Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE,

BUREAU OF PRISONS, U.S. MEDICAL

CENTER FOR FEDERAL PRISONERS, SPRINGFIELD, MISSOURI

Respondent

and

Case No.
DE-CA-80741

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
LOCAL 1612

Charging Party

Scot L. Gulick, Esquire

For the Respondent

Bruce E. Conant, Esquire

For the General Counsel

Before: WILLIAM B. DEVANEY

Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. [(1)], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns, as alleged by paragraph 16 of the Complaint, whether Respondent, "In approximately April 1998 . . . changed the working conditions of bargaining unit employees when it assigned total health care management duties to Physician Assistants working in Speciality Clinics." (G.C. Exh. 1(c), Par. 16). Respondent denied that it changed working conditions and denied that any Physician Assistant has

been assigned total health care management duties.

This case was initiated by a charge filed on June 29, 1998, which alleged violations of §§ 16(a)(1), (5) and (8) of the Statute (G.C. Exh. 1(a)) and by a 1st Amended charge filed on January 15, 1999, which alleged violations only of §§ 16(a)(1) and (5) of the Statute (G.C. Exh. 1(b)). The Complaint and Notice of Hearing issued January 20, 1999, and set the hearing for March 24, 1999, at a place to be determined in Springfield, Missouri (G.C. Exh. 1(c)). On March 10, 1999, Notice Setting Location of Hearing issued (G.C. Exh. 1(g)); on March 16, 1999, an Order Rescheduling Hearing to April 6, 1999, on Motion of the Charging Party, issued (G.C. Exh. 1(l)); On March 14, 1999, Respondent filed a Motion for a More Definite Complaint (G.C. Exh. 1(h)) and a Motion for Summary Judgment (G.C. Exh. 1(i)) which were denied by an Order dated March 18, 1999 (G.C. Exh. 1(m)). On March 24, 1999, Respondent filed a Request for a Continuance (G.C. Exh. 1(n)) and a Request for Reconsideration of the Motion for Summary Judgment or, in the Alternative, Motion for an Interlocutory Appeal (G.C. Exh. 1(o)). On March 25, 1999, an Order was entered rescheduling the hearing for April 26, 1999 (G.C. Exh. 1(r)), and on April 1, 1999, a further Order was entered rescheduling the hearing for June 2, 1999, at a place to be determined (G.C. Exh. 1(s)). On April 7, 1999, an Order issued Denying Respondent's Motion For Reconsideration And/Or For Interlocutory Appeal (G.C. Exh. 1(t)); and at the second Pre-hearing conference call on May 26, 1999, the place of hearing was confirmed as the same location as previously fixed for the March 24, 1999, hearing date (see, G.C. Exh. 1(g)), pursuant to which a hearing was duly held on June 2, 1999, in Springfield, Missouri, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument, which each party waived. At the conclusion of the hearing, July 2, 1999, was fixed as the date for mailing post-hearing briefs, which time, subsequently, was extended, on motion of the General Counsel, which Respondent supported and to which the Charging Party did not object, for good cause shown, to July 16, 1999. Respondent and General Counsel each timely mailed an excellent brief, received on July 19, 1999, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. The American Federation of Government Employees, AFL-CIO, Council of Prison Locals (hereinafter, "AFGE"), is the exclusive representative of a nationwide consolidated bargaining unit of employees of the Federal Bureau of Prisons and American Federation of Government Employees, AFL-CIO, Local 1612 (hereinafter, "Union") is an agent and affiliate of AFGE for the purpose of representing bargaining unit employees at Respondent's Springfield, Missouri facility.

2. Effective March 9, 1998, AFGE and the Federal Bureau of Prisons entered into a Master Agreement (G.C. Exh. 2), Article 9 of which governs negotiations at the Local Level. On March 10, 1998, the Union and Respondent entered into a Memorandum of Understanding which, in addition to the Outpatient Department and the Mental Health Department, established ". . . posts to be worked by Physician's Assistants in . . .": Medical, Dialysis and Ortho/Surgery Departments (Res. Exh. 1).[2]

3. The Internal Medicine Department, also referred to as the Medical Department (Res. Exh. 1) or Medical Clinic (Tr. 116), was described by Dr. George M. Klingner, Jr., currently Chief of the Outpatient Department (Tr. 58) and for four and one half years, until January 5, 1997, had been Chief of Health Programs, essentially

Chief Medical Officer (Tr. 59-60), who was succeeded by Dr. Lance Luria (Tr. 238), as made up of Dialysis, the renal failure area, and the regular Internal Medicine area that, inter alia, takes care of heart attacks and severe diabetics (Tr. 86-87).

