

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

IN RE: PETITION FOR ARBITRATION

Carolyn Rehbaum, et al.,¹

Petitioner,

v.

Case No. 2009-03-8901

Royal Arms Condominium Association, Inc.,

Respondent.

SUMMARY FINAL ORDER

Procedural History

On July 20, 2009, Petitioners filed a petition for mandatory non-binding arbitration alleging an election dispute. On August 5, 2009, an Order Requiring Answer was entered. On August 5, 2009, Petitioners filed a motion for emergency relief relating to the delinquency in the payment of assessments by a board member.

On August 28, 2009, Respondent Royal Arms Condominium Association, Inc. (Association) filed a Motion for Extension of Time to Respond to Order Requiring Answer requesting until September 10, 2009 to respond. Petitioners objected to the motion. The Association was granted an extension until September 4, 2009 to file an answer.

On September 4, 2009, the Association filed Respondent's Motion to Conduct New Election from Second (14 Day) Notice. On September 21, 2009, a Case

¹ The Individual Petitioners are: Janice Brooks, Anthony Edwards, Steve Holler, Wyndam R. Hunt, Beverly Markus, Patricia K. Parker, Carolyn Rehbaum, and David Wheaton. Carolyn Rehbaum is the Qualified Representative.

Management Conference was held with both parties in attendance. At the Case Management Conference, Petitioners objected to conducting a new election from the Second Notice, arguing instead that a new election must begin with the First Notice. On September 21, 2009, an Order Following Case Management Conference was entered requiring the parties to file their suggested statement to accompany a notice of new election, and the Association was directed to file the Association's arguments in opposition to the new election commencing from the First Notice. The parties timely complied with the Order Following Case Management Conference.

Statement of Issue

The issue in this case is whether the Association properly noticed and conducted the June 30, 2009 election to fill three vacancies on the Association's Board of Directors.

Findings of Fact

1. The Association sent a First Notice of Election and Annual Meeting dated March 28, 2009 announcing an election to be held May 28, 2009 to fill three vacancies on the Association's Board of Directors (Board). The mailing included a Notice of Intent to be a Candidate form.
2. The Association sent an Amended First Notice of Election and Annual Meeting Due to One Day Late Postmark of Original 60 Day Notice. The amended notice was dated April 23, 2009 and announced an election to be held June 30, 2009 to fill three vacancies on the Association's Board of Directors (board). The mailing included a form for a unit owner to complete if the unit owner wanted to nominate

herself or himself as a candidate for the board and a form entitled "Candidate Information Statement" for the candidate to complete if the candidate so desired.

3. Petitioners make the following allegations with respect to the First Notice of Election and Annual Meeting and the amended first notice:

A. Contrary to Section 718.112(2)(d)3., Fla. Stat., the Association failed to include the certification attesting that the candidate has read and understood, to the best of the candidate's ability, the Association's governing documents, the provisions of Chapter 718, Fla. Stat., and the applicable rules.

B. Contrary to Section 718.112(2)(d)3., Fla. Stat., the Association failed to mail the first notice and the amended first notice to all owners of record.

4. Petitioners make the following allegations with respect to the Second Notice of Annual Meeting:

A. The second notice was untimely.

B. The Association improperly included a document signed by the president of the Board that comments on a candidate or candidates.

C. The Association improperly included a two-page candidate information statement for one of the candidates.

D. The ballot may have included some candidates who did not provide timely notice of their candidacy.

E. The Association did not permit electors to continue to cast their ballots until the opening of the annual meeting.

F. The Association omitted from the packet mailed to at least one owner the proxy, ballot and exterior envelopes.

G. The Association's receipt confirming the Association had received a candidate's documents was sent untimely.

H. The Association's receipt confirming the Association had received a candidate's documents lacked specificity regarding which documents were received.

I. Timely submitted documents by certain candidates were omitted by the Association from the second notice mailing to all unit owners.

J. The Association failed to properly notice the election and annual meeting by failing to timely post such notice in a conspicuous place on the condominium property.

5. The Association filed Respondent's Motion to Conduct New Election from Second (14 Day) Notice in lieu of an Answer. The motion states, in pertinent part:

2. While Respondent takes exception to many of the allegations contained in the Petition for Arbitration, after review of the Exhibits and allegations made with regard to the Second Notice of Annual Meeting and Election, Respondent acknowledges that there may have been inadvertent flaws or deficiencies in the Second Notice, which when taken together likely justify conducting a new election from the point of Second (14 day) Notice.(with the same candidates as in the subject election)[.]

3. Accordingly, to avoid the unnecessary expenditure of time and resources for all involved the Association files this Motion in lieu of an Answer, seeking an Order requiring a new election from the point of Second (14 day) Notice.

4. To the extent that the Arbitrator seeks detail as to the issues with the Second Notice that are conceded, or why the requested relief is appropriate, Respondent provides the information below.

