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

IN RE: PETITION FOR ARBITRATION

WPB BERKSHIRE A CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

v. **Case No. 2005-04-7905**

UNIT OWNERS VOTING FOR RECALL,

Respondent.
_____/

SUMMARY FINAL ORDER ON PETITION FOR RECALL ARBITRATION

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."

On September 13, 2005, WPB Berkshire A 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 generally complied with rule 61B-50.105(5), Fla. Admin. Code, although it was not signed by an attorney or a "qualified representative." It was signed by the president of the association, Wendel R. Gilbert, who is the board member sought to be recalled and one of the two remaining board members. The group of unit owners who voted to recall Mr. Gilbert was named as the respondent in this action in accordance with section

718.112(2)(j)3., Florida Statutes (2003), and rule 61B-50.107(3), Florida. Administrative Code.

The petitioner is a condominium association with 26 units, with each unit having one vote; therefore, 14 units must vote in favor of a recall for it to be effective.

On August 26, 2005, the board of directors was served with a written recall agreement consisting of 17 separate ballots. Each of the ballots sought to recall Wendel R. Gilbert. The recall board meeting was noticed and held on September 2, 2005. Only one board member appeared at the meeting -- Wendel Gilbert. Although there are supposed to be five members on the board of directors, one of the seats was vacant, and two of the board members had recently resigned. Thus, Wendel Gilbert and Mark Ostrovsky are the only two remaining board members.[1]

According to the minutes of the board meeting of September 2, 2005, Mr. Gilbert opened the meeting by announcing that Jim Henson, Ngaire Premo, and Mark Ostrovsky had resigned from the board, leaving Mr. Gilbert as the only remaining board member. The minutes then recount a statement concerning the board's refusal to pay fees to United Civic Organization (UCO) 90-days in advance, which apparently motivated the recall. The minutes suggest that the UCO was, in effect, coercing the unit owners to sign the recall by halting certain services afforded by UCO to the unit owners. Mr. Gilbert then announced that the board declined to certify the written recall agreement because it was not in substantial compliance with rule 61B-23.0028, Florida

[1] Mr. Gilbert erroneously believed that Mr. Ostrovsky had resigned because of certain comments that Mr. Ostrovsky made to Mr. Gilbert. Mr. Ostrovsky did not submit a letter of resignation as required by §617.0807(1), Florida Statutes, and he has continued to serve as a board member.

Administrative Code. The meeting was thereafter adjourned. There was no other statement in the minutes regarding the reasons the written recall agreement was not being certified.

The petition for arbitration contends that the reason for rejecting the recall agreement was as follows:

> Each unit owner (sic) written recall agreement received by the board of directors on August 26, 2005, by way of the USPS enclosure was rejected and not certify (sic) on September 2, 2005, due to it's (sic) incompleteness in accord with FAC 61B-23.0028 and the association governing documents. There wasn't any replacement board member named to accept the administrative responsibilities for the association. (e.s.)

The minutes of the board meeting are not sufficient to support the additional allegation in the petition for arbitration or the rejection of the written recall agreement. 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.[2]

In this case, the minutes failed to provide any basis for the rejection of the recall. A statement that the recall does not comply with rule 61B-23.0028, Florida Administrative Code, is the equivalent of stating that the recall is rejected because it does not comply with the law. There must be a factual basis for the rejection of a written recall or a recall ballot. If an individual ballot is being rejected, the unit number of the rejected ballot must be stated or the ballot must be identified in some other way.

[2] 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).

If the written recall agreement as a whole is being rejected due to some defect in the forms used, the part of the ballot or agreement the board found defective must be stated. In this case, the minutes of the board meeting do not provide any factual information indicating why the board found the agreement deficient.

Of course, the minutes do mention the reason for the recall. Apparently, UCO decided to terminate certain gate services to the unit owners when the full amount of the quarterly fee was not paid by the association based on Mr. Gilbert's interpretation of the condominium documents. The unit owners didn't like their gate services disrupted, and they decided to recall Mr. Gilbert. However, whether Mr. Gilbert's interpretation of the condominium documents is correct is irrelevant in determining whether the recall should be certified.