4. Dr. Thomas Jones is Chief of the Internal Medicine Department (Tr. 168) and has occupied that position for about five years (Tr. 168). In about March, 1998, a Dr. Winn resigned (Tr. 116-117; 168; 222; G.C. Exh. 14) and the Internal Medicine Department was reduced to two staff physicians: Dr. Jones and Dr. Khalil (Tr. 177). Dr. Jones credibility testified, without contradiction, that to provide appropriate patient care, he and Dr. Khalil reviewed all patients in the Internal Medicine Department, retaining all patients requiring immediate, active care and identifying patients whose condition was stable and would be appropriate for a PA to follow (Tr. 178-179). This resulted in roughly 40 patients, who were initially assigned to PA Robin Anne Zorno-Floyd in early March, 1998, and subsequently to PA Brenda Hilburn in late March, 1998, to follow.

When Ms. Hilburn, then a Steward (Tr. 114) and since about April, 1999, a Vice President of the Union, learned that patients had been assigned to Ms. Floyd, she believed that Respondent was assigning total health care management to a PA and so reported to Union President Wanda Young (Tr. 29). When Ms. Floyd moved to Dialysis, these patients were assigned to Ms. Hilburn (Tr. 117-118). Ms. Hilburn remained in Internal Medicine for an unspecified time, apparently from late March into July, 1998, before returning to the Outpatient Department. (Tr. 164). Because the Position Description for Physician Assistant authorizes all duties performed, e.g., "Prescribes treatment and medication for routine chronic illnesses . . . Management of chronic health problems . . . Evaluates total health care needs of patients and develops plans to meet these needs . . . ." (G.C. Exh. 9; Tr. 45-46) (See, also, Physician Assistant Privileges Statement, G.C. Exh. 10; Tr. 46-47), the issue in this case is whether PAs acted without the requisite supervision of a physician. No new duties were assigned but the Union contended that because PAs in speciality clinics[3], and specifically in Internal Medicine, performed their PA duties without physician supervision they had been assigned total health care management. Union President Young readily conceded that if physicians were providing supervision to PAs, then PAs were not performing total health care management (Tr. 53-54).

5. Ms. Hilburn perceived that physician supervision was not provided Ms. Floyd or herself: (a) because a "block" of about 40 patients were assigned initially to PA Floyd and, a short time later, to her, PA Hilburn; (b) that the patient files for these patients were color coded to her; (c) that there was no record verifying physician supervision from the date she saw a patient on March 24, 1998 (G.C. Exh. 12) and another on April 6, 1998 (G.C. Exh. 11) and May 4 (G.C. Exh. 11) and May 5, 1998 (G.C. Exh. 12) when the patients were seen by Dr. A. Patel[4]. After May 4, 1998, i.e., after the addition of two physicians, Ms. Hilburn found that Physician supervision was, for the most part, documented; (d) that she found the same pattern in the records of patients seen by PAs Floyd and Maggio (Tr. 132-133); and (e) that on July 1, 1998, she saw a patient and when she looked at the patient's chart she, ". . . discovered he had not been seen by anyone from July 1st, 1998, to July 17th, 1998, except for [herself] . . . that Dr. Pearson never saw that particular patient . . . ." (Tr. 147). Ms. Hilburn's conclusions, vis-a-vis patient records, was premised on the adage, ". . . if it isn't written in the Progress Notes, then it wasn't done" (Tr. 140), which echoed the position of her supervisor in the Outpatient Department, Dr. Klingner, ". . . if it's not documented it didn't happen . . . . (Tr. 71, 77. 78).

Ms. Young perceived total health care by PAs in a letter to her from Mr. Z. Khan, PA, dated June 24, 1998, which stated as follows:

"This letter is in response to your request.

