of the board not to certify the recall should be approved.

By the same token, it is questionable whether the board can provide the remedy sought by the petitioner in this case on its own initiative. Once the board determines that the recall is certified, it is a final decision for all practical purposes. Section 718.112(2)(j)2., Fla. Stat., provides that when the board certifies the recall agreement “such member or members shall be recalled effective immediately and shall turn over to the board with 5 full business days any and all records and property of the association in their possession.” It is certainly questionable whether the board could reverse its position after the recall has been certified and the meeting adjourned.² Further, if the board has already filled the position, the authority of the board to oust that board member from his position as a board member and re-institute the former board member is certainly doubtful.

Finally, the recall statutes and rules make it clear that time is of the essence

¹ See also, e.g. *Barwood Condominium III Ass’n, Inc. v. Unit Owners Voting For Recall*, 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.”); *Granada House Association, Inc., v. Unit Owners Seeking Recall*, Case No. 00-0879, Summary Final Order (August 2, 2000) (corrected or additional ballots provided to the board or the arbitrator after service of the written agreement upon the board cannot be considered since they are not part of the written recall agreement, which becomes an official record upon service on the board.)

² Under the time restraints imposed by statute, a board has only five days from the date of service of the written recall agreement to make a decision on the recall agreement, which would not give the board much time to reconsider its opinion. Since most boards hold the board meeting near the end of the allotted 5 business days, any authority the board might have to revisit its decision would be within an extremely limited time period.

in dealing with a recall. After service of the recall agreement or the adjournment of the unit owner's recall meeting, the board must move quickly to hold the board meeting and determine whether to certify the recall. If the recall is not certified, the board must file a petition for arbitration within 5 days seeking affirmation of its decision. The arbitrator reviews the board's action and determines whether the board acted correctly in refusing to certify the recall. The arbitrator may affirm the board's decision or the arbitrator may determine that the board's decision not to certify the recall was unjustified and issue an order certifying the recall.

In the instant case, the petitioner is seeking review of the board's decision to certify a recall by written agreement. Since the board certified the recall, it was not required to file a petition for arbitration. However, the petitioner, the board member whose recall was certified, alleges that the recall was invalid and, therefore, the board improperly certified the recall by written agreement. It is doubtful whether a board, after certifying a recall, has the authority, on its own initiative, to reverse itself, unseat the replacement board member, and reseal the board member who has been recalled. Therefore, because pre-arbitration notice in a recall case would serve no useful purpose, because pre-arbitration notice has never been required in a recall case brought by an association, because pre-arbitration notice in a recall case would simply cause a delay in determining the propriety of the board's action, and because, in this case, the board was put on notice by the petitioner prior to the certification of the recall that she did not believe certification was appropriate, it is

ORDERED:

The motion to dismiss the petition for arbitration for failure to comply with section 718.1255(4)(b), Florida Statutes, is DENIED. The petitioner shall file an answer to the petition within twenty (20) days. The answer shall comply with the Order Requiring Answer entered on May 9, 2005. The respondent shall include as an exhibit to the answer a copy of the written recall agreement that was certified and a copy of the minutes of the board meeting at which the recall was certified.

DONE AND ORDERED this 7th day of June, 2005, at Tallahassee, Leon County, Florida.

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

Copies furnished to:

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
Respondent