IN THE MATTER OF AN ARBITRATION

B E T W E E N:

THE CITY OF OTTAWA

(The "Employer")

- and -

THE OTTAWA-CARLETON PUBLIC EMPLOYEES' UNION, LOCAL 503

(The "Union")

AND IN THE MATTER OF THE GRIEVANCE OF KEN WEBB

David K.L. Starkman — Arbitrator

APPEARANCES FOR THE EMPLOYER

Christine Enta — Counsel
Kelly Martin
Patti Latreille
Bruce Kenny

APPEARANCES FOR THE UNION

Randy Slepchik — Counsel
Ray Dinelle — Labour Representative

A Hearing in this matter was held on April 14, June 4,16, and July 13, 2009 at Ottawa, Ontario

AWARD

The Union alleges that the Employer has violated the provisions of article 11.1.1 of the collective agreement by not placing Mr. Ken Webb, the grievor, into the position of QA Technician. Article 11.1.1 (b) provides:

> Appointment shall be made of the applicant having the greatest seniority and the required qualifications, academic or otherwise for the position available, and in the case of a tradesman, demonstrated ability to carry out the work of the Employer, and competence in the trade. It is understood that the Employer has a right to establish the qualifications for the required vacancy or new position. These qualifications shall be those that are actually required to perform the normal functions of the position. The employee's absenteeism, past record and ability to perform the work of the Employer, shall be considered...

The QA Technician job posting provided in part:

> The unit's Quality Assurance Section evaluates construction material conformance to specifications and overall built product conformance to contract requirements and City specifications for City managed projects as well as subdivision/growth implementations. The evaluations are provided at various stages of construction and warranty periods as well as documentation of end product levels of service expected to be provided by the built infrastructure to ensure quality of constructed deliverables for City right of way assets. The Quality Assurance Technician is primarily responsible for undertaking of field (cores, bores, sampling, testing, site visits) activities associated with the Construction Quality Assurance process at various stages of project delivery (pre-construction, periodic monitoring, spot checks, issue resolution situations). The position provides specialized technical resources to contract administrators and construction technicians by performing or supervising material sampling

(soils, aggregates, asphalt, concrete), performing site tests and visits (sampling, compaction, environmental), performing/reviewing routine material testing as required (soils, concrete, aggregate), reporting of methods and providing technical input to QA reports used for projects. The QA technician responds to requests from contract administration personnel for non-routine on site support with respect to soils/material issues, additional sampling, compaction testing and QA requirements. The position also undertakes drilling, sampling, testing and reporting to support in house engineering activities (soils/geotechnical recommendations, vibration testing, pavement data collection, environmental sampling).

The grievor, who has twenty-four years seniority, applied for the position and was interviewed by three persons on October 12, 2007. He did not achieve the seventy per cent pass score and did not get the position which was given to an employee with less seniority than the grievor.

Mr. Dereck Trimble testified that he was employed as a QA Technician since the early months of 2007 and that previously he had been employed by the City of Ottawa as a Test Laboratory Technician 1. He stated that, in his view, the job duties of a QA Technician were the same as those of a Test Laboratory Technician 1, and that when he was transferred into the QA Technician job he received no additional training.

He described the job of a QA Technician as follows: from May 1 to December 31, about ninety per cent of the work is granular compaction testing, and from January until the end of April, most of the work is coring, breaking and capping concrete and Dynoflecting two days per week. He stated that he does tests and writes down the results but does not interpret the data. If he has a question he will ask the QA

Specialist. He stated that this was the identical work he performed as a Test Laboratory Technician 1, and also stated that, in his view, the job duties of a Test Laboratory Technician 1 were interchangeable with the job duties of a Test Laboratory Technician 2.

Mr. Trimble acknowledged that he had been told by management that there was a higher expectation from a QA Technician than had been required of a Test Laboratory Technician 1. He denied that he had any role in supervising contractors or advising them how to have the samples pass the test. According to Mr. Trimble it is their job to make the samples pass.

There was some discussion about the difference between Quality Control and Quality Assurance. Mr. Trimble stated that under Quality Control he would do the compaction testing himself and under Quality Assurance someone else would do the testing and he would verify the results.

In response to questions from counsel for the Employer Mr. Trimble acknowledged that management wanted him to write more detailed memos or field reports as a QA Technician.