"On Tuesday, June 2, 1998, I was assigned to post #1 in OPD because of staff shortage due to vacation schedules.

"Sometime between 11:00 a.m. - 12:00 a.m. on 6-2-98, Dr. Luria phoned OPD to speak with Ron Baker. Since I was assigned as #1 for that day, the phone call was transferred to myself. Dr. Luria informed me we had a new admission work cadre dialysis inmate housed on 1-4. Dr. Luria asked me to go, or send someone to watch Robin Floyd, Dialysis P.A. complete a physical on this inmate.

"I was also informed by Dr. Luria to assign myself or some other P.A. to manage the future problems of this inmate." (G.C. Exh. 8).

Ms. Young stated,

". . . He says to manage the future problems of this inmate. But in our conversation he was talking about total health care when he initially contacted me . . . ." (Tr. 49-50) (see, Tr. 32: ". . . And then after that [watch Ms. Floyd give a physical] Mr. Khan was to assign this inmate to another Physician's Assistant for total health care.") . . .

"A. He [Khan] doesn't use the word total --

"Q. -- total health care?

"A. -- no, he does not. . . ." (Tr. 50)

6. Dr. Jones testified that Ms. Floyd is under his supervision for administrative purposes and for clinical purposes she is supervised both by him and by Dr. Husted (Tr. 172); and that Ms. Floyd and Ms. Hilburn, when they were following the block of about 40 patients, were under his supervision (Tr. 179); that, ". . . we see patients all the time as problems arise . . . ." (Tr. 182); and that he kept himself familiar with her work, "...Through informal discussion and the usual...review mechanisms that have always been in place. Unit -- unit team meeting... concurrent chart reviews through medical records, the usual medical...medical staff review mechanisms." (Tr. 182)

Dr. Jones stated that the records of General Counsel Exhibit 11 were for a 48 year old man with a variety of chronic problems, admitted in 1995, whose active issues were being evaluated in the Urology Clinic; and whose other chronic problems were stable and were being monitored by Ms. Hilburn (Tr. 173). Dr. Jones stated that his seeing (monitoring) such a patient would be episodic, i.e., that he would be available for any changes of

condition or evaluation of new treatment plans (Tr. 173-174). Dr. Jones stated that the records of General Counsel Exhibit 12 were for a 54 year old man, admitted in 1997 whose initial complaint was a history of heart disease that had been stable for the previous four years; that his only active treatment was in Urology; and that the function of the PA was to monitor the patient and look for changes in conditions (Tr. 174-175).

Dr. Jones stated that when alerted to changes, they (Dr. Jones or Dr. Khalil) reviewed the case, ". . . that was part of the monitoring function . . . ." (Tr. 180). Ms. Hilburn, in a statement to the FLRA, had said, ". . . that there were 'two other physicians so it worked well.'" (Tr. 146, 159) (Dr. Jones and Dr. Khalil (Tr. 159)). Ms. Hilburn testified,

"Q. And because we had those two physicians it worked well, is that correct?

"A. It worked well in the clinic area, yes, seeing those patients." (Tr. 159)

Ms. Hilburn also said, with regard to the same reference,

"A. Yes, sir. I enjoyed working in the Medical Clinic with those physicians. (Tr. 146)

Ms. Hilburn said she would see a patient every two weeks or sometimes once a week (Tr. 146)

7. Dr. Mark Albert Pearson credibly testified that he personally saw the patient, to whom Ms. Hilburn referred as having see on July 1st, 1998, the day he was admitted and on July 17, 1998; that he sat down and talked with him on July 1st and did a brief examination; that he reviewed the admission orders Ms. Hilburn had written and co-signed the admission history (Tr. 165-166). Dr. Pearson stated he makes daily rounds on the unit and reviews the patients with the nursing staff, (Tr. 166) and, probably saw this patient on his rounds (Tr. 166) but writes in a chart only if there is something unusual that has occurred (Tr. 166). This particular patient's medical condition was quite stable (Tr. 166). Because Ms. Hilburn did not have admitting privileges (Tr. 147), I conclude, as Dr. Pearson testified, that Dr. Pearson co-signed his admission orders on July 1, 1998, when he was admitted. Further, Dr. Pearson was in his office daily and was readily available to Ms. Hilburn (Tr. 167).

