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2 DEPARTMENT OF INDUSTRIAL RELATIONS  
DIVISION OF LABOR STANDARDS ENFORCEMENT  
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7

8 BEFORE THE LABOR COMMISSIONER  
9 OF THE STATE OF CALIFORNIA

10  
11 THE GERSH AGENCY, INC., a California  
corporation,

12 Petitioner,

13 vs.

14 RED GRANT,

15 Respondent.  
16

CASE NO. TAC 52726

**DETERMINATION OF  
CONTROVERSY**

17  
18 **I. INTRODUCTION**

19 The above-captioned matter, a Petition to Determine Controversy under Labor Code  
20 section 1700.44, came on regularly for hearing in Los Angeles, California before the undersigned  
21 Hearing Officer for the Labor Commissioner. The hearing (hereinafter, the “TAC Hearing”) was  
22 held on January 26, 2021. Petitioner THE GERSH AGENCY, INC., a California corporation  
23 (hereinafter, “Petitioner”) was represented by Joseph P. Costa of COSTALAW. Respondent RED  
24 GRANT (hereinafter, “Respondent”) failed to appear.

25 Petitioner filed its *Petition to Determine Controversy* (hereinafter, “Petition”) on August  
26 5, 2019 alleging, *inter alia*, Respondent failed to pay Petitioner its 10 percent commission for  
27 various engagements Petitioner negotiated and procured.  
28

1 Due consideration having been given to the testimony, documentary evidence and  
2 arguments presented, the Labor Commissioner hereby adopts the following determination  
3 (hereinafter, the “Determination”).

## 4 II. FINDINGS OF FACT

5 1. Red Grant is an artist who performs live comedy shows in comedy clubs around  
6 the country.

7 2. The Gersh Agency is a talent agency licensed by the laws of the State of  
8 California.

9 3. Petitioner began representing Respondent in approximately April or May 2016.  
10 The parties entered into an oral agreement where Respondent agreed to pay Petitioner 10%  
11 commission of his gross compensation for personal appearances, plus 10% of bonuses or any  
12 “back-end” deal Petitioner negotiated at the time of procuring employment.

13 4. A “back-end” deal occurred when Petitioner negotiated compensation, in addition  
14 to an artist’s guaranteed payment for an engagement. This additional, built-in, compensation  
15 would be paid to an artist based on how well they performed, *e.g.*, increased ticket sales or  
16 increased audience turnout at the venue.

17 5. Sarah Leach (hereinafter, “Leach”) is responsible for the contracts and client  
18 accounting for the stand-up comedians Petitioner represents. Leach testified the terms of the oral  
19 agreement between the parties was customary in connection with Petitioner’s representation of  
20 comedic talent. It was also customary in connection with the representation of comedians in other  
21 agencies. Leach testified to her 24 years of experience in this area as a basis for her  
22 understanding. Leach further testified to the 10-percent commission structure as an industry  
23 standard based on how colleagues from other agencies structured their commission arrangements.

24 6. As part of its billing practices, Petitioner sends an artist a document referred to as,  
25 “Final Figures.” The Final Figures include detailed information regarding the artist’s name, the  
26 date(s) of the engagement, venue information, duration of the engagement, an artist’s  
27 compensation, and information related to an artist’s accommodations and travel. Petitioner also  
28 sends an artist an invoice listing their guaranteed payment, the Final Figures, which includes any

1 additional compensation earned as part of a back-end deal, and the commission amount due.  
2 Petitioner typically demands payments within 30 to 60 days of the billing. Petitioner will send  
3 late notices within the same timeframe.

4 7. As part of its billing practices, Petitioner sends its clients invoices on the 15th day  
5 of each month. The invoice includes information regarding previous engagements and  
6 corresponding commission payments which an artist has not yet paid.

7 8. Leach testified Petitioner negotiated the prices of shows, issued the contracts,  
8 which included providing the contracts to Respondent for his review and acceptance, and  
9 prepared the Final Figures for each engagement. On at least two occasions, Petitioner rescheduled  
10 Respondent's dates of employment for engagements in Baltimore, Maryland and San Antonio,  
11 Texas.

12 9. Petitioner negotiated and procured employment for Respondent for an engagement  
13 at the Comedy Factory in Baltimore, Maryland (hereinafter, the "Baltimore Engagement").  
14 Respondent performed at the Baltimore Engagement on June 28, 2018 to June 30, 2018.

