



*Public Service
Labour Relations Act*



Before the Public Service
Labour Relations Board

February
Date: 20060519

File: 547-02-00001

Citation: 2006 PSLRB 61

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant

and

TREASURY BOARD

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondents

Indexed as

*Professional Institute of the Public Service of Canada v. Treasury Board
and Public Service Alliance of Canada*

In the matter of an application, under section 34 of the *Public Service Staff Relations Act*, for a determination of membership of an employee or a class of employees in a bargaining unit

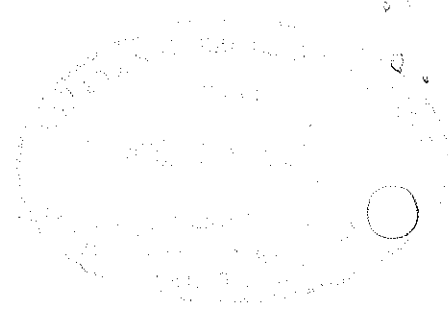
REASONS FOR DECISION

Before: Sylvie Matteau, Vice-Chairperson

For the Applicant: Dougald Brown, counsel

For the Respondents: Neil McGraw, counsel for Treasury Board;
Andrew Raven, counsel for the Public Service Alliance of
Canada

Heard at Ottawa, Ontario,
November 21 and 22, 2005.



REASONS FOR DECISION

Application before the Board

[1] This application was filed under section 34 of the *Public Service Staff Relations Act* (the former Act) by the Professional Institute of the Public Service of Canada (the applicant) for the issuance of an order declaring that the Medical Adjudicators positions within the Department of Social Development Canada (the DSDC) should belong within the Health Services group for which the applicant is the exclusive bargaining agent. Presently, this group is included in the Program and Administrative Services group, for which the Public Service Alliance of Canada (the PSAC) is the exclusive bargaining agent.

[2] The application was received at the Public Service Staff Relations Board (the former Board) on February 17, 2005. On March 3, 2005, the employer filed its response to the application, maintaining that the positions in question properly fell within the PSAC bargaining unit and objecting to having the matter dealt with in writing. The PSAC responded in writing on March 23, 2005. The applicant filed a reply dated April 13, 2005. Considering the availability of the parties, a hearing was scheduled on November 21 and 22, 2005. The applicant presented three witnesses. The employer presented one witness and the PSAC presented two.

[3] According to the applicant, this is not a matter of classification; rather, it is a matter of determining whether the duties of medical adjudicators fall within the mandate as set out in the certificate for representation of the Health Services unit that it represents. This would be the best fit for the purpose of representation of this group of some 300 employees, virtually all of whom are registered nurses.

[4] The PSAC argued that the duties of the medical adjudicators clearly do not include those of nurses as found in the Health Services group definition. The medical adjudicators deliver a government program. They are appropriately found in the Program and Administrative Services group (the PM group) represented by the PSAC. They do not provide nursing care as defined in the Health Services group definition. Placement within or outside of a group should not be determined by educational qualifications, but rather by the duties performed.

[5] For the employer, it is also a matter of the most appropriate group for this position, considering duties and responsibilities. This would be the PM group.

[6] Certificates and related decisions on certification were filed, and the application and responses were recognized as part of the record. They are as follows:

The application

...

4. The Applicant is an employee organization duly certified by the Public Service Staff Relations Board as the exclusive bargaining agent to represent all employees in the "Health Services Group";
5. The Respondent, TB, is the Employer;
6. The Respondent, PSAC, is an employee organization certified by the Public Service Staff Relations Board to represent employees in the "Program and Administrative Services Group";
7. The employees affected by the present application are occupying positions of Medical Adjudicators, within the Department of Social Development Canada (herein after SDC) and are presently included in the Program and Administrative Services Group, represented by the Respondent, PSAC;
8. The Medical Adjudicators are presently classified at the PM-03 group and level;
9. The Applicant respectfully submits that the Medical Adjudicators, approximately 300 public servants, employed by SDC are improperly included within the Program and Administrative Services Group and should rightfully be included into the Health Services Group;
10. The Occupational Group Definitions which defined the above mentioned groups were published in the Canada Gazette Part 1, March 27, 1999, pp. 801-831, and are attached hereto as Exhibit 1;
11. The Medical Adjudicators positions clearly fall within the definition of the Health Services Group and are just as clearly excluded from the definition of the Program and Administrative Services Group definition;
12. The definition of the Health Services Group positions indicates that it includes "positions that are primarily involved in the application of a comprehensive knowledge of professional specialties in the field of dentistry, medicine, nursing, nutrition and dietetics, occupational and physical therapy and mental well being of people (...)". It specifically "includes positions

that have, as their primary purpose, responsibility for one or more of the following activities: the assessment of medical fitness for the determination of disability and other federal government benefits (...)”;

13. The definition of the Program and Administrative Services Group specifically excludes the Medical Adjudicators positions by stating under the Exclusions title any positions “whose primary purpose is included in the definition of any other group”;
14. The Medical Adjudicators primary purpose and responsibility is to assess medical information in order to make a final determination of disability under the application of Canadian Pension Plan Disability Benefits. Medical Adjudicators' assessments and decisions are final;
15. According to the Employer, the Medical Adjudicators upon appointment are required to have a degree in Nursing and to hold a valid licence as registered nurses, as confirmed in the introduction section of the Business Case submitted by the Employer to the Public Service Human Resources Management Agency of Canada on March 30, 2004, attached hereto as Exhibit 2;
16. The above mentioned requirements are also included in job postings. Some examples are attached hereto as Exhibit 3;
17. The Applicant submits that the work performed by the Medical Adjudicators as described in paragraph 14 and 15, also fully describe in their job description, attached hereto as Exhibit 4, squarely falls within the Health Service Group definition;
18. The Applicant reserves the right to provide further particulars and evidence;
19. The Applicant respectfully request that the Board issues [sic] the following order:
 - Declare that the Medical Adjudicators positions are wrongfully included in the Program and Administrative Services Group;
 - Thus, declare that the Medical Adjudicators position rightfully belong within the Health Services Group;
 - Any further relief that the Board may deemed appropriate.