Dr. Pearson also credibly testified concerning his supervision of PA Maggio, noting, inter alia, that he assigns Mr. Maggio patients to do admission histories and physicals and to follow on a regular basis; that he, Pearson, sits in with him, Maggio, when he does the admission and from time to time they sit down and discuss the patients (Tr. 163-164).

8. Dr. Klingner described the Outpatient Department as, ". . . basically we do just as an

office practice would do outside of the hospital . . . we don't take care of inpatients in the hospital . . . we're a triage area. We . . . treat and evaluate. And then if they need specialty care, then we are the ones that end up referring to the different specialty areas within the institution . . . ." (Tr. 67). Dr. Klingner described the role of a PA as follows:

> " . . . the physician is the one that's -- that's -- and the only one that should be practicing the management, total health care management of whatever patient. And then . . . that physician has helpers and one of the helpers might be a Physician Assistant, just like the name says. They assist . . . the physician . . . different PAs have different capabilities. . . And different PAs . . . I think can be trusted to do more than perhaps others . . . ." (Tr. 65-66).

While I do not question Dr. Klingner's veracity, I do not credit the apparent implication that he reviews all charts for all patients seen by PAs of the Outpatient Department each day (Tr. 69-70). Rather, as Dr. Klingner stated, he reviews the work of the PAs working with his, Dr. Klingner's, patients every day (Tr. 67-68), and as Mr. Roland Glenn Baker, Supervisory PA in the Outpatient Department, (Tr. 93), credibly testified,

> ". . . We have a review process in OPD whereas x number of charts are taken each day from the sick call at random and the physician will see them . . . They'll pick like ten percent daily. . . ." (Tr. 99-100) "... That is a routine that we do. That is a minimum. But again, if the person is seen on off hours, weekends, evenings, an emergency case, then they will be reviewed. . . ." (Tr. 112).

Although Dr. Klingner characterized a PA strictly as a physician's helper who worked with the physician, doing as instructed, with the physician reviewing the work done by the PA, nevertheless, he said,

> ". . . our PAs in the Outpatient Department, they see an awfully lot of patients . . . that I don't see. . . ." (Tr. 70);

and he recognized that PAs have a certain amount of autonomy (Tr. 82) governed by the parameters of their Privilege Statement (Tr. 76).

Dr. Klingner stated that during the time he was Chief of Health Programs (before January 5, 1997), there were no PAs in Internal Medicine, in part because, ". . . we had enough physicians there and they didn't need one"; and in part because, ". . . the physicians . . . that made up the Internal Medicine . . . didn't desire to have PAs working in their department." (Tr. 87).

9. Dr. Frederick C. Husted, a Board Certified Nephrologist (Tr. 185), has been the sole contract

Nephrologist for about two years (Tr. 188) but has done contract work for the prison for twenty years (Tr. 188). Before he became the sole contractor, Nephrology services had been divided among five physicians, each coming out about five or six hours per week (Tr. 188). Upon becoming sole contractor, Dr. Husted retired from his clinical practice downtown, has an office in the Dialysis Unit, is in the Unit daily (Tr. 186) and spends about 30 hours per week in the Unit (Tr. 188).

Dr. Husted stated that at the time of the hearing there were about 105 patients in the Dialysis Unit (Tr. 186); that he sees each patient formally at least once a month (Tr. 185, 186, 187) and more frequently as circumstances may require (p.r.n.) (Tr. 185); that PA Floyd makes rounds with him, assists him in various aspects of the care of patients, including peritoneal dialysis (Tr. 185-186). Dr. Husted said that they, he and Ms. Floyd, break the patients into groups of about 15 for rounds; that they make the rounds of 15 and come back and discuss the care issues of each and jointly take care of the charts (Tr. 186). He said Ms. Floyd does not have total responsibility (Tr. 186-187); that he sees each patient monthly and more frequently as needed, that he walks the Unit every day; that he responds to her questions; that they sit down and go over the cases; that she implements treatment plans he has prescribed; that he is available to her seven days a week, by telephone at home or on his cell phone when he is not in the Unit (Tr. 187). Dr. Husted stated that, because he is not, per se, an employee of the prison, Ms. Floyd is officially assigned to the attending physician for supervision (Tr. 190).