15 10. Petitioner negotiated and procured employment for Respondent for an engagement  
16 at the Improv in Arlington, Texas (hereinafter, the "Arlington Engagement"). Respondent  
17 performed at the Arlington Engagement on July 12, 2018 to July 15, 2018.

18 11. Petitioner negotiated and procured employment for Respondent for an engagement  
19 at a second venue also known as the Improv in Washington D.C. (hereinafter, the "Washington  
20 D.C. Engagement"). Respondent performed at the Washington D.C. Engagement on July 20,  
21 2018 to July 22, 2018.

22 12. Petitioner negotiated and procured employment for Respondent for an engagement  
23 at the Atlanta Comedy Theater (hereinafter, the "Atlanta Engagement"). Respondent performed at  
24 the Atlanta Engagement on September 13, 2018 to September 16, 2018.

25 13. Petitioner negotiated and procured employment for Respondent for an engagement  
26 at the Punch Line Philadelphia (hereinafter, the "Philadelphia Engagement"). Respondent  
27 performed at the Philadelphia Engagement on September 27, 2018 to September 29, 2018.

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1           14.     Petitioner negotiated and procured employment for Respondent for an engagement  
2 at the Laugh Out Loud Comedy Club in San Antonio, Texas (hereinafter, the “San Antonio  
3 Engagement”). Respondent performed at the San Antonio Engagement on November 29, 2018 to  
4 December 2, 2018.

5           15.     In late 2018 or early 2019, Petitioner sent Respondent an invoice listing payments  
6 of outstanding commissions for the Baltimore Engagement, Arlington Engagement, Washington  
7 D.C. Engagement, Atlanta Engagement, Philadelphia Engagement, and the San Antonio  
8 Engagement. On June 20, 2019, Petitioner again sent Respondent an invoice listing these six  
9 engagements with the outstanding, corresponding commission payments.

10          16.     Respondent has not paid Petitioner its 10% commission for services rendered in  
11 the procurement of the Baltimore Engagement, Arlington Engagement, Washington D.C.  
12 Engagement, Atlanta Engagement, Philadelphia Engagement, or the San Antonio Engagement  
13 (hereinafter, collectively referred to as, the “Engagements”).

14          17.     On August 5, 2019, Petitioner filed its Petition alleging, *inter alia*, outstanding  
15 commission payments in the total amount of \$4,995.20, plus applicable interest.

16          18.     Petitioner served Respondent with the Petition. The Labor Commissioner’s Office  
17 served Respondent with an *Order Re: Notice of Unavailability* and a *Notice of Remote Hearing*.  
18 The *Notice of Remote Hearing* informed the parties the TAC Hearing would be held on January  
19 26, 2021 via a Zoom video conference and included a Zoom link to access the video hearing. The  
20 *Notice of Hearing* also instructed the parties to provide the Hearing Officer and the opposing  
21 party with an exhibit list, witness list, and the evidence the parties intended to present during the  
22 TAC Hearing by no later than January 12, 2021. Petitioner’s counsel served the Labor  
23 Commissioner’s Office and Respondent with *Petitioner’s Witness and Exhibit List* on January 12,  
24 2021. There is no evidence of improper service of the Petition, the Labor Commissioner Office’s  
25 *Order Re: Notice of Unavailability* or *Notice of Remote Hearing*, or *Petitioner’s Witness and*  
26 *Exhibit List*. The Hearing Officer determined during the TAC Hearing that Respondent was  
27 properly served but failed to appear. The Hearing Officer further determined this matter could  
28 proceed.

1 **ISSUES**

2 **A. Did Petitioner procure employment for Respondent for the Engagements?**

3 **B. Is Petitioner entitled to payment of the outstanding commissions for the**  
4 **Engagements?**

5 **III. LEGAL ANALYSIS**

6 A talent agent is a corporation or person who procures, offers, promises, or attempts to  
7 procure employment or engagements for an artist or artists. (See Labor Code § 1700.4(a).) Labor  
8 Code section 1700.4(b) defines an “artist” as “actors and actresses rendering services on the  
9 legitimate stage and in the production of motion pictures . . . and other artists and persons  
10 rendering professional services in motion picture, theatrical, radio, television and other  
11 entertainment enterprises.”