[Sic throughout]

The employer's response

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The Employer's position with respect to the subject Application is that it should be dismissed as the Service Delivery Specialist (Medical Adjudicator) positions in question properly fall within the P.S.A.C. Program and Administrative Services Group Collective Bargaining Unit.

...

The PSAC's response

...

1. It is the position of the Respondent, PSAC that there is no merit to this section 34 application and no basis in fact or law for the Board to accede to this request and, in effect, transfer Service Delivery Disability Specialists (SDDS), also known as Medical Adjudicators, from the PA Group bargaining unit to the Health Services Group bargaining unit.
2. At the outset, PSAC notes the submissions of the Applicant at page 22 of its "Business Case" material (included as part of Exhibit 2) which confirms that in 2001 a request was made to the Treasury Board Secretariat that it interpret the Health Services occupational group definition to include the jobs which are the subject of this section 34 proceeding. This request was rejected by the employer on the basis that the new group definitions and consequential occupational restructuring were to reflect the status quo and to maintain existing bargaining unit affiliations. In short, the Health Services occupational group definition was not intended to expand the Applicant's bargaining rights or to include the Medical Adjudicators in particular.
3. It would appear that the underlying basis for this section 34 application is the submission of [the] (sic) Applicant that the incumbents of these jobs require "nursing knowledge" and are required to be qualified as a Registered Nurse at the time of appointment. It is the position of [the] (sic) PSAC that, whatever precise relevance this submission may have in terms of the applicable occupational group definitions, it is a fact that the nature of the work does not require incumbents be qualified as Registered Nurses.

4. The work descriptions governing the positions in question confirm that incumbents assess whether or not individual cases fall within applicable Canada Pension Plan (CPP) provisions. As such, position incumbents interpret and apply legislative and administrative provisions respecting CPP eligibility requirements. Incumbents do not deliver hospital or community nursing services. The essence of this work is captured in the Key Activities section of the work description including, for example, the following:

Within an assigned case load, prioritises and manages case files...including the analysis, evaluation and adjudication of CPP disability benefit applications...assesses the severity and expected duration of the disability within the context of CPP legislative and policy frameworks, knowledge of nursing, medical conditions, treatment regimes, and relevance of medical opinions provided by physicians/health care providers, or by peers, and all other evidence or information available.

Determines the need for, and requests additional medical information and opinion(s), undertakes independent fact-finding/consultation and documentation/information from treating physicians, applicants, physicians engaged by the Department, or other sources, to make appropriate and equitable decisions, on a case-by-case basis, on disability benefit entitlements to clients.

...

Provides interpretation and explanation on the Canada Pension Plan disability legislation, programs and policies to audiences, including the medical community, Members of Parliament, officials in other departments and governments, agencies, insurance companies, and the general public, and participates in outreach activities/programs.

5. Prior to 1999, when the new occupational group structure was implemented, these positions belonged to the PM Group. They were captured within inclusion #4 which stated:

Continuing responsibility for an administrative program or activity in which there is a requirement for the application of knowledge,

principles, or skills specific to a specialized body of knowledge or profession.

6. The Nursing Group definition clearly did not capture Service Delivery Disability Specialists:

The care of patients and assistance to medical doctors in the treatment of illness; the conduct of programs designed to prevent and reduce illness and to promote health; the provision of advice.

7. In fact, the current PA occupational group definition clearly includes the work of these positions as follows:

The Program and Administrative Services Group comprises positions that are primarily involved in the planning, development, delivery or management of administrative and federal government policies, programs, services and other activities directed to the public or to the public service.

8. PSAC maintains that the work of the SDDS incumbents fits squarely within the PA Group definition and they are, and have always been, properly included within this bargaining unit.

9. PSAC notes the submissions of the Applicant at paragraph 12 of its application and the reference in the Health Services Group definition to the words "...the assessment of medical fitness for the determination of disability and other federal government benefits...". PSAC submits that this phrase was always intended to cover medical doctors and not to position incumbents of the subject positions involved in this proceeding.

10. Moreover, the Health Group Services (sic) definition, on its face, stipulates a knowledge requirement applicable to the fields of dentistry, medicine, nursing and other health professional positions. There is no requirement that incumbents of SDDS positions be registered as a nurse under the laws of a province or territory in order to assess disability claims under the CPP. Nor is it the case that this work is primarily aimed at the "safety and physical and mental well-being of people" as specified in the HS definition.

11. Contrary to the position asserted by the Applicant, the primary purpose of the Medical Adjudicator job is to determine eligibility for CPP

disability benefits. These jobs exist within the Income Security Branch of CPP within HRDC. As such, these position incumbents administer a government income security program pursuant to legislation and regulations governing CPP disability benefits. Incumbents do not provide traditional medical or nursing health care functions.