The grievor testified that he started as a labourer in 1985 and became a Construction Inspector in June 1987. This job was from mid-April until mid-November and involved inspecting the road work of outside contractors, to be certain that the terms of the

contract are being carried out with respect to the quantity and quality of the materials used and generally that the work being done is up to standards He visited construction sites, gathered samples and delivered them to the lab for testing.

In March, 2001 he got the position of Test Laboratory Technician 1 and remained there until January, 2004 and then returned to the Inspector position. When working in the laboratory he was responsible for compaction testing on asphalt and granulars and gathering samples from different quarries, and estimated that this comprised about ninety per cent of the work. He worked the Dynofleck machine, picking up and breaking concrete cylinders, and calibrating various gages. He stated that when he worked in the laboratory he was the only Technician 1, and there was also a Technician 2 and a Senior Technician. He stated that when the Lab Technician 2 was not there he did the job. In his view the jobs of the Technician 1 and Technician 2 were interchangeable.

The job description for the Test Laboratory Technician 1 Position provided in part as follow:

> SUMMARY (Overall Responsibilities)
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> Responsible for performing field testing services provided by the Test Laboratory for the area municipalities construction projects.
>
> DUTIES
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> 1. Scheduling, performing and reporting to project supervisor(s) on technical field tests carried out on construction material, in place, to ensure compliance with contract specifications/standards.

2. Collecting field samples (concrete, soils, construction materials), ensuring proper documentation and associated requisitions and transporting to laboratory, providing technical expertise, in the field and recommending remedial measures when required, to projet supervisors, contractors, outside organizations and consultants on compaction and compaction techniques.

3. Directing, as necessary and or co-ordinating the sampling of asphalt concrete and asphalt cement in order to ensure compliance with the contract specifications and for possible consideration of end results bonus(es) or penalties.

4. Collecting samples, such as granular or aggregate in accordance with the accepted standards for handling and sampling of material, for laboratory testing.

5. Training of summer and coop students on technical field tests of construction material "in place" and construction material sampling procedures.

6. As required, performs various tasks such as: pavement evaluation measurements for the pavement management system; coordination of the annual maintenance repair and calibration of lab/field test equipment; responding to general inquiries/requests from Engineering staff, contractors and inspectors.

7. Reading and understanding a variety of contract and testing specifications, plans and testing manuals

8. Ensuring that all municipal, provincial and federal safety regulations are followed;

9. Performing various laboratory technical tests on construction materials, as required.

Mr. Webb stated that as a Lab Technician 1 he had done Quality Assurance on a joint project between the City of Ottawa and the Ontario Ministry of Transport. He stated that the City was moving from a Quality Control to a Quality Assurance model. Quality Control means actually testing the contractor's material whereas Quality Assurance is

verifying that the contractor has correctly tested their material and that the material passed the test. He stated that Quality Assurance involves more auditing and providing input and direction, but indicated that he had been doing much of this type of work as a Construction Inspector and, as such, believed he had been doing Quality Assurance work.

Mr. Webb stated that when the QA Technician job was posted he applied because he believed he had all the qualifications for the job. He had been a Construction Inspector for twenty years and had worked for more than three years in the laboratory.

The grievor reviewed the key responsibilities and duties of a QA Technician as set out in the job summary and asserted that he had performed most of them. He stated that the job of a QA Technician was the same as a Lab Technician 1, except that they wanted a little more paperwork.

In response to questions from counsel for the Employer, the grievor acknowledged that under a Quality Assurance model one is expected to provide input and direction, but stated that is what he does at the present time as a Construction Inspector. He stated that he did not prepare for the interview because he knew the job and had worked side by side with Mr. Trimble. He acknowledged that he was nervous in the interview.

He stated that from January, 2004 until 2006 he was asked to come back and help out in the laboratory for one or two weeks at a time when they needed additional staff.

Mr. Bruce Kenny, the materials engineer responsible for asphalt, concrete, Quality Assurance, materials testing and supervisor of the laboratory, testified that, at the time of amalgamation, the City conducted a universal programs review, and one of the questions was how the lab would fit into the new City. As part of the review a Centralized Quality Assurance Program was developed which would move toward a Quality Assurance program which would shift the responsibility for testing to the contractor. He indicated that the old model was a testing service but the new model would concentrate on improving every aspect of the construction process.

