IN THE MATTER OF AN ARBITRATION

BETWEEN: THE CORPORATION OF THE TOWN OF INNISFIL

AND: INNISFIL PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF LOCAL 3804

AND IN THE MATTER OF A GRIEVANCE CONCERNING VOLUNTEER FIREFIGHTERS

O.B. SHIME, Q.C. SOLE ARBITRATOR

APPEARANCES:

MR. SEAN MCMANUS	COUNSEL FOR THE ASSOCIATION AND OTHERS
MR. ROSS DUNSMORE	COUNSEL FOR THE CORPORATION AND OTHERS

Hearings were held in this matter on June 9th, June 25th and July 23rd, at Barrie, Ontario

AWARD

In this matter the Corporation had offered employment as a volunteer firefighter to Mr. Nick Rosiello, who was employed as a full-time firefighter at the City of Toronto. The Corporation alleges that Captain Hunter, who was the President of the local Association, approached Mr. Rosiello and threatened to charge him under the International Association of Firefighters (IAFF) constitution if he accepted the position as a volunteer in Innisfil. Accordingly, the Corporation filed the following grievance:

> The Town of Innisfil hereby files with the Grievance Committee the following policy grievance pursuant to its rights under the Fire Protection and Prevention Act.
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> On or about May and June, 2007, Captain Hunter learned that the Town had offered employment as a volunteer fire fighter to Mr. Rosiello. He also learned that Mr. Rosiello was employed as a full-time fire fighter at the City of Toronto. Captain Hunter contacted a representative of the Toronto Fire Association, provided him with the Innisfil employment information regarding Mr. Rosiello, and encouraged that person to contact Mr. Rosiello.
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> Thereafter, he approached Mr. Rosiello directly and threatened to charge him under the IAFF Constitution if he accepted the role as a volunteer in Innisfil. Subsequently, Captain Hunter referred to the Constitution and the possibility of being charged as an inducement for him to terminate any employment relationship with the Town.
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> Mr. Rosiello felt threatened and complained to the Town. He has been unwilling to commence employment as a volunteer because of the situation. This conduct by Captain Hunter violates the collective agreement articles 3.01, 14.01 and 22.01 and such other articles as may become apparent, the Ontario Human Rights Code, and the hiring, privacy and harassment policies of the Town which are binding upon this bargaining unit.
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> The Town requires that Captain Hunter and any other representative of the Association cease and desist from any impugned conduct. More specifically, the Town seeks an Order that the Union and all of its representatives not interfere or attempt to interfere or seek to induce others to

interfere with the employment relationship which the Town has or attempts to have with any volunteer firefighters.

The Town requests a meeting as soon as possible. If a satisfactory adjustment cannot be made between the parties, the Town intends to proceed to arbitration, pursuant to article 20 of the collective agreement. The Town's nominee to the Board of Arbitration shall be Bruce Light. He may be contacted at 416-868-0557.

The Corporation also wrote to Captain Hunter as follows:

"Mr. Jim Hunter
R. R. #2
Utopia, Ontario
L0M 1T0

August 10, 2007

Dear Mr. Hunter:

You are a full-time fire fighter in this Municipality. Your terms and conditions of employment are covered by the collective agreement between your Association and the Town. You are a union steward for the purposes of acting on behalf of the Union under the Innisfil professional Firefighters Association. Your rights are referred to in Article three.

You have no role in the hiring or firing of any employees. You are responsible to work with volunteer firefighters from time to time but their selection and employment are matters determined by others.

Recently the Town offered employment to Mr. Rosiello as a volunteer fire fighter after an interview process. Soon after he advised us that he was reluctant to accept our offer because you had told him that you were aware that he was employed as a full-time fire fighter in Toronto and you interpreted his working as a volunteer in Innisfil to be a violation of the Constitution of the International Association of Firefighters. You told him that he should not work in Innisfil. You also told him that if he accepted the Town's offer that you would advise the Toronto Association President of the fact and seek to have him charged under the Constitution. You told Mr. Rosiello that the consequences of a conviction could be loss of his full-time employment in Toronto. Consequently, you urged him not to become a volunteer in Innisfil.