12. In short, incumbents of the SDDS positions are required to possess specialized knowledge for purposes of benefit entitlement under federal legislation. As such, incumbents of these positions fall properly within the existing PA bargaining unit and there is no basis to alter their inclusion in this bargaining unit.

...

The applicant's reply

...

1. The Applicant reiterates that the Medical Adjudicators, subjects of this Application, are improperly included within the Program and Administrative Services Group and should rightfully be included into the Health Services Group;
2. The Medical Adjudicators positions clearly fall within the definition of the Health Services Group and are just as clearly excluded from the definition of the Program and Administrative Services Group definition;
3. The Respondent, PSAC, in its response makes reference to prior decision of the Employer concerning the Medical Adjudicators. We would respectfully submit that a prior decision of the Employer is of no consequence for this current application;
4. The Respondent, PSAC, also refers to the requirement or not for Medical Adjudicators to be qualified as Registered Nurses. Whether or not the professional requirement is present can be helpful in determining their status but the work actually performed by the medical adjudicators needs to direct any decision in this process and their primary purpose is, in accordance with the SH Group Definition to assess "medical fitness for the determination of disability and other federal government benefits (...)";

5. Furthermore, any reference to past Group definition or designation is irrelevant since the applicable Group Definitions, published in the Canada Gazette Part 1, March 27, 1999, pp.801-831, attached to PIPSC's Application as Exhibit 1, holds no ambiguity;
6. We respectfully submit that the Board would in fact be exceeding its powers should it decide to provide interpretation to these clear and unambiguous Group Definitions by relying on inapplicable prior Group Definitions;
7. The Applicant respectfully submit that its Application under Section 34 of the PSSRA, filed with the Board on February 16, 2005 is well founded in facts and in law and should be granted.

...

[Sic throughout]

[7] Classification standards for Nursing (Exhibit A-4), Medicine (Exhibit A-5) and Program Administration (Exhibit A-6) were also filed, as well as pertinent extracts from The Canada Gazette, Part I, March 27, 1999, regarding Occupational Group Definitions (Exhibit P-3) and The Canada Gazette, Part I, July 17, 2004, regarding Occupational Sub-Group Definitions (Exhibit A-9).

[8] On April 1, 2005, the *Public Service Labour Relations Act* (the "new Act"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Also on this date, the former Board ceased to exist and was replaced by the Public Service Labour Relations Board (PSLRB). Pursuant to section 39 of the *Public Service Modernization Act*, the PSLRB continues to be seized with this application, which must be disposed of in accordance with the new Act. Under the new Act, the determination of questions of membership in bargaining units is a matter which falls under section 58.

Summary of the evidence

[9] Some 300 medical adjudicator positions are affected by this application. All medical adjudicators are presently classified at the PM-03 group and level. Their work involves the determination of claimants' eligibility to health benefits under the Canada Pension Plan (CPP). Claimants must meet specific criteria found in section 42 of the *Canada Pension Plan Act*. This assessment includes that of medical fitness and of

contributory service. Medical adjudicators report to team leaders or supervisors, who are generally classified at the PM-04 group and level.

[10] The employer requires that all medical adjudicators be registered nurses at the time of hiring and pays the licensing fees to all medical adjudicators to assist them in maintaining their licensing. The employer insisted, however, that the licensing is not a requirement to execute the work. Team leaders and supervisors are also required to be registered nurses.

[11] Ruth Walden received her nursing degree and has been a registered nurse since 1968. In 1993, she joined Health Canada as a medical adjudicator (group and level PM-03). She has held this position until now. She testified that the hiring requirements at the time, and still today, included graduation from a nursing program, proof of licensing and recent clinical experience.

[12] When she applied for the position, she wrote a test. The questions were directed to medical knowledge (worth 90% of the total score) and to knowledge of the CPP disability program (worth 10% of the final score). Her review of job advertisings and postings (Exhibit P-4) shows that a nursing license has always been a requirement for this position. As far as she knows, only one medical adjudicator does not meet this last requirement, but is licensed in another country.

[13] On December 3, 1998, Ms. Walden filed a classification grievance (Exhibit P-5). She argued that her work description was incomplete. Her present work description (Exhibit P-6) is dated October 1, 2004. It applies to all medical adjudicators. This generic work description was developed through a long process of consultation between the employer and the bargaining agent, as well as herself and her colleagues. Still, Ms. Walden does not agree with this work description and considered, at the time, filing a new classification grievance. That work description presents the following key activities:

...

KEY ACTIVITIES

Within an assigned case load, prioritises and manages case files (initial, reconsideration, reassessment, Internationals, with papers, fast-track, terminal, Review Tribunal appeals, Pension Appeals Board appeals), including the analysis, evaluation and adjudication of CPP disability benefit

applications (and where applicable the disability elements of CPP Survivor and Old Age Security benefit applications), and all medical, pharmacological, psycho-social, work-related, including self-employment, and other supporting documentation provided by claimants and physicians; assesses the severity and expected duration of the disability within the context of CPP legislative and policy framework, knowledge of nursing, medical conditions, treatment regimes, and relevance of medical opinions provided by physicians/health care providers, or by peers, and all other evidence or information available.

...