5. Specifically, Respondent acknowledges that the letter from the Board of Directors² regarding issues contributing to the Association's increased budget, which was contained in the Second Notice of Annual Meeting and Election, and is attached hereto as Exhibit A, may be construed as a

² The letter is titled "A Letter to All Unit Owners from Juan R. Quintana, President, Royal Arms Condominium Association, Inc." The Association does not argue this distinction, but if it had, it would have been a distinction without a difference. See *Yanniello v. Arrowhead Golf & Tennis Club Number One Ass'n, Inc.*, Arb. Case No. 03-05-0146, Final Order (Jan. 7, 2004).

communication from the board endorsing or otherwise commenting on a candidate, which is prohibited by Florida Administrative Code 61 B-23.0021(8).

6. Respondent further acknowledges that the aforementioned communication from the Board, coupled with the cut-off time for submission of votes which was set forth on the ballot document in the instructions for completing the ballot, and the candidate information sheet included in the Second Notice Package for candidate Carlos Martinez, weigh in favor of conducting a new election from the point of Second (14 day) Notice. (Instructions for ballot and Martinez's candidate information sheet are attached hereto as Exhibit B).]

7. Respondent respectfully acknowledges the aforementioned potential deficiencies in the Second Notice of Annual Meeting and Election, and respectfully suggests that an order be issued by the Arbitrator requiring a new election to be conducted from Second (14 day) Notice forward, utilizing the same candidates as the subject election.

8. Respondent believes that ordering a new election from Second (14 day) Notice would not prejudice or otherwise impair the rights of the parties to this action. Much to the contrary, in an abundance of caution and in fairness to all candidates who timely submitted and expressed their intent to become candidates for election to the board, conducting the election from Second Notice will ensure that each candidate has another opportunity to obtain the plurality of votes of the membership.

...

11. In the event that the Arbitrator accepts the Respondent's request, and orders a new election from Second Notice, in order to ensure the proper preparation of such Second Notice, Respondent agrees to have the Second Notice Package prepared by Association legal counsel.

(footnotes in the original and exhibits omitted).

6. Each party submitted a proposed letter to accompany any required notice of new election. However, the parties' proposed letters did not agree in their contents.

Conclusions of Law

The undersigned has jurisdiction over the parties to, and the subject matter of, this dispute, pursuant to Section. 718.1255, Fla. Stat. If no disputed issues of material fact exist, the arbitrator may enter a summary final order. Fla. Admin. Code R. 61B-45.030.

The Association concedes certain improprieties in the election process and agrees to a new election from the Second (14 Day) Notice. Relying on the allegations in the petition of deficiencies in the First Notice and Amended First Notice, Petitioners argue any new election must be from the first notice of election.

With respect to the first notice and amended first notice, Petitioners allege the Association failed to: 1) Include the certification attesting that the candidate has read and understood, to the best of the candidate's ability, the Association's governing documents, the provisions of Chapter 718, Fla. Stat., and the applicable rules; and 2) Mail the first notice and the amended first notice to all owners of record.

Inclusion of Certification

Section 7 of Chapter 2008-28, Laws of Florida,³ added the underlined words to the pertinent part of Section 718.112 (2)(d)(3), Fla. Stat., as follows:

Not less than 60 days before a scheduled election, the association shall mail, deliver, or electronically transmit . . . to each unit owner entitled to a vote, a first notice of the date of the election along with a certification form provided by the division attesting that he or she has read and understands, to the best of his or her ability, the governing documents of the association and the provisions of this chapter and any applicable rules. Any unit owner or other eligible person desiring to be a candidate for the board must give written notice to the association not less than 40 days before a scheduled election. Together with the written notice and agenda as set forth in subparagraph 2., the association shall mail, deliver, or electronically transmit a second notice of the election to all unit owners entitled to vote therein, together with a ballot which shall list all candidates. Upon request of a candidate, the association shall include an information sheet, no larger than 8 1/2 inches by 11 inches, which must be furnished by the candidate not less than 35 days before the election, along with the signed certification form provided for in this subparagraph, to be included with the mailing, delivery, or transmission of the ballot, with the costs of mailing, delivery, or electronic transmission and copying to be borne by the association. The association is not liable for the contents of the information sheets prepared by the candidates. In order to reduce costs, the association may print or duplicate the information sheets on both sides

³ The law took effect October 1, 2008.

of the paper. The division shall by rule establish voting procedures consistent with the provisions contained herein, including rules establishing procedures for giving notice by electronic transmission and rules providing for the secrecy of ballots.