Mr. Rosiello has taken your threats seriously. He has approached the Town to complain about your conduct. We interviewed you about these allegations

and you confirmed the facts set out above. In fact, you admitted that you had telephoned Scott Marks, the Toronto Association President and passed on the information about Mr. Rosiello. You said you asked Mr. Marks to speak to his member. (Mr. Rosiello has confirmed that Mr. Marks did so and warned him about the Constitution and the impact of volunteer employment in Innisfil). You told us that you intended to charge four other volunteers in Innisfil who fall into the same category. You assented that it was your duty to stop "two hatting in Innisfil". You also claimed that the former Chief had made an arrangement with you sometime ago not to hire any additional two hatters if you did not lay charges against the four already employed. You viewed the hiring of Mr. Rosiello as a violation of your previous arrangement.

You also confirmed that you had not consulted with anyone in the management of the Town or the Fire Department before taking your recent actions. You did not suggest that you had any authority in your job for the Town that permitted you to act as you had. I advised you at the time that we would investigate this matter further and advise you of our determination.

I now confirm that you have been recently advised of the Town policy "Respectful Workplace" and the duty of all employees to treat each other with respect and to be non-threatening. You are also aware that both the Human Rights Code and the Collective Agreement protect employees from discrimination and harassment in the work place.

I have confirmed with both the Fire Chief and the Deputy that neither of them ever made any "arrangement" with you respecting two hatters. Also, neither recollects discussing the situation of Mr. Rosiello with you.

I confirm that the subject of two hatters was not addressed at collective bargaining. Further, there is no municipal policy that would support your conduct.

I conclude that your actions violate the Respectful Workplace Policy of the Town. More significantly, you have interfered with the management decision to offer employment to Mr. Rosiello. You have threatened his full-time job security elsewhere and encouraged others to do the same so that Mr. Rosiello will decide not to work for Innisfil. In this context, you have chosen to discriminate against Mr. Rosiello because of the origin of his full-time employment in Toronto, Ontario. Your actions have nothing to do with his skill and ability or work place performance, they are solely related to your interpretation of a Union constitution which is not part of the terms and conditions of Mr. Rosiello's offered employment in Innisfil.

In fact, we are advised by our solicitors that the enforceability of the

constitutional provision upon which you rely is highly questionable. Not only is the provision not uniformly enforced by union locals in Ontario, the provision is not enforced in the United States. We are advised that over 500 union locals in America do not attempt to enforce the same provision you are referencing. Consequently, your action attacks Mr. Rosiello because he is a fire fighter in Ontario rather than in the United States. This is origin discrimination which is illegal. Further, since your own International and the great majority of its members do not enforce this rule, it would be unfair and unreasonable for a single fire fighter in Innisfil to decide to do what so many others are not.

For all these reasons, the Town finds your conduct unacceptable. You must cease your threats immediately. You must desist from any attempt to interfere with the management decision to offer employment to Mr. Rosiello. Further, you must not threaten him in any way or attempt to induce any other person to include Mr. Rosiello to reject our offer or to terminate his contract with us. Your duties include a responsibility to work co-operatively from time to time with volunteer firefighters. You must no longer be provocative in any way respecting their employment. You should also recognize that some employment information you passed to others may have been protected by privacy legislations. You had no authorization to release information about Mr. Rosiello to others outside the Municipality.

Mr. Hunter, your conduct is very serious. You cannot impose your political views upon the Town and others. In the normal course, you would have been subject to discipline up to and including the penalty of dismissal. However, in the circumstances of this case, you may have misunderstood your responsibilities and the limitations on your conduct in view of discussions you may have had with the former Chief. For this reason, and in view of your long service, we are using this letter to clarify to you your obligations. If you violate the instructions found in this letter, if you do not cease and desist from your unacceptable conduct, you will be subject to most serious discipline. We require you to govern yourself accordingly.

Yours very truly,

"George Shaparew, Director of Community Services"

There is no significant dispute about the essential facts outlined in the grievance and the cautionary letter to Mr. Hunter. Both Mr. Hunter and Mr. Rosiello confirmed the nature of the conversations. Their respective testimony about what was said, subject to certain nuances, was

essentially consistent. Mr. Hunter advised Mr. Rosiello that if he accepted a position as a volunteer firefighter with the Corporation of Innisfil, he would become a two hatter and subject to charges under the Association's constitution. Mr. Rosiello's membership in the Association was therefore imperilled by potential charges which Mr. Hunter might file, and since his full-time employment in Metropolitan Toronto was conditional on being a member in good standing of the Association, the threat of charges had the potential to cause Mr. Rosiello to lose his job as a full-time firefighter in Metropolitan Toronto. The threat of charges and consequent loss of employment was a serious enough threat to Mr. Rosiello's permanent employment that he declined the job offer at the Corporation of Innisfil. Mr. Rosiello, who is a full-time firefighter in Metropolitan Toronto, but lives in Innisfil, hoped that by volunteering in Innisfil it would assist him in eventually attaining a full-time position in Innisfil, which would save him from commuting to Metropolitan Toronto.