10. Ms. Robin Anne Zorno-Floyd received her B.S. degree and completed the Physician Assistant program at the Colorado School of Medicine in 1983 (Tr. 212) and received her Master of Science Degree in Medicine from Colorado School of Medicine in 1985 (Tr. 212-213). Ms. Floyd had been employed by the Bureau of Prisons before 1989 when she left to work for Kaiser Permanente, an HMO, for four years, then for Salute Health Care Center, a system of ten clinics on the eastern plains of Colorado for four years, (Tr. 224-225), has been employed at Springfield two years and has been assigned to the Dialysis Unit for 15 months (Tr. 212). Ms. Floyd stated that she is supervised by two physicians: Dr. Husted, contract Nephrologist, and primarily by Dr. Jones (Tr. 213-214). She stated that she does, ". . . health care in conjunction with a physician." (Tr. 216), primarily, Dr. Husted and Dr. Jones, but if the patient is assigned to another staff physician, Dr. Khalil, Dr. Pearson or Dr. Patel, then she consults with them (Tr. 216-217).

Ms. Floyd said that she, Dr. Husted and Dr. Jones worked closely as a team on a day-to-day basis; that they meet every morning for at least 30 minutes to go over any problem patients (Tr. 214-215); that Dr. Husted's office is next to hers; and that she has immediate access to either Dr. Jones or Dr. Husted (Tr. 215-216). Ms. Floyd stated that she accepted the block of patients in 1998, on the express understanding, ". . . that if I had any problems the doctors would be immediately accessible to [her]" (Tr. 217); and that with respect to the patient she saw on March 5, 1998 (G.C. Exh. 14), she saw him only once and, ". . . I remember my putting the charts on a rack to be routed to the primary care doctor" (Tr. 224) when she moved to Dialysis in March, 1998.

11. Mr. Louis John Maggio received his training as a Physician Assistant at Brooks Army Medical Center, San Antonio, Texas, completing his PA training in 1977. Mr. Maggio left the military and worked as a PA for Arco Alaska for 14 years (Tr. 198-199). Arco Alaska would fly two PAs and a physician from Anchorage to the north slope where they would remain a week and then rotate back to Anchorage for a week (Tr. 199). On occasion, the two PAs would work a rotation without the physician (Tr. 199). Mr. Maggio has been employed at Springfield for approximately four and a half years (Tr. 193) and his current duties include admitting inmates through Receiving and Discharge (R&D) at which time he does a screening history and physical examination to determine to which ward they can be assigned (Tr. 194-195) and he works in the Medical

Clinic (Internal Medicine) where he is supervised by Dr. Pearson (Tr. 195). Mr. Maggio has a caseload of Dr. Pearson's patients for whom he performs histories and physical examinations (Tr. 195-196). He makes rounds with Dr. Pearson each morning in 3 Building, where the more serious patients are housed, and helps administer EKGs (Tr. 196). Mr. Maggio said, "I don't have total responsibility. I don't know of a Physician's Assistant that does. It's a dependent occupation.... Dependent on the physician. We're working under the physician's license. The physician is ultimately responsible for the care of that patient. We cannot practice medicine without a physician sponsorship." (Tr. 197).

Mr. Maggio said that Dr. Pearson knows the patients he (Maggio) is following as well as he does because they are his, Dr. Pearson's, patients (Tr. 200); that Dr. Pearson takes the supervision seriously and when he, Maggio, first started working with him, Dr. Pearson sat in on every physical (Tr. 200-201); that this continued for two months or so (Tr. 202) and now after he, Maggio, has done a physical he tells Dr. Pearson who comes over and sees the patient, reviews Mr. Maggio's treatment plan and may ask the patient questions (Tr. 203). Mr. Maggio stated that Dr. Pearson saw the patient, whose records were introduced as General Counsel Exhibit 13, on April 27, 1999, the day he, Maggio, dictated his physical examination (Tr. 209) and, indeed, Dr. Pearson signed the typed examination which is dated April 27, 1999 (G.C. Exh. 13).