With respect to Petitioner's allegation that the Association failed to include the certification form with the mailing of the first notice and amended first notice, the Association argues that there has been confusion with respect to the timing of sending the certification form as evidenced by legislation enacted in 2009, but vetoed by the governor, which would have changed the timing of the certification from that currently required to within 90 days after election to the Board.⁴ The Association also argues that the Florida Department of Business and Professional Regulation has not promulgated a rule to address the certification requirement. These arguments are not persuasive because unsuccessful legislation is not applicable in statutory construction, and current law does not require the Department to promulgate a rule for every amendment to statute.

In any event, Petitioners do not allege certification forms were not obtained from the candidates. Rather, Petitioners only allege that the certification forms were not sent with the first notice and the amended notice. The Association states that a certification form was presented to those who submitted an intent to be a candidate form, and certification forms were obtained from the candidates. Given these circumstances, the Association will not be required to hold a new election from the first notice on this basis.

⁴ Section 4, Enrolled SB 714 (2009). The legislation also would have: specified with particularity to what the new board member was certifying; provided an alternative certification of completion of an educational curriculum; provided for disqualification for failure to comply timely; required retention of the certification; and specified the effect on appropriate board action.

Mailing of First Notice and Amended First Notice

Petitioners second allegation with respect to the first notice of election and amended first notice is that the Association did not mail the notice to "all owners of record." Petitioners reference Section 718.112 (2)(d)(3), Fla. Stat. As set out above, that section provides, in pertinent part, "Not less than 60 days before a scheduled election, the association shall mail, deliver, or electronically transmit . . . to each unit owner entitled to a vote, a first notice of the date of the election." In support of their argument that the Association failed to meet this requirement, Petitioners attached to the petition a chart allegedly showing that the Association did not properly mail the first notice for 33 units. The chart shows the address and mailing label the Association used, the owner in the last recorded document, the number of owners in the last record, Petitioners' interpretation of the deficiency in the Association's mailing and the Book and Page in the Seminole County Official Records.

The Association argues that Petitioners do not have standing to challenge the mailing of the first notice or amended first notice, because Petitioners do not allege that any of Petitioners failed to receive the mailed first notice or amended first notice. None of the Petitioners is among the 33 to whom Petitioners allege the first notice or amended first notice was improperly mailed. Because none of the 33 to whom the first notice or amended first notice allegedly was improperly mailed is a party to this arbitration proceeding, Petitioners do not have standing to assert this claim. See *Harrison, et al. v. Heritage Square Ass'n, Inc.*, Arb. Case No. 2004-01-1144, Final Order (Sept. 14, 2004) (petitioners lacked standing to assert association member was improperly excluded from ballot when member was not party to arbitration proceeding)

(citing *Greenlee v. Oceanside Terrace Condo. Ass'n, Inc.*, Arb. Case No. 95-0497, Notice of Communications, Order Requiring Respondent to Answer Portions of Amended Petition and Denying Emergency Relief (May 1996)). Nevertheless, Petitioners argument will be addressed to avoid confusion.

Petitioners quote *Maqueira, et al. v. Int'l Park Condo. II Ass'n, Inc.*, Arb. Case No. 01-3939, Amended Final Order (May 30, 2002), for the proposition that the Association must mail the notice of election to each unit owner at the unit owner's correct mailing address, and implicitly that the Association is required to do an investigation to ascertain a unit owner's correct address. While *Maqueira* does stand for the proposition that the Association must mail the notice of election to each unit owner as provided in Section 718.112 (2)(d)(3), Fla. Stat, it does not stand for the proposition that the Association is required to do an investigation to ascertain a unit owner's correct address.⁵ Section 718.112 (2)(d)(2), Fla. Stat., provides:

Notice for meetings and notice for all other purposes shall be mailed to each unit owner at the address last furnished to the association by the unit owner, or hand delivered to each unit owner. However, if a unit is owned by more than one person, the association shall provide notice, for meetings and all other purposes, to that one address which the developer initially identifies for that purpose and thereafter as one or more of the owners of the unit shall so advise the association in writing, or if no address is given or the owners of the unit do not agree, to the address provided on the deed of record.

Thus, it is the responsibility of the unit owner to provide the Association with a correct mailing address. Where the unit has multiple owners, the Association is to mail notice to that one address . . . as one or more of the owners of the unit shall so advise the

⁵ The arbitrator in *Maqueira* did not find credible the Association's explanation, or lack of explanation, why: the Association sent mail to incorrect zip codes, when all of the unit owners should have had the same zip code; those who did not receive notice happened to be four individuals with whom the Association had a contentious relationship; and the Association used a nickname and shortened name when the respective individuals never did so.

association in writing." (emphasis added). It is clear that for a unit with multiple owners, the responsibility for providing the one correct mailing address also lies with the unit owners. If the unit owners do not provide an address or the owners of the unit do not agree, the Association is to mail the notice to the address on the deed of record. Therefore, where title to a unit changes, it is the responsibility of the new unit owner to provide the new mailing address.⁶

The Association has conceded a new election is required. Petitioners have not prevailed on their arguments that the new election must proceed from the first notice of election.