[14] Ms. Walden then described her duties as well as the program. She also described the tools that medical adjudicators use, namely the forms that are submitted by claimants. She explained that the medical adjudicators are called to read and assess the medical reports accompanying the applications to determine if the information is sufficient to process the claim. They assess each case and provide a decision. Medical knowledge is, therefore, required to read, interpret and assess medical reports. The process aims at determining the existence or not of a disability which meets the criteria of the program. Medical adjudicators, for example, look for consistency in medical history, treatments, medications, diagnosis and prognosis. They also need to be able to determine what could be missing or what could be needed for a better assessment of the applicant's disability as it prevents him or her from working. Medical adjudicators regularly contact the applicant or the medical officer on file to enquire about additional information or tests. This, in her opinion, is where her medical training is most important.

[15] In the end, the medical adjudicator makes the decision on whether or not to grant the application. There are no requirements to obtain approval from a supervisor or a physician prior to making a decision. The medical adjudicator's decision is communicated directly to the applicant. If the application is turned down, the medical adjudicator provides the reasons for the decision in the letter to the applicant. A decision to reassess the case later can also be made. The applicant is also notified of that decision. A worksheet is thereafter completed explaining the rationale of the decision.

[16] The applicant can ask for a reconsideration of the application. This was formerly referred to as an appeal. A different medical adjudicator would then be called to reconsider the decision. Usually, additional information is provided to make

a new assessment. This medical adjudicator would review the entire file and any new information. The new decision is communicated directly to the applicant, again without pre-approval of any kind.

[17] The applicant who is not satisfied with the decision can then appeal it to a tribunal composed of a lawyer, a member of the community and a medical specialist. The role of the medical adjudicator, at that stage, is to prepare a written document, referred to as a case submission, explaining the Minister's position. It provides a review of the medical condition and a rationale for the decision. The tribunal then issues a written decision.

[18] There is one more level of appeal. It requires leave to appeal. The Pension Appeal Board (PAB) is composed of three judges. At this level, the role of the medical adjudicators is to make a new assessment, as there is often new evidence provided, and to decide whether or not to contest the appeal. They need to provide a rationale for that decision. If the medical adjudicator decides to grant the application at that level, approval of a physician is required. The physician will appear before the PAB if the decision is maintained. In the event that the physician decides to grant the application, the signature of another physician or a nurse is then required. Wherever two signatures are required, they cannot be of two nurses; one doctor has to sign. Most appeals are settled without a hearing.

[19] When granted, the medical adjudicator does not determine the amount of compensation the applicant will receive. The file is passed on to another section, which calculates the amount to be paid and implements the decision. The medical adjudicators do not assess the contributory eligibility either.

[20] Ms. Walden testified that the issue of the medical adjudicators' classification has arisen many times over the years. More recently, on March 30, 2004, a Business Case was prepared by the DSDC. According to the witness, the medical adjudicators were consulted. One of the options considered in the report was the creation of a Nurses Sub-Group within the Health Group. The report also indicates that this option did not have the support of the bargaining agent, the PSAC. In September 2004, the medical adjudicators were informed of the Public Service Human Resources Management Agency of Canada's (the PSHRMAC) response to the proposals included in the Business Case (Exhibit P-14). Its conclusion was that, in the case of disability adjudicators, "[d]epartmental senior management understands that within the confines

of the present group structure there is no alternative to classification within the PA (PM) group." The report also points out (page 4) that:

...

Many occupational groups have a variety of professionals within their ranks such as Engineers performing town management functions for federally managed towns in national parks, or designing and delivering boat safety programs to the Canadian public, Educators performing training functions, (PM or PA) Accountants performing tax audits, and other (PA) Accountants performing internal audits, Lawyers working as Foreign Service Officers etc. However, it should be noted that group allocation is based on the primary purpose of the position and not on the qualifications of the incumbent. The fact that they require professional qualifications to do their jobs does not qualify them to be included in the occupational group where the majority of employees have the same professional degree or qualifications i.e., not all employees with a law degree or [who] (sic) have been admitted to the Bar are classified as LA's and not all professional Engineers are classified as EN.

...

[21] The decision to maintain the classification at the PM-03 group and level was issued on January 27, 2005 (Exhibit P-15).

[22] Through all this period, the work description was contested through other processes. Ms. Walden's first grievance was filed in December 1998 (Exhibit P-5). The witness explained that medical adjudicators spend 95% of their time analysing and evaluating files to make a determination of medical condition. She then provided an explanation of her duties through key activities and required knowledge found in the 2004 work description (Exhibit P-6). She pointed out that medical knowledge and expertise is an essential aspect of the requirements to accomplish the work. In her opinion, it is the main component of the requirements. This work could not be accomplished without medical knowledge. She concluded that what is unsatisfactory about the work description is its emphasis on the managerial aspects of the work, rather than her main function which is the medical assessment of applications.

[23] Furthermore, Ms. Walden and other medical adjudicators filed a complaint with the Canadian Human Rights Commission against the PSHRMAC, Social Development Canada and the Treasury Board (Exhibit P-16), arguing that, based on their sex, they are treated differently than their largely male colleagues, who are doctors employed in the

same program, with respect to the classification of their positions. Doctors are recognized as practising their profession while nurses are not. The Commission has recommended the appointment of a Human Rights Tribunal.

[24] In cross-examination, Ms. Walden recognized that if she did not maintain her nurse's registration, she would be in no danger of losing her employment.