12. Dr. Lance Luria, Board Certified in Internal Medicine, succeeded Dr. Klingner in 1997 as Chief of Health Programs (Tr. 238). Dr. Luria stated,

> ". . . All Physician's Assistants must have oversight and supervision from a physician. That's part of what Physician's Assistants are licensed and certified for. That has to be. It's in our bylaws, it's in our rules and regulations, it's common -- it's community standard. There is -- I don't know of a Physician's Assistant that operates without being under auspices or supervision of a physician." (Tr. 246).

Dr. Luria, when asked if a physician's failure to sign off on Progress Notes of a PA was on any importance, responded:

"A. No, no, sir, none at all.

"Q. Why not?

"A. Well, the whole point of a Physician Assistant is to be able to, under the supervision and within the scope of practice of a physician, manage patients . . . obviously, if you're in private practice, which I have been and I have worked with PAs, . . . if you had to co-sign

every time a Physician Assistant saw a patient you'd have to wonder why you had a Physician Assistant in the first place. They are trained, they are qualified, they are privileged to render those services without having a physician co-sign them. I mean, that would defeat the purpose of having a Physician Assistant if they had to co-sign their charts. That's not what happens in the rest of the country as far as I know and that's not what's appropriate care." (Tr. 245-247).

However, Dr. Luria stated,

> ". . . Our policy is -- is that all histories and physicals to the hospital have to be co-signed, . . . by a physician, not only upon admission but also on discharge. Before they can be officially discharged the physician has to review the whole thing and make sure everything is right and then sign off on it." (Tr. 250-251).

On cross-examination, Dr. Luria was asked what, in his opinion, constituted the minimum oversight of a PA by a physician and Dr. Luria responded:

"A There is no one size fits all. There is no specific number. It's a relationship that has a comfort zone between the physician who is ultimately responsible, ultimately responsible, and the PA that is responsible to that physician to manage those things that they're comfortable with and knowing when to tell the physician, 'I need some assistance, I need some

help.' And the physician has to be available to help them." (Tr. 261).

CONCLUSIONS

There is no dispute that in March, 1998, the Internal Medicine Department had a shortage of physicians which left it with only two staff physicians until a third, Dr. Patel, reported sometime in March or April and a fourth, Dr. Pearson, reported on April 26, 1998. Nor is there any dispute that, to provide appropriate patient care, Dr. Jones, Chief of Internal Medicine, and Dr. Khalil, the other remaining staff physician in Internal Medicine, reviewed all patient files and selected patients who were stable and appropriate for a Physician Assistant (PA) to follow and, in early March, 1998, assigned the resulting "block" of about 40 patients first to PA Floyd and, when Ms. Floyd was moved to Dialysis in late March, 1998, to PA Hilburn.

It is conceded that the PAs were assigned no new duties; but it is asserted that Respondent, in approximately April, 1998, assigned total health care management to PAs by withdrawing, or failing to provide, physician supervision of PAs, in particular in the Internal Medicine Department. There is some evidence to support this assertion; however, the strong preponderance of the evidence supports Respondent's contention that it provided requisite physician supervision of PAs and, accordingly, that PAs never were assigned total health care management of patients.

(A) Evidence tending to support [5] total health care management by PAs.

Ms. Floyd testified that when the "block" of about 40 cases were assigned to her in March, 1998, she accepted the block of patients on the express understanding, ". . . that if I had any problems the doctors would be immediately accessible to [her]" (Tr. 217). Ms. Hilburn viewed the assignment of cases to Ms. Floyd, and then to her, as an indication that total health care management had been given to a PA and this was further emphasized when the "block" of cases were color coded to her. Further, Ms. Hilburn believed the absence of recorded physician review of PA Progress notes meant that "if it isn't written . . . then it wasn't done." (Tr. 140).

(B) Evidence Supporting Requisite Physician Supervision of PAs.

Ms. Floyd, although she stated that when "assigned" the block of cases in March, 1998, insisted upon immediate doctor accessability, gave no indication that she did not have physician supervision. Indeed, when asked about General Counsel Exhibit 14, she said, ". . . I remember my putting the charts on a rack to be routed to the primary care doctor." (Tr. 224). In addition she said that she does, ". . . health care in conjunction with a physician." (Tr. 216) and, while she was being questioned about her work in dialysis, she did not limit her statement.