Because a new election must be conducted it is not necessary to address Petitioner's Motion for Emergency Relief to Supplement Petition alleging a board member, Carlos Martinez, is in violation of Section 718.112(2)(n), Fla. Stat., due to a delinquency in the payment of regular assessments in excess of that allowed.⁷ However, "A person . . . who is delinquent in the payment of any fee or assessment as provided in paragraph (n) is not eligible for board membership." § 718.112(2)(d)1., Fla. Stat. Thus, a candidate who is elected in the new election may not take office, if the candidate is in violation of Section 718.112(2)(d)1. & (n), Fla. Stat., at the time he or she would take office.

Based upon the foregoing, it is **ORDERED**:

⁶ For example, this requirement would apply where a foreclosure has occurred and title to a unit has reverted to the mortgage lender; the mortgage lender must notify the Association of the new mailing address in order to receive notice.

⁷ Section 718.112(2)(n), Fla. Stat., provides, "*Director or officer delinquencies.*—A director or officer more than 90 days delinquent in the payment of regular assessments shall be deemed to have abandoned the office, creating a vacancy in the office to be filled according to law."

1. No later than five days after the expiration of the time for filing a Motion for Rehearing has expired, the Association shall mail the Second (14 Day) Notice of Election, including the same candidates who ran in the Association's June 30, 2009 election, without mailing a First Notice of Election.

2. Because the parties could not agree on a proposed letter to accompany any required notice of new election, the Second (14 Day) Notice of Election shall include the following statement with the Second (14 Day) Notice of Election, which statement shall be printed in bold, all capital letters, size 14 font, in a format identical to the following, including line spacing:

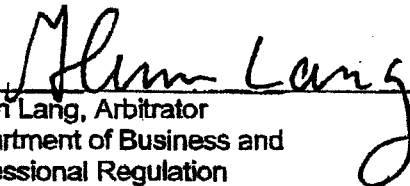
IN ORDER TO COMPLY WITH THE ENCLOSED OCTOBER 7, 2009, SUMMARY FINAL ORDER ENTERED BY THE ARBITRATION SECTION OF THE DIVISION CONDOMINIUMS, TIMESHARES AND MOBILE HOMES, FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, A NEW ELECTION, TO REMEDY DEFECTS IN THE JUNE 30, 2009 ELECTION PROCESS, MUST BE HELD WITH THE SAME CANDIDATES AS IN THAT ELECTION COMMENCING WITH THE ENCLOSED SECOND (14 DAY) NOTICE OF ELECTION.

3. The Second (14 Day) Notice of Election shall be mailed or delivered to the unit owners consistent with Section 718.112 (2)(d)(2), Fla. Stat., Rule 61B-23.0021, Fla. Admin. Code, and the applicable provisions of the governing documents of the Association that are not in conflict with the statute and the rule.

4. A candidate who is elected in the new election may not take office, if the candidate is in violation of Section 718.112(2)(d)1. & (n), Fla. Stat., at the time he or she would take office.

5. A candidate who takes office pursuant to the new election required by this order shall serve only for the unexpired term of the office.

DONE AND ORDERED this 7th day of October, 2009, at Tallahassee, Leon County, Florida.



Glenn Lang, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029
Telephone: (850) 414-6867
Facsimile: (850) 487-0870

Trial de novo and Attorney's Fees

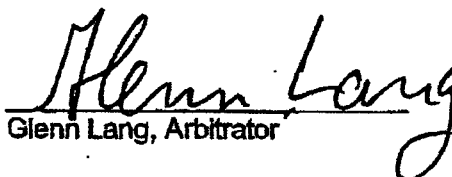
This decision shall be binding on the parties unless a complaint for trial *de novo* is filed in accordance with section 718.1255, Florida Statutes. As provided by section 718.1255, Florida Statutes, the prevailing party in this proceeding is entitled to have the other party pay reasonable costs and attorney's fees. Any such request must be filed in accordance with Fla. Admin. Code R. 61B-45.048.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by facsimile and U.S. Mail to the following persons on this 7th day of October 2009:

Carolyn Rehbaum
516 Orange Drive
No. 34
Altamonte Springs, FL 32701
Facsimile: 407-869-1884 (David Wheaton)*
Qualified Representative for Petitioners

Paul Milberg, Esq.
Mary Ann Chandler, Esq.
Katzman Garfinkel Rosenbaum
1501 N.W. 49th Street, Second Floor
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Facsimile: 954-486-7782*
Counsel for Respondent


Glenn Lang, Arbitrator

* If the facsimile number provided is busy or does not connect, a total of two attempts will be made to transmit this document via facsimile; thereafter, the document will be sent only by U.S. mail.