[25] Vernon Toews has been a registered nurse since 1989 and joined the public service in 1999 as a medical adjudicator in Manitoba. He confirmed the hiring requirement of possessing the active nursing registration and the fact that the employer has regularly paid for the annual dues, with the exception of one year. Mr. Toews also described his work and confirmed Ms. Walden's description of the application process and the assessment of the files, as well as all other duties. He agreed that this work cannot be accomplished without medical knowledge. In his opinion, one needs extensive medical knowledge to understand and fully comprehend the medical condition of the applicant and how that affects the applicant's ability to be employed. Each case is analysed on the basis of the medical reports; there are no administrative guidelines. The medical adjudicator assesses the medical condition in each case and then the case is analysed through the criteria and indicators laid out in a policy.

[26] Mr. Toews also confirmed that he has no difficulty maintaining his registration with the provincial authorities. They consider his work to be medical practice, one of the requirements for renewal.

[27] Gwen Wills qualified as a nurse in 1965, in Scotland. She moved to British Columbia in 1968. She joined the Department of Health and Welfare Canada in 1993 as a medical adjudicator at the PM-03 group and level. She presently works in the reassessment unit. Her work involves the reassessment of beneficiaries to determine if they are still eligible. She confirmed the ratios of work activities presented by the other witnesses.

[28] She finds herself particularly well-suited for work in this reassessment unit considering that she has past experience in rehabilitation. The medical adjudicator alone makes the decision to proceed with a reassessment, based on the medical condition of the beneficiary. No approval process exists. A reassessment "kit" is sent out to the beneficiaries and their doctor. When the information comes back it is

analysed and the medical adjudicator, looking at the congruence of the file, could decide to reject the doctor's assessment, require a functional capacity evaluation (a simulation of the workplace and work performed) or a second medical opinion. The process of determination is the same as the one employed at the initial assessment level and also includes the writing of a rationale for the decision.

[29] Ms. Wills explained that the policies to which medical adjudicators refer to perform their work assist them in defining the terms used in the law. This ensures that there is consistency in the interpretation of the law throughout the country. Policies and guidelines do not assist medical adjudicators in their actual assessment of the medical condition of the applicant, or in the case of reassessment, of the beneficiary.

[30] Isabel MacNeil has been a registered nurse since 1982. She joined the public service in Peterborough in 1994 as a medical adjudicator. In 1997, she became manager and since May 2005, she is Senior Manager, Service Delivery Disability Operations, at the PM-06 group and level. As such, she is providing national support and guidance for the delivery of CPP disability.

[31] Ms. MacNeil also described the day-to-day activities of the medical adjudicators, as well as the entire processing of an application. She agreed with the description presented by the previous witnesses. She confirmed that medical adjudicators make all final decisions. They have an array of resources and can refer to their peers or to a doctor in difficult cases. These resources would make a recommendation, but the final decision remains with the medical adjudicator. She explained that the same medical condition could lead to different conclusions in different cases. The medical adjudicators have to use their medical knowledge and experience in each case.

[32] According to the legislation and the Policy Guidelines (Exhibit P-17), medical adjudicators have to determine, first that the person has a medical condition and second, that medical condition must result in severe and prolonged disability for a person to be eligible for the CPP benefits. The Policy acts as a guide to the interpretation of the law and the determination to be made according to jurisprudence and other factors.

[33] The witness also confirmed the hiring practices which require the candidates to hold a current registration. This is to ensure that at the time of hiring, the candidate's

medical knowledge is current. Once hired, there is no requirement to maintain the licensing; however, most do as a backup. The provincial authorities all recognize their work as professional practice, which is an important requirement to maintain the licensing.

[34] Ms. MacNeil has been involved in the classification grievance process since 1998, due to her position. She confirmed that this has been a fairly slow process. At one point, consultants were hired to review the positions and their classification. They confirmed the PM-03 group and level. The grievor, Ms. Walden, then pursued the matter further.

[35] A review of the work description was initiated. Many versions were prepared and the medical adjudicators were consulted. In their opinion, the Nursing Unit (NU) group was more appropriate for them and a request was presented to the Treasury Board. The conclusion of this analysis was that the work that the medical adjudicators perform does not meet the criteria for the NU classification. At the same time, work was still being accomplished on the work description. There was a mediation process. Concessions were made on both sides and the grievance was thought to be settled. The work description was then sent to classification review and a decision was announced in February 2005, confirming the PM-03 group and level. As medical adjudicators were still dissatisfied with this result, a commitment was made by management to pursue other avenues for solutions. As a result, a committee is now studying other possibilities, a complaint was filed with the Canadian Human Rights Commission and the present application has been made before this Board.

[36] Patricia Powers is acting director of classification. She explained that the *Public Service Reform Act* of 1992 provided the Treasury Board with six years to define and redefine occupational groups in the public service. A new group structure was put forward in 1996 (Exhibit A-3) and a rationalisation of the 73 groups down to 23 was accomplished and adopted in 1999. The intent was to maintain the union affiliations of all groups. The final groupings were published in *The Canada Gazette* in 1999 (Exhibit P-3). A mapping system was developed and the witness explained its workings in relation to the different groups involved in this application, the Health Services group and the Program and Administrative Services group.

[37] The table found in the Treasury Board document published on December 5, 1996 (Exhibit A-3), shows the reclustering of the groups and is used as

the source for the new structure. The witness then explained the mapping tools. Using the Nursing (NU) Classification Standard (Exhibit A-4) and the Health Services (SH) Group Definition mapping tool (Exhibit A-4A), we find that:

...

The Health Services Group comprises positions that are primarily involved in the application of a comprehensive knowledge of professional specialties in the fields of...nursing,...to the...physical and mental well-being of people...

Inclusions

Notwithstanding the generality of the foregoing, for greater certainty, it includes positions that have, as their primary purpose, responsibility for one or more of the following activities:

...