This dispute is about firefighters, who are members of the IAFF and who are separately employed by two distinct municipal entities - as a full-time firefighter in one of the entities and/or as a volunteer firefighter in the other entity. Firefighters who work full-time for one entity and volunteer for another, are also referred to as two hatters. Volunteer firefighters receive some form of stipend, although that issue was not fully explored in these proceedings. According to Mr. Hunter, the IAFF's constitution prohibits members from engaging in the practice of being two hatters.

Based on these facts, the Corporation argues that the collective agreement acknowledges the Corporation's right to hire and use the best volunteer firefighters, that its management's rights are not

circumscribed and there is not an oral agreement or binding agreement, as alleged by the Association, between Mr. Hunter and the Chief to exclude the hiring of volunteer firefighters, who are employed full-time in other municipalities. Further, the Corporation submits that the Association's constitution is not incorporated into the collective agreement between the parties.

The Association argues that the Corporation is able to hire and use volunteer firefighters but that the Association need not stand by if the Corporation hires volunteers who violate their obligations under the IAFF constitution by acting as two hatters. The Association submits there is no prohibition in the collective agreement preventing the Association President from informing a fellow member that his proposed conduct would violate the IAFF's constitution and by-laws, thereby subjecting Mr. Rosiello to internal discipline. The Association maintains the Corporation's conduct in lobbying the Ontario government for protection in the use of two hatters demonstrates that it had not negotiated such protection in its collective agreement and that the Corporation's grievance is an improper attempt to interfere with the legitimate conduct of the Association. The Association further argues that President Hunter was carrying out his duties as an elected representative of the Association and is entitled to immunity for engaging in legitimate union activity. Finally, the Association submits there was an agreement between Mr. Hunter and the Chief not to have additional two hatters.

The relevant provisions of the collective agreement are as follows:

> Article 14.01 The Association recognizes the continuing needs of the Corporation as it relates to the use of volunteer firefighters.

> The Corporation recognizes the concerns of full-time firefighters covered by this agreement as these relate to protection from layoff.
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> In light of these concerns the parties agree as follows:
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> (a) The Association recognizes the continuing use of volunteer firefighters.
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> (b) The Corporation agrees that no full-time firefighters employed by the Corporation as of the date of this agreement and as set out in Appendix "C" attached hereto shall be laid off as a result of the Corporation assigning full-time fire fighter duties to volunteers. This section shall not be applicable to any new full-time fire fighter hired after the date of this agreement and subsequent agreements.
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> (c) No work customarily performed by a full-time fire fighter covered by this agreement shall be performed by non-qualified personnel, or part time firefighters unless the Association agrees otherwise.
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> Article 22.03 The Town through the Chief, shall be empowered to maintain order and efficiency and direct the working force including the right to hire, suspend, discharge, discipline, layoff, recall, transfer, promote or demote employees subject only to the limitations expressed in this agreement and the ***Fire Protection and Prevention Act, 1997***.

After duly considering the evidence and the argument, I am of the opinion that this matter falls to be decided based on the language of the collective agreement and the obligations of the Association, pursuant to that agreement. Despite the able submissions of Mr. McManus for the Association, I find that this is not a case of employer interference with the Association's constitution or the rights of its members.

Article 14 of this collective agreement has been in effect in both the same or a similar form

since 1991, which is the date of the first collective agreement. At that time, the IAFF local did not represent the firefighter employees of the Corporation. Accordingly, at no time did the parties subject the terms of the collective agreement to the IAFF constitution, nor did they incorporate the IAFF constitution by reference into the collective agreement. Had the IAFF local, at the time it began to represent the employees in 1997, wished to subject the collective agreement to the terms of the IAFF constitution, it ought to have negotiated a reference to its constitution into the collective agreement or incorporated its constitution into the agreement. The Association made no effort to do so. The Association cannot shelter behind its constitution in derogation of its obligations under the collective agreement. That principle was clearly stated by the board in ***Re Int'l Association of Machinists and Orenda Engines Ltd.***, 1958, 8 L.A.C. 116 (Laskin, B. as he then was) at p. 123 where he stated as follows:

> "… the union cannot insist on enforcement of its constitution and by-laws in derogation of its obligations which it has assumed, ones which are binding upon employees, under the terms of the collective agreement….. If a dilemma is posed for the Union as between its constitution and by-laws on the one hand, and the collective agreement on the other, the latter must govern if it should be impossible to reconcile them"

See also ***Re Labatt Brewing Co. Ltd. and Brewery, Winery and Distillery Workers, Local 300*** 1982) 2 L.A.C. (3rd) (L. Getz). Therefore, given the origin of Article 14, which pre-existed the IAFF's representation of the employees, coupled with the lack of any reference to the IAFF Constitution, I am unable to conclude that the collective agreement is in any way subject to the IAFF constitution. I therefore determine that the parties have in effect, agreed that the Corporation has an unfettered right to hire anyone it so chose as a volunteer fire fighter unencumbered by the IAFF constitution.

However, the local Association as co-author of the collective agreement has reciprocal obligations to ensure that there is a reasonable administration of the collective agreement, including an implied right to ensure that its members work safely. The Association contends that Mr. Hunter "acted professionally and respectfully towards Mr. Rosiello", and that he was carrying out his duties as the elected representative of the Association "out of concern for safety". The Association also contends that its role is to protect the safety of its members and to ensure compliance with the Association's governing association. I reject that argument for the following reasons.

I now turn to consider the alleged safety concerns more fully. First, as I have indicated, there were no restrictions imposed by the collective agreement on the Corporation's right to hire, and if safety was a concern the Association should have attempted through negotiations to impose restrictions on the hiring of volunteer firefighters. However, no such attempt was made. Second, the Corporation in the past had employed two hatters and, for some period of time, Mr. Hunter, himself had been a two hatter. The Corporation has continued to employ two hatters until the present with the full knowledge of Mr. Hunter and the local Association.

Third, Mr. Hunter stated that a firefighter, who was involved in fire protection activities in the service of one municipality, and who was tired or fatigued if called upon by the other municipality as a volunteer would pose a threat because of his condition. That view is not supported by the evidence. The Corporation has 96 volunteer firefighters and only six of them are two hatters. Volunteer firefighters have the option of declining an assignment and therefore a volunteer firefighter, who was

fatigued as a result of an event occurring elsewhere, is capable of declining a volunteer assignment. There is no evidence that a problem had ever arisen concerning the two hatters who are currently employed by the Corporation.

Fourth, firefighting is an extremely dangerous and hazardous occupation where firefighters' lives are constantly at risk. The evidence demonstrates that the International Association does not strictly enforce its by-laws and regulations so as to prohibit two hatters, but permits local firefighter associations the option of determining whether to permit two hatters. If safety is the concern of the Association, given the hazardous and life threatening situations in which firefighters work, the failure to strictly enforce matters related to safety by the International Association undermines the stated safety concerns alleged in this case by the local Association. That lack of consistency among locals of the IAFF is corroborated by Mr. Rosiello's evidence that when he advised the president of the Metropolitan Toronto local of the IAFF of his situation, he was told that the Metropolitan local, which is the largest local of the IAFF in the Province, would not pursue the matter under the IAFF Constitution.

Further, Mr. Hunter, as stated, had been a two hatter in his early years of employment with the Corporation and according to his own testimony he had, as the local Association president, agreed with the Chief permitting the Corporation to use two hatters and also had unilaterally permitted others employed by the Corporation to become two hatters. If safety is a legitimate concern, then Mr. Hunter's failure to limit his local members is a serious indictment of his own conduct in permitting two hatters. Simply put, there ought to be no compromise with safety given the hazardous

and dangerous conditions under which firefighters are employed. There was no rational or satisfactory explanation why Mr. Hunter permitted his own local members to work as two hatters, while denying that same opportunity to a fellow member from another local. The patchwork nature of enforcement coupled with the compromises made by Mr. Hunter detracts from the alleged concern for safety argued by the Association. Indeed, while Mr. Hunter appeared to be a serious and honest witness, his conduct completely contradicts his assertions that safety is a concern. For these reasons, I reject the Association's submissions that safety was a legitimate concern for Mr. Hunter when he cautioned Mr. Rosiello.

The Association, in further defence of its position, submits that there was a verbal agreement between Mr. Hunter and the Chief to permit the use of existing two hatters, while preventing the Corporation from hiring and using additional two hatters. The Corporation claims there was no such agreement. In my view, the collective agreement is not ambiguous (which the Association concedes) and accordingly, the alleged oral agreement cannot be used to interpret the collective agreement. Nor may the alleged verbal agreement be used to establish an estoppel to prevent the Corporation from enforcing its strict rights under the collective agreement.