Mr. Kenny referred to a document titled Service Delivery Review which he developed in consultation with others in January, 2004 which discusses the proposed changes in the following language:

> OBJECTIVE
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> The purpose of this proposal is to generally outline two opportunities to improve the City of Ottawa's ability to evaluate the quality of construction on City of Ottawa construction contracts under a recognized centre of expertise.
>
> OPPORTUNITIES
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> 1. The Centralized Quality Assurance Initiative would consist of developing an organizational model and system that will move City of Ottawa resources away from labour intensive testing, to performing Quality inspection, review, and monitoring in a centralized system of material acceptance.
>
> 2. An effective implementation of a comprehensive Quality Assurance system will further require a Contractor Quality Control Initiative. This initiative would consist of developing a contractor Quality control/owner Quality assurance system for the acceptance of construction materials

and workmanship.

Definitions

Quality Control (QC) means a system or series of sampling, testing, monitoring, or other activities carried out by the Contractor or Consultant to ensure that materials, products, or services supplied to the Owner meet the specified requirements.

Quality Assurance (QA): means a system or series of sampling, testing, monitoring, or other activities carried out by the owner to ensure that materials, products, or services received from the Contractor or Consultant meet the specified requirements.

1. Centralized Quality Assurance Initiative

Although Quality Assurance can apply from planning to construction completion, this initiative will only concentrate on City construction contracts from the issuance of the Commence Work Order.

Current Service Delivery and Deficiencies

Currently, the City of Ottawa Material Testing Laboratory acts as a service rather than a comprehensive Quality Assurance system. The test Labs role is advisory only, and is mandated to provide test results, evaluation of deficient material/workmanship upon request, and perform some pre-engineering investigation.

The Project Manager and Site Inspectors have a large impact on type/frequency of material testing which results in variable compliance of City construction contracts. The lack of a Quality Assurance system also results in the City of Ottawa Material Testing Laboratory being involved on approximately 50% of construction contracts. The materials testing on other contracts is performed by outside consultants, and facilities contracts have other special requirements. Further, the existing model requires the City of Ottawa to operate and maintain materials testing facilities.

Proposed Quality Assurance Service Delivery Model

It is assumed for this initiative that this system would apply to all contracts that will use the City of Ottawa's "Standard Tender Documents for Unit Price Contracts".

As part of this initiative, it is proposed that the City move resources away

> from labour intensive testing, to a role of Quality inspection, review, and monitoring. The Materials Test Laboratory staff presently consists of highly skilled construction materials specialists and this initiative would require a re-organization of existing staff to form a new section of Quality Assurance Officers within the Construction and Technical Support Unit of Right-of-Way Management. The primary focus of this existing QA staff will be transformed from conducting in-house materials testing to evaluating outsourced test results and conducting more effective evaluation of material quality, material placement and contractor workmanship.

Mr. Kenny also referred to a second document prepared in 2003 which outlined the phasing in of the model over several years and made the following comment:

> Training
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> It has been proposed to change the role of our construction materials specialists from conducting quantitative materials tests to the evaluation of the overall quality of the materials supplied on City of Ottawa projects. This transformation, although logical, will require training to ensure that the projections are consistent with the management direction. It will be the responsibility of the engineering supervisor, the QA Engineer, to ensure that personnel are directed towards implementation of the Centralized QA System. Some outside technical training will be required on an ongoing basis to ensure that the QA specialists maintain a high level of technical knowledge.

When asked by counsel for the Union why these documents do not mention having to replace existing employees, Mr. Kenny advised that, to a certain extent, the documents were intended to persuade management that there was value in the group, but were not intended as a commitment to keep all staff.

Mr. Kenny testified that, after the concept was approved, job descriptions were developed. The expectation was that QA Technicians would do spot checks of construction sites, and, in addition to recording the findings, they would be responsible for interpreting the results and providing advice. It was intended that a QA Technician would spend no more than ten to twenty per cent of their time doing work that was previously done by a Lab Technician 1.

In 2007 there were two QA Technician vacancies. Mr. Trimble was placed in one of the positions and the second position was posted. A set of interview questions were developed, and ultimately three candidates were interviewed. Mr. Kenny said that the grievor was nervous, that he struggled with the questions, did not provide detail, and did not answer the questions in depth. He got sixty per cent, and the pass grade was seventy per cent. The job was given to an employee with approximately one years service.

Mr. Kenny acknowledged that the grievor had experience working with construction inspectors and with contractors, was familiar with construction site protocols, could read drawings and tender documents. He also stated that the grievor had returned to the laboratory on at least three occasions between 2004 and 2006 to work in the laboratory when it was busy.

Mr. Kenny stated that testing remains a significant part of the current QA Technician position, but it remains the intention to significantly reduce the testing or to phase it out.

