STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Petitioner,	)	
vs.	)	Case No. 03-1658
RALPH SPICER and RITA SPICER, d/b/a CRESCENT MANOR,	)	
Respondents.	)	

RECOMMENDED ORDER

On June 11, 2003, a formal administrative hearing in this case was held in St. Petersburg, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Katrina D. Lacy, Esquire
Agency for Health Care Administration
525 Mirror Lake Drive, North
Suite 330G
St. Petersburg, Florida 33701

For Respondents: Ralph Spicer, pro se
835 20th Avenue, North
St. Petersburg, Florida 33704

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations set forth in the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated October 24, 2002, the Agency for Health Care Administration (Petitioner) alleges that Ralph and Rita Spicer, d/b/a Crescent Manor (Respondents) have failed to comply with certain requirements set forth in the Florida Administrative Code related to operation of a licensed assisted living facility. Specifically, the Administrative Complaint alleges that the Respondents failed to provide residents with at least 30 days notice of a rate increase (citing Rule 58A-5.025(1)(d), Florida Administrative Code) and failed to maintain for at least six months a log of menu substitutions (citing Rule 58A-5.020(2)(d), Florida Administrative Code).

The Respondents disputed the allegations and requested a formal hearing. The Petitioner forwarded the request for hearing to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of one witness and had one exhibit admitted into evidence. The Respondent, Ralph Spicer, testified on his own behalf, presented the testimony of one witness, and had two exhibits admitted into evidence. The one-volume Transcript of the hearing was filed on June 27, 2003. Both parties filed Proposed Recommended Orders.

All citations are to Florida Statutes (2002) unless otherwise indicated.

FINDINGS OF FACT

1. At all times relevant to this case, the Respondents owned and operated a licensed assisted living facility located at 835 20th Avenue, North in St. Petersburg, Florida.

2. On September 5, 2002, an employee of the Petitioner conducted a survey of the Respondents' facility and determined that the facility operation was deficient as to compliance with two requirements. The deficiencies are commonly identified on the survey form as numbered "tags" and were communicated to the Respondents at the time of the survey.

3. In Tag A313, the Petitioner alleges that the Respondents failed to provide residents with at least 30 days written notice of a rate increase.

4. The administrative rule cited in support of the alleged deficiency does not require that such written notice be provided, but requires only that the contract between the facility and the resident contain a provision requiring that such notice be provided. The Administrative Complaint does not allege that the contracts failed to include such a provision. The evidence offered at the hearing fails to establish that the provisions in the Respondents' contracts are inadequate.

5. In Tag A811, the Petitioner alleges that the Respondents failed to maintain for a period of six months a log of menu substitutions in the facility.

6. During the September 5, 2002, survey, the Respondents were unable to produce a log of any menu substitutions.

7. The Respondents are required to prepare and post menus complying with various nutritional requirements in advance of meal service. During holidays and at other various times, the Respondents have served to residents foods other than those identified on the pre-planned menus. The Respondents do not maintain a log of such substitutions.

8. The Respondents are aware that a log of menu substitutions is required, having been cited for an identical deficiency during a survey conducted on September 29, 2000. By the time a follow-up survey was conducted on December 7, 2000, the deficiency had been corrected. At some point after the December 2000 follow-up survey, the Respondents discontinued compliance with the requirement that menu substitutions be logged and that the log be maintained for six months.

9. The Petitioner cited the failure to maintain the log as a repeat "Class III" deficiency.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Section 120.57(1).

11. The Petitioner has the burden of establishing by a preponderance of the evidence, the facts alleged in the Administrative Complaint. *Florida Department of Transportation v. JWC Company, Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *Balino v. Department of Health and Rehabilitative Services*, 348 So. 2d 349 (Fla. 1st DCA 1977).

12. The Administrative Complaint alleges that the Respondents violated Rule 58A-5.020(2)(d), Florida Administrative Code, which provides as follows:

> (2) DIETARY STANDARDS.
>
> * * *
>
> (d) Menus to be served shall be dated and planned at least one week in advance for both regular and therapeutic diets. Residents shall be encouraged to participate in menu planning. Planned menus shall be conspicuously posted or easily available to residents. Regular and therapeutic menus as served, with substitutions noted before or when the meal is served, shall be kept on file in the facility for 6 months.

13. The Petitioner has met the burden in establishing that food substitutions have occurred at the facility and that the

Respondents have failed to maintain a log of such menu substitutions.

14. The Respondents assert that there is no definition of "substitution" in the Rule and that, therefore, it is not possible to comprehend what the rule requires. Absent a statutory definition of "substitution," the word is defined according to general usage and is given its plain and ordinary meaning. *Southeastern Fisheries Association, Inc. v. Department of Natural Resources*, 453 So. 2d 1351 (Fla. 1984). The Merriam-Webster dictionary defines a substitute to mean "to put or use in the place of another." Apparently the Respondents understood the meaning of the word sufficiently to acknowledge during the September 2000 survey that they did not keep the required log and to comply with the requirement as of the December 2000 follow-up survey.

15. The Petitioner cited the Respondents' failure to maintain the menu substitution log as a "Class III" violation. Subsection 400.419(1)(c) provides as follows:

> Class "III" violations are those conditions or occurrences related to the operation and maintenance of a facility or to the personal care of residents which the agency determines indirectly or potentially threaten the physical or emotional health, safety, or security of facility residents, other than class I or class II violations. A class III violation is subject to an administrative fine of not less than $500 and not exceeding $1,000 for each violation.

> A citation for a class III violation must specify the time within which the violation is required to be corrected. If a class III violation is corrected within the time specified, no fine may be imposed, unless it is a repeated offense.

16. In this case, the classification of the deficiency is appropriate.

17. The Administrative Complaint further alleges that the Respondents violated Rule 58A-5.025(1)(d), Florida Administrative Code, which provides as follows:

> 58A-5.025 Resident Contracts.
> (1) Pursuant to Section 400.424, F.S., each resident or the residents legal representative, shall, prior to or at the time of admission, execute a contract with the facility which contains the following provisions:
>
> * * *
>
> (d) A provision giving at least 30 days written notice prior to any rate increase.

18. The Petitioner has failed to meet the burden in establishing this allegation. In support of the allegation, the Petitioner offered evidence that the Respondents' files failed to contain evidence that a written rate increase notice had been provided to a resident. The Rule does not require that the written notice be contained in the Respondents' files, but requires only that the contract between the facility and the resident contain a provision requiring that such notice be provided. There is no evidence that the Respondents' contracts

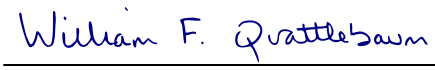
do not contain a rate increase notice provision. In the Petitioner's Proposed Recommended Order, the Petitioner acknowledges that the allegation related to Rule 58A-5.025(1)(d), Florida Administrative Code, had not been proven at the hearing and further states that the Respondents should not have been cited for this deficiency.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Petitioner enter a Final Order finding that the Respondents violated Rule 58A-5.020(2)(d), Florida Administrative Code, and imposing a fine of $1000.

DONE AND ENTERED this 8th day of September, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 8th day of September, 2003.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.