Dr. Jones credibly testified that Ms. Floyd and Ms. Hilburn were under his supervision when they were following the block of about 40 patients; that, ". . . we see patients all the time as problems arise . . . ." (Tr. 182); and that he kept himself familiar with her (Ms. Hilburn's work, ". . . Through informal discussion...unit team meeting... concurrent chart reviews... ." (Tr. 182). Ms. Hilburn, by strong inference, confirmed her physician supervision. She stated, ". . . there were 'two other physicians [Dr. Jones and Dr. Khalil (Tr. 159)] so it worked well.'" (Tr. 146) and she testified,

"Q. And because we had those two physicians it worked well, is that correct?

"A. It worked well in the clinic area, yes, seeing those patients." (Tr. 159)

Ms. Hilburn further said,

"A. Yes, sir. I enjoyed working in the Medical Clinic with those physicians." (Tr. 146)

Ms. Hilburn contended that she found the same pattern of the absence of recorded patient supervision in the records of patients seen by PAs Floyd and Maggio (Tr. 132-133); but the testimony of Ms. Floyd and Mr. Maggio and of Dr. Husted, of Dr. Jones and of Dr. Pearson, set forth above, show requisite physician supervision of PA Floyd and of PA Maggio. Thus, by way of example, the testimony shows that Ms. Floyd, Dr. Husted and Dr. Jones work together as a team on a day-to-day basis; that they meet every morning for at least 30 minutes to go over any problem patients; that Dr. Husted's office is next to hers and she has immediate access to either (Tr. 214-216); and if a patient is assigned to another staff physician, she consults with that physician, i.e., Dr. Pearson, Dr. Patel or Dr. Khalil (Tr. 216-217). Because he is not, per se, a staff physician, Dr. Husted is not the official supervisor of Ms. Floyd (Tr. 190); but there is no question that he supervises her clinical work. Dr. Klingner explained it as follows:

". . . We have a nephrologist who manages the total bottom line of the health care in those individuals. He's the expert.

"And underneath him you've got the MDs like Dr. Jones, who manages to a certain degree most of the problems of those chronic dialysis patients who have a lot of problems usually besides just renal favor (sic) (failure). They have hypertension problem[s], diabetic problems and so forth.

"Then underneath Dr. Jones, to take care of more of the mundane things, you have the PAs

. . . . (Tr. 91-92).

Dr. Klingner recognized that in the Dialysis Unit supervision of the PA would be a combination of Dr. Husted and Dr. Jones (Tr. 92). Dr. Jones testified that Ms. Floyd is under his supervision for administrative purposes and for clinical purposes she is supervised by both him and by Dr. Husted. Dr. Husted testified that Ms. Floyd makes rounds with him, assists him in various aspects of patient care including peritoneal dialysis; that after making rounds, generally about 15 patients, they come back and discuss the care issues of each and they jointly take care of the charts; that Ms. Floyd implements treatment plans he has prescribed; that he is available to her seven days a week, by telephone at home or on his cell phone when he is not in the Unit; and that Ms. Floyd does not have total responsibility for patient care. Mr. Maggio detailed the supervision of Dr. Pearson, including Dr. Pearson sitting in on histories and physical examination he, Maggio, performs and, when he does not sit in on an examination, Mr. Maggio calls him and he, Dr. Pearson, sees each patient, reviews Mr. Maggio's treatment plan and may ask the patient questions. Mr. Maggio makes rounds each morning with Dr. Pearson. Mr. Maggio credibility testified, "I don't have total responsibility. I don't know of a Physician's Assistant that does. It's a dependent occupation.... Dependent on the physician. . . . We cannot practice medicine without a physician sponsorship." (Tr. 197). Dr. Pearson credibly testified concerning his supervision of PA Maggio.

Ms. Hilburn contends that she saw a patient on July 1, 1998, and that the patient was never seen by Dr. Pearson (Tr. 147), but Dr. Pearson credibly testified that he saw the patient on July 1, 1998, when he was admitted; that he sat down and talked with him and did a brief examination; that he reviewed the admission orders Ms. Hilburn had written and co-signed the admission history on July 1, 1998.