He stated that he did not believe the grievor had the skill set to perform the job of QA Technician as set out in the job description.

Mr. Kelly Martin, the program manager for Quality Assurance, testified that it was the intention to move from testing to Quality Assurance which would involve interpreting and not just recording the results. In his view, interpretation involves the documentation of the methods observed. He wanted QA Technicians more actively involved in providing summaries as to how things could be done better.

Reference was made to a memo Mr. Martin wrote in November, 2005 with respect to the job description updates which provides in part as follows:

> Public Works and Services endorsed a Quality Assurance/Quality Control (QA/QC model for Infrastructure Service in 2004. A re-focus of the existing QA staff (Materials Test Lab) functions away from routine testing towards management of the QA process is required to ensure an adequate and effective level of service is maintained during the construction of infrastructure.
>
> Background
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> The QC/QA model adopted by PWS requires the adoption of a centralized QA Section in conjunction with specified Contractor QC requirements based on two main components:
>
> A Centralized Management of Quality Assurance Function that consists of developing an organizational model and system that moves resources from labour intensive testing to performing Quality inspection, review, and monitoring in a centralized and consistent system for material and workmanship acceptance.
>
> A Contractor Quality Control initiative that consists of developing a Contractor quality control/owner quality assurance system for the

acceptance of construction materials and workmanship.

Implementation of the plan does not constitute an entirely new way of doing business but rather it defines more clearly a process that outlines Contractor submission and Contractor testing requirements. In other words, quantitative field test results will be obtained from the Contractor rather than from the laboratory staff as in the past. Laboratory staff will retain expertise to sample and test but the focus of their testing will be on issue specific situations of deficient material or workmanship as opposed to routine sampling and testing.

Routine physical testing will be completed through a number of service delivery scenarios and the laboratory staff roles will be shifted more to developing and managing test results, QA analysis and reporting as well as technical support functions to construction inspectors and project managers to ensure delivery of consistent decision making associated with issues arising from the QA/QC test results submitted by the contractors.

Change Highlights

While a significant volume of laboratory staff time was previously spent performing prescriptive material testing, that volume will diminish and be limited to random QA sampling and problem-area forensic sampling and testing. In addition to the retained portion of their testing functions, staff will be more involved in:

- interpreting specifications and project specific needs for QA/QC
- defining, setting out and monitoring delivery of the QA/QC requirements for inspectors and project managers
- laboratory staff expertise will be used to benchmark/train inspection staff with respect to material requirements and performance
- providing expertise to inspectors and project managers to define consistent treatment of deficient product, pay factor recommendations and product acceptance or rejection

This refocus of functions implies more interpretive work with a requirement to analyse, report and recommend as opposed to simply following routine and prescriptive approaches. Each of the existing descriptions will be reviewed and changes made to reflect the shift in delivery that is appropriate for the position within the organizational structure. Following are some examples of existing to new functions...

Mr. Martin stated it was their intention to add more functions to the Lab Technician 1 position so that more analysis would be provided as to how things could be done better, how processes could be improved, and how things could be made more efficient. In his view this represented a substantial change.

SUBMISSIONS OF THE PARTIES

The Union submitted that the grievor had twenty-two years service and that article 11.1.1 was a sufficient abilities clause in which the grievor only needed the minimum qualifications. In its view, the Employer failed to consider his experience as a Lab Technician 1 and a Construction Inspector, and they erred in relying exclusively on the interview to determine the grievor's qualifications. The Union submitted that the QA Technician position was not substantially different from the Lab Technician 1 position as the gathering of samples and the testing of samples in the laboratory occupies the majority of the time of both positions.

Reference was made to the decisions in *Canadian Forest Products Ltd and I.W.A. - Canada, Loc. 1-424 (Wilson)*, (1999) 80 L.A.C. (4th) 374 (D.C. McPhillips), *Temiskaming Hospital and O.N.A. (Regan)*, (2006) 150 L.A.C. (4th) 334 (J.B. Rose), *St. Joseph's General Hospital and Canadian Auto Workers, Local 1120*, (2004) 126 L.A.c. (4th) 114

(D.A. Harris), *Re University of Toronto and Canadian Union of Public Employees, Local 3261*, (1995) 52 L.A.C. (4th) 387 (K.M. Burkett), *Re Elgin County Roman Catholic Separate School Board and London & District Service Workers' Union, Local 220*, (1992 26 L.A.C. (4th) 204 (J.B. Rose), *Edmonton (City) and A.T.U., Loc. 569 (Sargent)*, (2006) 154 L.A.C. (4th) 257, and *Re City of Winnipeg and Canadian Union of Public Employees, Local 500*, (1990) 12 L.A.C. (4th) 231 (M.H. Freedman).