7. the care of patients and the treatment and management of illness in co-operation with medical doctors, and the provision of specialized nursing services;

8. the evaluation of nursing policies, procedures, standards and practices and the conduct of related research and education;

...

16. the provision of advice in the above fields; and

17. the leadership of any of the above activities.

Exclusions

Positions excluded from the Health Services Group are those whose primary purpose is included in the definition of any other group or those in which one or more of the following activities is of primary importance:

...

Also excluded are positions that:

1. do not require the application of a comprehensive knowledge of...nursing...such as registered nursing assistants, community health representatives...

...

[38] In the case of the Medicine Classification Standard (Exhibit A-5) and the Health Services (SH) Group Definition (Exhibit A-5A), we find that:

The Health Services Group comprises positions that are primarily involved in the application of a comprehensive knowledge of professional specialties in the fields of...medicine...to the safety and physical and mental well-being of people...

Inclusions

Notwithstanding the generality of the foregoing, for greater certainty, it includes positions that have, as their primary purpose, responsibility for one or more of the following activities:

...

2. the conduct and management of programs to promote public and individual health and the reduction of disease;

3. the prevention, diagnosis and treatment of disease, disability and abnormal physical and mental conditions;

4. the assessment of the incidence and prevalence of diseases; the assessment of the fitness for work of Public Service employees; the medical assessment of applicants for immigration into Canada; and the assessment of the medical fitness of aviation personnel;

5. the assessment of medical fitness for the determination of disability and other federal government benefits, special equipment and services to eligible applicants;

6. the appraisal of drugs and medical devices for safety and efficacy under the conditions of their intended use;

...

16. the provision of advice in the above fields; and

17. the leadership of any of the above activities.

Exclusions

Positions excluded from the Health Services Group are those whose primary purpose is included in the definition of any other group...

...

Also excluded are positions that:

1. do not require the application of a comprehensive knowledge of...medicine...

2. as primary activities, engage in research in microbiology, pharmacology, toxicology, physiology, virology or related biological sciences; and

...

[39] Finally, in the case of the Programme Administration Classification Standard (Exhibit A-6) and the Program and Administrative Services (PA) group definition (Exhibit A-6A), we find that:

...

The Program and Administrative Services Group comprises positions that are primarily involved in the planning, development, delivery or management of administrative and federal government policies, programs, services or other activities directed to the public...

Inclusions

Notwithstanding the generality of the foregoing, for greater certainty, it includes positions that have, as their primary purpose, responsibility for one or more of the following activities:

...

2. the planning, development, delivery or management of government policies, programs, services or other activities directed to the public ...

...

4. the planning, development, delivery or management of government policies, programs, services or other activities dealing with the collection of taxes and other revenues from the public;

5. the planning, development and delivery of consumer product inspection programs;

...

7. the planning, development, delivery or management of policies, programs, services or other activities dealing with the privacy of and access to information;

...

15. the leadership of any of the above activities.

Exclusions

Positions excluded from the Program and Administrative Services Group are those whose primary purpose is included in the definition of any other group.

[40] The witness pointed out that the NU (nursing) Classification Standard (Exhibit A-4) provides for two sub-groups: Hospital Nursing and Community Health Nursing. She also explained the process of classification referring to the *Guide to Allocating Positions Using the 1999 Occupational Group Definitions* found at Exhibit E-6. Factors considered are the primary intent of the work involved, the "raison d'être" of the position. From there one should look for the most appropriate occupational group. At this preliminary stage, more than one group may seem suitable. Looking further at the work description and the inclusions and exclusions provided with the group descriptions help determine the best fit.

[41] The witness testified that the 1999 maps were valid only for the one exercise of rationalisation that took place in that year. The 2004 table is the one to be used on an ongoing basis (Exhibit A-9). This 2004 table is where the classification standard that applies to any particular group or sub-group is found. This is done with the work description in hand. The witness also confirmed that the 1999 rationalisation was not intended to modify any bargaining unit affiliations. However, the 1999 rationalisation was also not intended to freeze indefinitely the composition of the bargaining units.

[42] Margaret Jaekl works for the PSAC on classification-related issues. She testified to two comparable cases. One relating to the patent adjudicators and the other relating to the pension adjudicators. The applicant objected to the presentation of this evidence on the basis of relevance to the present case and the fact that classification is not at issue. The employer argued that it was relevant to present its consistent interpretation of the group descriptions and allocation of positions to each group. The work description, evaluation rationale and statement of qualifications were filed under Exhibit A-10. I reserved decision on this objection and will address the issue in my reasons.

Summary of the argumentsFor the applicant

[43] The applicant pointed out that there is very little dispute over the essential facts of the case. I will, therefore, turn to the legal arguments presented.

[44] According to the applicant, the issue to be determined is whether the medical adjudicators are in the wrong bargaining unit within the PM group and should rather find themselves in the Health Services group. The applicant argues that the work accomplished by the medical adjudicators is best described in the definition for the latter group, which is found at page 818 of The Canada Gazette, Part I:

...

Health Services Group Definition

The Health Services Group comprises positions that are primarily involved in the application of a comprehensive knowledge of professional specialties in the fields of ...nursing...and physical and mental well-being of people...

Inclusions

Notwithstanding the generality of the foregoing, for greater certainty. ...

5. the assessment of medical fitness for the determination of disability and other federal government benefits...and services to eligible applicants".

...