12 Respondent is an “artist” within the meaning of Labor Code section 1700.4(b). Petitioner  
13 is a talent agency within the meaning of Labor Code section 1700.4(a).

14 **A. Did Petitioner procure employment for Respondent for the Engagements?**

15 A talent agent is a corporation or person who procures, offers, promises, or attempts to  
16 procure employment or engagements for an artist or artists. (See Labor Code § 1700.4(a).) While  
17 not specifically defined by the Talent Agencies Act, the different definitions for employment  
18 require an act on behalf of the employed. (See *Malloy v. Board of Education* (1894) 102 Cal.  
19 642, 646; Industrial Welfare Commission Wage Order No. 12-2001, section 2(D)-(F).)

20 The Labor Commissioner has ruled that the term “procure” means, “[t]o initiate a  
21 proceeding; to cause a thing to be done; to instigate; to contrive, bring about, effect or cause. To  
22 persuade, induce, prevail upon, or cause a person to do something.” (*Maureen McDonald, p/k/a,*  
23 *Mozella v. Peter Torres, individually and dba Peter Torres Management*, Case No. TAC 27-04, at  
24 p. 6 (2005) (“*McDonald*”).) Procurement also includes the solicitation, negotiation or acceptance  
25 of a negotiated instrument for the engagements at issue. (See *Id.*, at p. 8.) Additionally,  
26 procurement “includes an active participation in a communication with a potential purchaser of  
27 the artist’s services aimed at obtaining employment for the artist, regardless of who initiated the  
28 communication.” (*ICM Partners v. James Bates*, Case No. TAC-24469, at p. 5 (2017) (“*Bates*”))

1 (citing *Hall v. X Management*, Case No. TAC 19-90, at pp. 29-31 (1992)).) “The Labor  
2 Commissioner has long held that ‘procurement’ includes the process of negotiating an agreement  
3 for an artist’s services.” (*Bates*, at p. 5) (citing *Pryor v. Franklin* (TAC 17 MP-114 (1982)).)

4 Here, the evidence demonstrates Petitioner procured employment for Respondent for the  
5 Engagements. Leach testified Petitioner would negotiate the prices of shows, issued the contracts  
6 for the Engagements, which included providing the contracts to Respondent for his review and  
7 acceptance, rescheduled dates for Respondent’s employment in the Baltimore Engagement and  
8 San Antonio Engagement, and prepared the Final Figures. The Final Figures explained in detail  
9 various aspects of Respondent’s employment including the date(s) of the engagement, venue  
10 information, duration of the engagement, Respondent’s compensation, and information related to  
11 Respondent’s accommodations and travel. The scope of detail and information in the Final  
12 Figures demonstrate Petitioner actively participated in communications with the venue operators  
13 who purchased Respondent’s services. Petitioner further actively participated in the procurement  
14 of employment by negotiating Respondent’s employment terms including any back-end deals,  
15 which led to the improvement and increase of Respondent’s compensation in several of the  
16 Engagements. Leach testified Petitioner would not have engaged in these actions but for its  
17 procurement of employment for Respondent.

18 **B. Is Petitioner entitled to payment of the outstanding commissions for the**  
19 **Engagements?**

20 The question of whether Petitioner is entitled to payment of the outstanding commissions  
21 for the Engagements depends on whether a contract was formed between the parties.

22 The essential elements of a contract include “[p]arties capable of contracting who  
23 consented with a lawful object and sufficient consideration.” (See Civil Code § 1550; *The*  
24 *Endeavor Agency, LLC v. Alyssa Milano*, Case No. TAC 10-05, at p. 6 (2007) (“*Milano*”).) The  
25 existence and terms of an implied contract are manifested by conduct, and such an implied  
26 contract is formed, absent a written agreement, where the parties’ conduct demonstrates a meeting  
27 of the minds. (See Civil Code § 1621; *Milano*, at p. 6.)