The Employer submitted that the QA Technician position is a new position with greatly expanded job duties and responsibilities than the Lab Technician 1 position. The Employer has the right to establish qualifications for particular jobs and also has the right to expect candidates to meet the qualifications, and in this case the Employer was establishing positions with entirely different expectations, and requiring different job skills than what had previously existed. The onus is on the Union to establish that the QA Technician position is the same or similar to positions previously held by the grievor and it had failed to do so.

According to the Employer, Mr. Tremble was grandfathered into the position and offered coaching. The grievor did not demonstrate that he had the requisite qualifications for the job. He may have been recalled to work in the laboratory, but he did not perform all the duties of a QA Technician.

DECISION

There is no doubt that Messieurs Kelly and Martin in 2004 and 2005 intended to change the manner in which inspections were done by moving from a Quality Control to a Quality Assurance model, and greatly reducing or eliminating altogether the testing being done in the City's laboratory. In their view the movement to Quality Assurance, which is described in various memos set out above, would involve individuals having the ability to analyse, report and recommend, to a degree not previously done.

Mr. Trimble, who had been employed since January, 2004 as a Laboratory Technician 1, was transferred into the QA Technician position in early 2007. The job description for the QA Technician position were revised and finalized in August, 2007. A second QA Technician position was posted and interviews were held in October, 2007.

There was considerable evidence about the job responsibilities of the QA Technician job and how it compared to the job responsibilities of a Lab Technician 1 or a Construction Inspector, and from the evidence I have concluded that it was the intention of management to significantly increase the job responsibilities of persons working in the inspection area by reducing or eliminating the amount of time spent by QA Technicians in the laboratory, and increasing the time spent on analysing data and making recommendations as to how quality could be improved. According to the evidence however, this change has not occurred as quickly or to the extent initially envisaged, and in my view at the time of the posting the job duties of the QA Technician remained very similar to the job duties of the Lab Technician 1.

The evidence of the Employer disclosed that it was the initial intention of management that existing employees in the laboratory could obtain the requisite skills through training to do the job envisaged for the newly created position of QA Technician. That is presumably why Mr. Trimble was placed directly into the job. Mr. Trimble's evidence however was that no further training was provided to him, and this evidence was not contradicted.

The grievor received sixty per cent on the interview. The incumbent received seventy-five per cent. Pass was seventy per cent. The parties were in agreement that article 11.1.1(b) of the collective agreement is a sufficient abilities clause. In other words, the grievor should be placed in the position if he can demonstrate that he had the qualifications that are actually required to perform the normal functions of the position.

When the job was posted in September, 2007 the evidence of Mr. Trimble and the grievor was that the job functions of a QA Technician was predominately testing with some additional paperwork and that these job functions were very similar to the job performed by a Lab Technician 1. The Employer did not present any evidence as to the work actually being done which contradicted the evidence of the grievor or Mr. Trimble. It is not surprising therefore that the grievor concluded that he had the requisite skills having worked for three years in the laboratory and more than twenty years as a Construction Inspector.

I was referred to several arbitral decisions which indicated that performance on an

interview should not be the sole criteria of whether a person has sufficient ability to perform a particular job, and that other matters should be considered such as the work history of the applicant and perhaps performance appraisals.

In the circumstances of this case, where the viva voce evidence of the work actually being done by a QA Technician indicated that it was largely similar to the work previously done by the grievor when employed as a Laboratory Technician 1 and a Construction Inspector, I believe that if the Employer had taken into account the grievor's work history as it would have concluded that the grievor had the qualifications to perform the normal functions of a QA Technician as it was actually being performed. Accordingly, the grievance is allowed.

Given the passage of time, I have determined that the appropriate remedy is to place the grievor into the position of QA Technician forthwith. The trial period referred to in article 11.1.1 shall run from the date of placement into the position. Nothing in this Award prevents the Employer in the future, and in accordance with the provisions of the collective agreement, from re-organizing the workplace to fully implement a Quality Assurance program.

I will remain seized with respect to any issues flowing from this Award, including any issues of compensation which cannot be resolved by the parties.

Dated at Maberly, Ontario this 23rd day of October, 2009

David K.L. Starkman