Dr. Klingner appears to have grudgingly accepted PAs and in caring for his patients wants the PA with him so he can instruct what he wants done and then he reviews what the PA has done. Nevertheless, as to patients he is not personally caring for, Dr. Klingner grants PAs autonomy to care for patients. Indeed, he stated,

> ". . . our PAs in the Outpatient Department, they see an awfully lot of patients . . . that I don't see. . . ." (Tr. 70).

To be sure, about ten percent of these PA charts are subject to random review daily; but in reality, the PAs in the Outpatient Department, except those helping Dr. Klingner, did as the PAs in the Internal Medicine did, they saw patients alone, evaluated them and cared for them, and referred them to a physician only for things they could not handle (Tr. 95, 98). There was a physician present in the Internal Medicine Department, including dialysis. PA Privilege Statements are reviewed annually (Tr. 105, 257); changes are made only by the Medical Executive Committee (Tr. 258) and Dr. Luria testified that the Executive Committee had made,

> ". . . some slight modifications . . . to make them more consistent with what we were doing. And those are privileges that are -- that can be requested by the PA or the physician and then granted or not by the Executive Committee . . . for the inpatient areas we permitted . . . the possibility of a PA

> giving intravenous administration fluids, IVS for surgical cases. That was a privilege that was authorized . . . so that if a PA wanted to do that and checked off the grant that . . . the supervising physician of record authorized and permitted them and approved it, and then the Medical Executive Committee felt that that person had the credentials, then they would be able to do that. ..." (Tr. 258-259).

In short, while General Counsel presented some evidence that Respondent changed the conditions of employment of PAs by withdrawing, or failing to provide, physician supervision, the overwhelming weight of the evidence shows that Respondent provided physician supervision of PAs at all times and, accordingly, PAs were never assigned total health care management duties. Because General Counsel failed to prove by a preponderance of the evidence that Respondent violated the Statute as alleged, United States Customs Service, Region IV, Charleston District, Charleston, South Carolina, 42 FLRA 177, 190-191 (1991); Letterkenny Army Depot, 35 FLRA 113, 119 (1990), it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. DE-CA-80741 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Date: August 19, 1999

Washington, DC

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(5) will be referred to, simply, as, "§ 16(a)(5)".

2. Respondent Exhibit 1 is entitled, "Physician's Assistant Rotation" (Res. Exh. 1) and in about September, 1998, Ms. Wanda Young, President of the Union (Tr. 16-17), exercised the reserved right to negotiate (Res. Exh. 1; Tr. 40); the Warden made assignment of PAs permanent and Respondent refused to negotiate, whereupon the Union filed a grievance and the Regional Director ordered Respondent to bargain (Tr. 41-42). The parties met and negotiated but have not reached agreement (Tr. 42). This is not an allegation covered by the Complaint, was not litigated, and I express no opinion whatever on the matter. I simply accept, as an

acknowledged fact, that the parties agreed to the assignment of PA's to all specialty clinics (Departments).

3. Although the Complaint refers to "Speciality Clinics" no evidence or testimony was presented concerning Mental Health or Ortho/Surgery. Accordingly, the evidence concerning the allegations of Paragraph 16 of the Complaint (G.C. Exh. 1(c), Par. 16) relate solely to the Internal Medicine Department, which includes Dialysis.

4. Two additional physicians were hired by Internal Medicine, the first, Doctor A. Patel, who reported sometime in March or April, 1998, (Tr. 177), and the second, Doctor Mark A. Pearson, who reported April 26, 1998 (Tr. 162). This brought the complement of physicians in Internal Medicine to four: Doctors: Jones, Khalil, Patel and Pearson (Tr. 162); plus a contract Nephrologist, Dr. Frederick C. Husted (Tr. 184). Ms. Floyd is a PA in Dialysis, which is part of Internal Medicine (Tr. 185, 212) and Mr. Louis John Maggio is a PA in Internal Medicine (Tr. 162, 195).

5. PA Khan's June 24, 1998, letter to Ms. Young in which he reported that Dr. Luria asked him to watch, or send someone to watch, Ms. Floyd complete a physical, and "to assign myself or some other P.A. to manage the future problems of this inmate." (G.C. Exh. 8), fails to show absence of physician supervision.