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1 Like *Milano*, the agreement between Petitioner and Respondent is an oral and implied  
2 contract formed between the parties, the existence and terms of which were manifested by the  
3 parties' subsequent conduct. Specifically, the evidence presented at the TAC Hearing shows  
4 Petitioner and Respondent entered into an oral agreement where Respondent agreed to pay  
5 Petitioner 10% commission of his gross compensation for personal appearances, plus 10% of  
6 bonuses or any "back-end" deal Petitioner negotiated at the time of procuring employment. Leach  
7 testified the terms of the oral agreement between the parties were customary in connection with  
8 Petitioner's representation of comedic talent, as well as representation of comedians in other  
9 agencies. Leach testified to her 24 years of experience in this area as a basis for her  
10 understanding. Leach further testified to the 10-percent commission structure as an industry  
11 standard based on how colleagues from other agencies structured their commission arrangements.  
12 Respondent first signed with Petitioner in April or May 2016. No evidence was presented to  
13 demonstrate Respondent disputed, rejected, or disagreed with the 10-percent commission  
14 structure in the first two years Petitioner represented Respondent.

15 Furthermore, the evidence shows Petitioner procured employment for Respondent and  
16 Respondent performed at the Engagements between June 28, 2018 through December 2018. As  
17 part of its billing practices, Petitioner sent Respondent the Final Figures and an invoice. Petitioner  
18 typically demands payment within 30-60 days of billing. Petitioner sent Respondent an invoice in  
19 late 2018 or early 2019 and on June 20, 2019, which included the outstanding commissions owed  
20 to Petitioner for the Engagements. Petitioner demonstrated it was entitled to commission  
21 payments of \$4,995.21, plus interest, which Respondent has failed to pay.

#### 22 IV. ORDER

23 For the reasons set forth above, IT IS HEREBY ORDERED that:

24 1. Respondent RED GRANT shall pay to Petitioner THE GERSH AGENCY, a California  
25 corporation the unpaid 10% commissions for the Baltimore Engagement, Arlington Engagement,  
26 Washington D.C. Engagement, Atlanta Engagement, Philadelphia Engagement, and the San  
27 Antonio Engagement in the amount of **\$6,282.87**, which includes interest on unpaid commissions  
28 based on 60 days from the last day of performance for each Engagement through May 12, 2021,

1 at the rate of 10% per annum as follows:

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5	6	7	8
<b>Payment of the Engagements</b>	<b>Commissions Earned</b>	<b>10% Interest on Unpaid Commissions (60 days from last day of performance through May 12, 2021)</b>	<b>Total Amount Owed (with Interest)</b>
9	10	11	12
The Baltimore Engagement	\$1,050.00	\$283.93	\$1,333.93
The Arlington Engagement	\$550.00	\$146.32	\$696.32
The Washington D.C. Engagement	\$1486.50	\$392.60	\$1,879.10
The Atlanta Engagement	\$700.00	\$174.33	\$874.33
The Philadelphia Engagement	\$858.71	\$210.80	\$1,069.51
The San Antonio Engagement	\$350.00	\$79.68	\$429.68
<b>TOTAL AMOUNT OWED FOR THE ENGAGEMENTS</b>	<b>\$4995.21</b>	<b>\$1,287.65</b>	<b>\$6,282.87</b>

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14 Dated: May 12, 2021

Respectfully submitted,

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17 PATRICIA SALAZAR  
18 Attorney for the Labor Commissioner

19 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

20 Dated: May 18, 2021

21 

22  
23 LILIA GARCIA-BROWER  
24 State Labor Commissioner



**PROOF OF SERVICE  
TAC-52726**

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES )

I, Jhonna Lyn Estioko, declare and state as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is Division of Labor Standards Enforcement, Department of Industrial Relations, 320 W. 4th Street, Suite 600, Los Angeles, California 90013.

On May 18, 2021, I served the following documents described as:

**DETERMINATION OF CONTROVERSY**

on the persons below as follows:

Joseph P. Costa, Esq.  
COSTALAW  
17383 Sunset Blvd., Ste. A350  
Pacific Palisades, CA 90272  
[Joseph.costa@costalaw.com](mailto:Joseph.costa@costalaw.com)

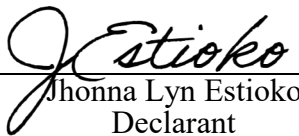
Red Grant  
[REDACTED]

**(BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED)** By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

**(BY E-MAIL SERVICE)** I caused such document(s) to be delivered electronically via e-mail to the e-mail address of the addressee(s) listed above, and did not receive a non-deliverable email message.

**(STATE)** I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.

Executed on May 18, 2021, at Los Angeles, California.

  
Jhonna Lyn Estioko  
Declarant