Mr. Hunter testified he had a discussion with the Chief who agreed not to have any more two hatters, while the Association, on its part, agreed to permit the Corporation to use those persons already employed, who were two hatters. Section 14, section 41(a) and section 51 of the ***Fire Protection and Prevention Act, 1997,*** define a collective agreement as an agreement in writing between an employer and a bargaining agent that represents firefighters. The purpose of that

provision is to provide certainty in the interpretation, application or administration of the agreement. Thus some caution must be exercised before overriding the express provisions of a written collective agreement by alleged verbal or oral agreements.

In this case, Mr. Hunter, while alleging a conversation between himself and the Chief, does not remember the circumstances surrounding that conversation. He does not remember the time or date of the agreement or the precise language used. Moreover, Mr. Hunter was, at all material times, aware that the Corporation, along with other municipalities, had over the years taken a firm position and enacted specific resolutions objecting to the position of the International Association of Firefighters, and the Ontario Professional Firefighters Association prohibiting full-time firefighters from performing volunteer work in their communities, and discouraging the use of full-time firefighters providing volunteer services to local communities. The Corporation also encouraged the Province to enact legislation to that effect. The Corporation passed resolutions and made public statements to that effect in 2002, 2004 and 2005. Mr. Hunter was aware of the Corporation's position. It is also significant that Mr. Hunter was the primary negotiator for the local Association, at all relevant times, and that all the collective agreements were signed by members of Council and not by the Chief. In these circumstances, the Chief cannot be deemed to have ostensible authority to enter into agreements contrary to the publicly stated position of the Corporation. Mr. Hunter was fully aware that if the Chief did enter an agreement with him, which is denied, that the Chief was acting contrary to the public position taken by the Corporation with some consistency.

Further, having entered into an alleged oral agreement, no sign of it appears in successive

collective agreements entered into after the alleged oral agreement, whose exact timing was uncertain, but was certainly prior to some of the collective agreements negotiated between the parties. That was even so, notwithstanding that other matters found their way into the collective agreement by way of letter or the like. Where a party alleges an oral agreement to its benefit arising from the non-enforcement of the other party's legal rights, it takes a substantial risk if it fails to ground that agreement in writing in subsequent negotiations. *Re Longyear Canada Inc. and International Association of Machinists, Local Lodge 2412*, (1981) 2 L.A.C. (3d) 72 (P.C. Picher). Also, a supplementary or ancillary agreement which contradicts a written agreement and which does not have a definite term of operation cannot survive the agreement to which it relates, and lapses with the collective agreement which it purports to amend or contradict. *Ontario Paper Co. Ltd and C.P.U. Local 101*, (1987) 32 L.A.C. (3d) 346 (V. Solomatenko). Accordingly, it is my view that the oral agreement relied upon by Mr. Hunter, if one did exist, lapsed prior to the instant agreement and cannot be relied upon.

In the result, I determine that Mr. Hunter's action in cautioning Mr. Rosiello as he did were not reasonable, and, by so doing, he not only threatened Mr. Rosiello's employment in Metropolitan Toronto, but also he interfered with the Corporation's unfettered right to use volunteer firefighters regardless of their permanent employment elsewhere, contrary to Articles 14 and 22 of the collective agreement. The Corporation's right to hire in article 22 combined with the absence of any restrictions on the use of volunteer firefighters in Article 14 was violated by Mr. Hunter when he interfered with the hiring of Mr. Rosiello.

Accordingly, the grievance is allowed and Mr. Hunter and the Association are to cease and desist from interfering directly or indirectly with the Corporation's hiring of volunteers including two hatters.

The Corporation seeks damages of $180.00 being the amount expended as a result of the hiring process concerning Mr. Rosiello. The Association claims that the Corporation did not make such a claim in its grievance. These matters, including the filing of grievances, are conducted by lay persons and most often it is the union or employees who file these grievances. Based on the arbitral jurisprudence, arbitrators have not taken an overly technical view of these matters, particularly where there is no prejudice to either of the parties. There is no prejudice to the Association in this matter and certainly the matter would not have proceeded on any different basis if the $180.00 had been initially claimed. In these circumstances, the amendment to the grievance is allowed and the Association shall pay to the Corporation the sum of $180.00.

Dated at Toronto this 10th day of September, 2008.

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Owen B. Shime, Q.C.