In the petition for arbitration, the petitioner asserted that the basis for rejecting the written agreement was that there were no replacement candidates listed on the ballot. Petitioner asserted that since the other board members had resigned, the majority of the board was being recalled, yet there were no replacement candidates listed.

Although this reason for rejecting the recall was not properly raised and need not be addressed, it is also flawed. There are several problems with the petitioner's argument, chief among them is that it is a five-member board, therefore one member being recalled would not constitute a majority. Additionally, rule 61B-23.0028(1)(c), Florida Administrative Code, specifically provides that the failure to list replacement candidates will not affect the validity of the recall. The rule states as follows:

> (c) List, in the form of a ballot at least as many eligible persons who are willing to be candidates for replacement board members as there are board members subject to recall, in those cases where a majority or more of the board is sought to be recalled. Candidates for replacement members shall not be listed when a minority of the board is sought to be recalled, as the remaining board members may appoint replacements. …The failure to comply with the requirements of this subsection shall not effect (sic) the validity of the recall of a board member or members.

During the case management conference call, Mr. Gilbert mentioned that a unit owner had told him that her ballot was already marked with an "x" in the "recall" box when she received her ballot. The pre-marking of any of the ballots was not mentioned as a basis for rejecting the written recall agreement in either the minutes or the petition for arbitration. Any ballots allegedly pre-marked would have had to be identified in the minutes unless the pre-marking was apparent from the face of the ballot.

However, in this case, the pre-marking of the ballots would not have invalidated them in any event because only one person was being recalled. When only one person is being recalled, the failure to have recall and retain spaces will not invalidate a recall ballot, and pre-marking the ballot with an "x" in the "recall" box would have to be treated in the same manner, since it is the equivalent of not having recall/retain spaces.

In Pinebark Condominium Ass'n, Inc. v. Lopez and Other Unit Owners, Arb. Case No. 93-0177, Summary Final Order (December 2, 1993), the arbitrator discussed the purpose of recall and retain spaces as follows:

> The purpose of the rule is to ensure that no duly elected board member is removed from office unless a majority of the voting interests actually want that board member recalled. If board members were allowed to be "linked" in a written recall agreement, the result could be that a competent board member, "A", would be removed from office only because she or he was linked with board member "B"…. The requirement of Rule 61B-23.0028(1)(b) ensures that no duly elected board member is removed from office solely due to this type of linkage.

Obviously, when only one board member is sought to be recalled, the requirement of recall and retain spaces is not crucial. Thus, cases have held that the lack of recall/retain spaces next to the name of the sole board member sought to be recalled will not invalidate the recall.[3]

The pre-marking of a recall space is the same as not having recall and retain spaces. Therefore, when only one board member is being recalled, pre-marking the "recall" space or box will not invalidate the recall ballot. The unit owner simply doesn't sign the ballot if he wants the board member to be retained.

In this case, the minutes of the board meeting were insufficient to support the board's rejection of the recall agreement, and the written recall agreement was facially valid. Therefore, based on the foregoing, it is

ORDERED:

The recall of board member Wendal Gilbert is hereby **CERTIFIED**. The recall is effective immediately. Any association records in the possession of Mr. Gilbert shall be given to the remaining board member(s) within five (5) days of the date of this order.

DONE AND ORDERED this 11th day of October, 2005, in Tallahassee, Leon County, Florida.

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Diane A. Grubbs, Arbitrator
Dep't of Business and Professional Regulation
Arbitration Section

[3] *See, e.g., Seapointe Terrace Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,* Arb. Case No. 01-3656, Final Order Certifying Recall (September 20, 2001)(where a single board member was sought to be recalled, the omission of recall and retain lines would not invalidate the otherwise valid recall; a unit owner who did not wish to recall that board member simply could have refused to sign the agreement).

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 to the following persons on this 11th day of October, 2005:

Wendal R. Gilbert
24 Berkshire A
West Palm Beach, FL 33417
Petitioner's Representative

Terry Polanco
13 Berkshire A
West Palm Beach, FL 33417
Unit Owner Representative

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Diane A. Grubbs, Arbitrator