[45] When this definition is compared to the work description for the medical adjudicators, the applicant finds a perfect fit. In counsel's opinion, the work description and the testimonies presented all confirm that medical adjudicators are primarily involved in the assessment of the medical fitness of claimants as well as their physical and mental well-being for the determination of disability and eligibility to benefits. The evidence showed that the medical adjudicators spend up to 90% of their time making these determinations which require use of their nursing knowledge and experience. Their duties easily meet the terms found in the first paragraph of the definition included in the 1999 Canada Gazette at page 818. Then, paragraph 5 of the specific inclusions is also met with reference to the duties of the medical adjudicators. They are involved in analysing and evaluating the medical condition of the claimants,

which is the primary indicator to determine eligibility according to the department's own policy (Exhibit P-17).

[46] Contrary to the PSAC's allegation in their response to the application, the opinion of an independent physician is not determinative of a disability claim. Medical adjudicators are not bound or permitted to be bound by the opinion of the applicant's physician or other specialists. Even the department's physicians are not involved in this determination, except at the PAB level.

[47] Now, looking at the PA group definition referenced at page 802 of The Canada Gazette, Part I, 1999, we find that the primary duties of medical adjudicators do not correspond to the definition. They are not "primarily involved in the planning, development, delivery or management of administrative and federal government policies, programs, services or other activities directed to the public or to the Public Service." This description relates to the management of programs and the development of policies, duties absent from the day-to-day duties and primary concerns of the medical adjudicators.

[48] There would then remain some uncertainty as to the meaning of the expression "delivery" used in that same definition. Referring to the common understanding of what constitutes the delivery of services, the primary function of administrators, the applicant argues that this is not the concern for medical adjudicators. Their primary concern is making decisions, using medical knowledge, not management or systems management knowledge. What sets apart the medical adjudicators is not their licensing as nurses, but rather the application of their knowledge to the work they do. It is clearly not the diploma that brings these employees to a bargaining unit; it is the fact that they apply their specialized knowledge to do their work and in fact, are required to do so. The diploma is a way of ensuring that the employee has the required knowledge to do the work.

[49] The applicant insisted on the fact that this application is not concerned with the manner in which the employer has classified the medical adjudicators. The classification standards or mapping tools used by the employer do not govern inclusion or exclusion from a bargaining unit. The exclusive discretion of the employer to decide on classification is acknowledged. As regards the determination of bargaining units, it is the PSLRB that has the last say. Section 34 of the former *Act* serves this purpose.

[50] Inclusions and exclusions in bargaining units therefore depend on the definition as set out by the former Board in the certificate issued to the bargaining agent. The concern of the PSLRB in such a case is to ensure that the employees are included in the proper bargaining unit. The present focus is to determine whether the duties of the employees are within the definition of the current bargaining unit or whether they would better fall under the definition applicable to the Health Services unit. The impact on the bargaining agents should not even be considered.

[51] As Ms. Powers acknowledged, the Treasury Board did not want to disturb the existing patterns of representation when it restructured its occupational groups in 1999. She also acknowledged that the 1999 exercise was not intended to freeze for all time the composition of bargaining units.

For the employer

[52] The employer argued that the primary concern for medical adjudicators is the delivery of a government program for the benefit of the public. Hiring nurses does not make nursing a part of the work performed. The Health Services group definition calls for direct contact with individuals. It calls for nursing care either in the hospital environment or as a community service, as set out in the delineation of the two existing sub-groups. The work that medical adjudicators accomplish is done behind a desk reading files and preparing rationales for decisions. Furthermore, and in any event in the employer's opinion, nurses do not perform the work described in paragraph 5 of the definition of the Health Services group, only doctors do.

[53] Looking at the definition of the PM group and the primary purpose of the work accomplished by the medical adjudicators, that is to say the determination of the eligibility of an individual to a government program, and not the care of the individual, there is no question that the classification is correct and that the medical adjudicators are in the right unit. The applicant cannot argue in front of this forum that the classification is not accurate.

[54] According to the work description, the medical adjudicators do not apply their medical knowledge to the safety and well-being of individuals. Nothing in the work description refers to the offer or delivery of health or medical services on their part.

[55] Although the employer requires medical knowledge on the part of the applicant to this position and uses licensing as proof of this knowledge and its currency, this requirement does not make nursing part of the work performed. Also, the fact that provincial bodies recognize the work accomplished as the practice of nursing for the purpose of maintenance of the licensing, does not bind the employer, the bargaining agents or the PSLRB.

[56] The classification of the positions is not in question before the PSLRB. However, the evidence relating to this issue is relevant. The employer pointed out that whether or not the 1999 consolidation was meant to freeze the bargaining unit indefinitely, it is relevant to note that the core functions of the medical adjudicators have not changed since that time. The employer has exclusive authority to define the occupational groups. These definitions are then used to define the bargaining units.

[57] In the employer's view, the medical adjudicators do not perform the tasks found in paragraph 5 of the inclusions in the Health Services group unit: "the assessment of medical fitness for the determination of disability and other federal government benefits...and services to eligible claimants." This is performed solely by doctors. The medical adjudicators evaluate only the documents provided by claimants using their medical knowledge. They are assessing their eligibility to the program, not their health condition.

[58] In conclusion, the central issue is whether medical adjudicators deliver a government program in determining entitlement to the benefits of the program by evaluating the documentation provided by claimants to establish their level of medical disability and in assessing that eligibility. In the employer's opinion, the answer is a clear yes. As a consequence, medical adjudicators are in the appropriate bargaining unit.

