

## Board Members Broke Their Trust

*State Finds that Pair Willfully Violated Law*

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Over the years of writing this column, I have received a multitude of questions from readers asking what they should or should not do in certain circumstances. A recent recommended order by the State of Florida Division of Administrative Hearings reads as a virtual guide to what not to do as a condominium board member. In the case *Department of Business and Professional Regulation v. Richard Walters and Arcenio Carabetta*, two board members were accused of breach of fiduciary duty to the condominium association; failure to respond to written inquiries made of the board of directors; failure to properly notice a meeting at which regular assessments were discussed; failure to excuse payment of common expenses for all unit owners after doing so for one unit owner; and, willfully violating Florida Statute 718, the Florida Condominium Act.

It all started in October of 2001 when two unit owners, who owned fifty-three percent of the voting interests in the condominium, used their majority voting interests to elect themselves as members of the board of directors. One unit owner, Mr. Walters, allegedly owed the association about fifty thousand dollars in back assessments and interest. The other, Mr. Carabetta, allegedly colluded with Walters in order to grant him a “sweetheart deal” for settling the assessment claim.

According to the reported decision, with Carabetta’s support, the board forgave four-fifths of Walters’ past due assessments, without reducing assessments for other unit owners similarly. The forty thousand dollar shortfall was paid for by a special assessment levied on the rest of the unit owners.

As a result, the hearing officer opined that Walters and Carabetta’s actions were a violation of their fiduciary duty to the Association.

To spice things up a bit, Walters and Carabetta, reportedly acting in concert with another board member, approved this sweetheart deal at a board meeting without posting proper notice of the meeting.

When the rest of the unit owners complained, via certified letters, the board of directors largely ignored these letters. The Division of Administrative Hearings found that it was abundantly clear that Walters and Carabetta considered the flood of inquiry letters from the minority unit owners to be of no more than “nuisance value.” Therefore, in the eyes of the hearing officer, the board members made a conscious decision to ignore them, and thus violated Florida Statute Section 718.112(2)(a)2.

The hearing officer found that Walters and Carabetta did not simply make honest mistakes, but rather violated the Florida Condominium Act in a willful and knowing manner. The agency sent Walters and Carabetta warning letters in April of 2002, to which they responded, but took no corrective action.

As a result, Walters was ordered to make restitution to the condominium in the amount of \$68,710.92 in past due assessments and interest. Walters and Carabetta were also ordered to pay a civil penalty of \$10,000.00 each.

The moral of this story is that, as a board member, your duty is to act in the best interest of the condominium association as a whole. Should a situation arise wherein a board member may stand to personally benefit, in order to remove all appearance of impropriety, a board member should excuse him or herself from the decision-making process. Even an “honest mistake” could wind up being reversed, or could be quite expensive.

Additionally, when unit owners make an inquiry of the board of directors by certified mail, even if the board of directors believes that it is a mere nuisance, the board of directors must respond within thirty days of receiving the inquiry (there can be extensions granted under certain circumstances). Should the board fail to do so and litigation ensues, the association will be unable to collect its attorney's fees from the unit owner (even if the unit owner loses the suit). At worst, if the board is found to be knowingly and willfully ignoring the requests, there could be harsher penalties, as Mr. Walters and Mr. Carabetta learned the hard way.

The Florida Condominium Act has, for a number of years, contained a provision which allows the Division to fine directors for "knowing and willful" violations of the law. It is generally believed that "knowing and

willful" is a difficult standard to prove. I am often asked by people, hesitant to serve on boards, about potential personal liability. In general, my reply is that Florida's law uses an "empty head, clean heart" standard. Stated in more direct terms, directors can make bad decisions, perhaps downright stupid ones, and should not unduly fear the specter of personal liability or fines.

However, when the director has a personal interest in the outcome of the actions of the board, the line has been crossed.

Since this case is still in the status of a "recommended order," it is not necessarily over. However, the enforcing agency's view of conflicts-of-interest situations is quite clear. Forewarned is forearmed. ⚖️

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