For the PSAC

[59] The PSAC argued that the problem with the position of the applicant is that the work described in paragraph 5 of the Health Services group is the work done by medical doctors. It was designed for the purpose of classification and to determine bargaining units. The units represent a community of interest. This facilitates their representation in collective bargaining and otherwise.

[60] Bargaining units are defined for the purpose of negotiating for a group of employees who have a community of interest. The purpose is to facilitate this representation. The mapping system referred to in these proceedings does not dictate the determination of bargaining units. They can only be used for classification purposes.

[61] Medical adjudicators use their specialized medical knowledge to deliver a program, not to ensure the claimant's well-being. The PSAC agrees with the employer that the fact that the medical adjudicators have a degree or are licensed is not determinative of the bargaining unit they should be in. Their core duties and their key activities are the only relevant factors. Medical adjudicators do not work hands on with patients. Their activities do not involve the direct treatment of patients. On the contrary, their work involves office work, sitting at their computer for the great majority of their work day. In conclusion, there are no grounds to move the medical adjudicators into the Health Services bargaining unit.

Reasons

[62] The responsibility to determine membership in bargaining units rests with the PSLRB. Under section 58 of the new Act (section 34 of the former Act), parties may, at any time, ask that the PSLRB determine to which unit a group of employees would appropriately belong:

58. On application by the employer or the employee organization affected, the Board must determine every question that arises as to whether any employee or class of employees is included in a bargaining unit determined by the Board to constitute a unit appropriate for collective bargaining, or is included in any other unit.

[63] This new Board is also guided by paragraphs 57(2) and 57(3) which state that:

...

(2) In determining whether a group of employees constitutes a unit appropriate for collective bargaining, the Board must have regard to the employer's classification of persons and positions, including the occupational groups or subgroups established by the employer.

(3) The Board must establish bargaining units that are co-extensive with the occupational groups or subgroups established by the employer, unless doing so would not

permit satisfactory representation of the employees to be included in a particular bargaining unit and, for that reason, such a unit would not be appropriate for collective bargaining.

...

[64] When reviewing a bargaining unit, the PSLRB is instructed as follows:

70. (1) If the Board reviews the structure of one or more bargaining units, it must, in determining whether a group of employees constitutes a unit appropriate for collective bargaining, have regard to the employer's classification of persons and positions, including the occupational groups or subgroups established by the employer.

(2) The Board must establish bargaining units that are co-extensive with the occupational groups or subgroups established by the employer, unless doing so would not permit satisfactory representation of the employees to be included in a particular bargaining unit and, for that reason, such a unit would not be appropriate for collective bargaining.

[65] The key element and essential purpose behind the determination of the appropriateness of a bargaining unit and of its composition is collective bargaining and representation. For this reason, this Board is guided by the community of interest behind group members, by the duties performed, as well as the employer's determination of occupational groups.

[66] The onus is on the applicant to demonstrate that the medical adjudicators' primary duties would better fit within the description of the Health Services group, rather than the Program and Administrative Services group.

[67] As pointed out in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2001 PSSRB 68, at paragraph 28: "The Board has no authority to reclassify positions or order their reclassification". However, paragraph 30 of the decision states that: "[G]iven the generality of group definitions there may arise conflicts when particular positions, as in this case, at least at first glance, appear to fall within two distinct group definitions." It was suggested by the Chairperson that an assessment of the evidence concerning the primary duties of the position will assist in determining the proper occupational group for these employees.

[68] The evidence adduced by the parties convinced me that the medical adjudicators are presently allocated to the proper group. Considering the testimonies and description of their responsibilities, I conclude that their primary duty is to determine eligibility for benefits under a specific government program. The medical adjudicators are assessing the application of claimants using their medical knowledge to fully understand and assess the documentation submitted, looking for congruency and indicators. They are not assessing the claimants. They assess the file, not the individual. This latter task is left to the physicians and specialists who meet with claimants and make an assessment of their medical condition, provide treatment and prognoses. The medical adjudicators are primarily involved in the delivery of services to the public, i.e. the process of delivering the program that the public is applying for.

[69] The medical adjudicators do not provide health care to the claimants as defined in the Health Services Group definition. As pointed out in the parties' submissions and in the evidence submitted, there are a few examples of positions within the public services where professional knowledge is used in the course of employment to meet the requirements of the position, but this does not necessarily mean that the individuals should be part of the bargaining unit where these professionals are generally found. As such, this case is similar to the *PIPSC* case, and I see no distinguishing factor.

[70] The fact that the employer requires, at the time of hiring, a nursing license or that the employer regularly pays for such licensing dues or even that the provincial licensing bodies considers their work to be "practice" is not evidence that the medical adjudicators are required to provide work which should be considered in the nature of health services delivery in accordance with the group definitions applicable to employees of the public service. In a case such as this, it is the duties of the position which must be evaluated, not the knowledge of the incumbents of those positions. More importantly, the work performed on a day-to-day basis, based on the evidence presented, leads me to believe that the medical adjudicators will find a better community of interest within the PM group as the issues of work schedule and other work conditions will be of the same nature.

[71] Considering my decision and the elements on which I have based it, I do not need to address the applicability to this case of the pension adjudicators' case, submitted by the PSAC and which was subject to an objection by the applicant.

[72] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page.)

Order

[73] The application is denied and the positions at issue are confirmed to be properly included in the PA group.

May 19, 2006.

**Sylvie Matteau,
Vice-Chairperson**