

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
2 BY: THOMAS S. KERRIGAN, State Bar No. 36003
107 South Broadway, Room 5022
3 Los Angeles, California 90012
(213) 897-1511

4 Special Hearing Officer
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8 **BEFORE THE LABOR COMMISSIONER**
9 **STATE OF CALIFORNIA**

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12 STEVE VIEIRA, an individual and) CASE NO. TAC 12-98
dba SJV MANAGEMENT)
13) DETERMINATION OF CONTROVERSY
Petitioner,)
14)
vs.)
15)
GEORGE ALVAREZ,)
16)
Respondent.)
17 _____)

18 The petition in the above-entitled controversy alleges, *inter alia*,
19 that on or about May 16, 1991, the parties entered into a written
20 agreement which provided that petitioner Steve Vieira [hereinafter
21 "Vieira"] would act as respondent George Alvarez's [hereinafter "Alvarez"]
22 personal manager. The agreement further provided that Vieira was to
23 receive 15% of all gross earnings received by Alvarez during the three
24 year term of the contract.

25 Both parties agree that Vieira was not a licensed talent agent at the
26 time the written agreement was entered into and that he did not become a
27 licensed talent agent until December of 1995, i.e., after the original

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1 term of the agreement had expired.

2 Following the execution of this agreement, Alvarez received a number
3 of engagements, working on General Hospital, Port Charles, and The Bold
4 and the Beautiful, among other television shows, as well as in films.
5 Alvarez continued to pay commissions to Vieira based on these engagements
6 until June of 1996, when their relationship deteriorated and Alvarez
7 attempted to cancel the agreement.

8 The written agreement provided for an option for renewal by Vieira
9 for an additional three years, provided that Alvarez was notified in
10 writing of the renewal. In fact, as Vieira concedes, the written
11 notification was never given. Nevertheless, the parties continued to
12 perform under the terms of the agreement after the three years had
13 expired. Whether this constituted an extension of the existing written
14 agreement need not be determined in view of the conclusions reached
15 hereinafter.

16 Sometime in 1994 Vieira secured the services of Henderson Hogan, a
17 licensed talent agency, to represent Alvarez for an additional commission.
18 Vieira appears to argue that this constituted a validation or legitimizing
19 of the existing written agreement inasmuch as the provisions of Labor Code
20 §1700.44(d) sanctions the actions of an unlicensed person who acts in
21 conjunction with, and at the request of, a licensed talent agency.

22 Vieira seeks unpaid commissions earned during and after 1996.
23 Alvarez has counterclaimed to recover commissions he paid to Vieira prior
24 to that time, arguing that the written agreement was invalid inasmuch as
25 Vieira was an unlicensed talent agent at the time this agreement was
26 entered into by the parties.

27 The matter came on for hearing on September 5, 1998 before Thomas S.
28 Kerrigan, Special Hearing Officer, in Los Angeles, California. Petitioner

1 appeared through his attorney Darrin A. Blumfield; respondent appeared
2 through his attorney Michael M. Baranov. The matter was taken under
3 submission at the close of the hearing.

4 ISSUES

- 5 1. Is the written agreement valid and enforceable?
6 2. If so, to what relief, if any, is petitioner entitled?
7 3. Can respondent recover on his counterclaim?
8 4. If so, to what relief, if any, is respondent entitled?

9 DISCUSSION AND FINDINGS

10 There is no dispute between the parties that Alvarez, an actor in
11 television and films, is an artist within the meaning of Labor Code
12 §1700.4(b).

13 There is additionally no dispute that Vieira was not a licensed
14 talent agent at the time he entered into the written contract authorizing
15 him to receive commissions as Alvarez's "personal manager." The question
16 then becomes what was the actual nature of the relationship created by the
17 written agreement.

18 The terms of the agreement itself specifically provide that Vieira
19 was being retained by Alvarez solely to "advise and counsel" with respect
20 to selection of artistic and music material, publicity, and general
21 practices in the entertainment industry. The agreement expressly recites
22 that Vieira is not "a theatrical agent" or "employment agent" and has not
23 "offered or attempted or promised to obtain employment or engagements" for
24 Alvarez.

25 But our inquiry must extend beyond these contract provisions. It is
26 the actual conduct of the parties, not their contractual language, that
27 must be at the forefront of the analysis in a case of this nature. See
28 *Buchwald v. Superior Court* (1967) 254 Cal. App. 2d 347, 355. Any other

1 approach would elevate form over substance and would permit circumvention
2 of the law based on careful draftsmanship. The key, therefore, is not how
3 the parties contractually defined their relationship but how they actually
4 performed under the contract.

5 It was apparent in this case, if only from Vieira's own testimony at
6 the hearing, that he was actively engaged from the outset of the contract
7 in soliciting offers of employment for Alvarez. He was, for example,
8 instrumental in securing a continuing role for Alvarez on General Hospital
9 in 1991 and maintained these efforts in 1992 and 1993. It is clear that
10 only after Henderson Hogan, a licensed talent agent, was retained did
11 Vieira's unilateral efforts on Alvarez's behalf cease.

12 This evidence accordingly more than meets the minimal standard of
13 *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal. App. 4th 246, 255-
14 260. Clearly the major purpose of this written agreement was to authorize
15 Vieira, an unlicensed talent agent at the time, to do something he had no
16 legal right to do, to obtain work for Alvarez in television and films.
17 Confronted with such evidence, we have no other alternative than to
18 declare the written agreement void *ab initio*. *Waisbren, supra*, at pp.
19 261-262.

20 Neither the fact that Henderson Hogan, a licensed talent agent, was
21 later retained by Vieira to handle transactions regarding Alvarez nor the
22 fact that Vieira later became licensed himself militate in favor of a
23 different result. The validity of a written agreement is determined by
24 the circumstances existing at its inception and not by later events. As
25 the courts have long held, void agreement cannot be made valid by
26 subsequent circumstances. *Interinsurance Exchange v. Ohio Casualty Ins.*
27 *Co.* (1962) 58 Cal. 2d 142, 148.

28 We need not decide whether the original written agreement was

1 extended or whether the parties adopted a successor agreement or
2 agreements based on the same terms. To begin with, the evidence was
3 inconclusive concerning the existence of any such agreements. Secondly,
4 any such agreements should have been tainted with the illegality of the
5 original agreement. Finally, any such agreement, which would have been
6 entered into at a time when Vieira was licensed, would not have complied
7 with the requirements of Labor Code § 1700.23.

8 CONCLUSIONS OF LAW

9 1. Respondent is an "artist" within the meaning of Labor Code
10 §1700.44(a). The Labor Commissioner has jurisdiction to determine this
11 controversy pursuant to the provisions of that section.

12 2. Petitioner violated Labor Code §1700.5, in that he engaged in and
13 carried on the occupation of a talent agency without first procuring a
14 license therefor from the Labor Commissioner. The aforementioned written
15 agreement and all successor agreements, if any, between petitioner and
16 respondent are accordingly void *ab initio* and are unenforceable for all
17 purposes.

18 3. The Counterclaim of respondent seeking restitution of commission paid
19 prior to 1994, is barred by the one-year limitation provisions of Labor
20 Code §1700.44(c).

21 CONCLUSION

22 The written agreement entered into between the parties in 1991 and
23 all successor agreements, if any, are each void and unenforceable for all
24 purposes. The Petition is dismissed. The Counterclaim is barred by the
25 one-year statute of limitations in Labor Code §1700.44(c) and is likewise
26 dismissed.

27 Dated: April 12, 1999

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Thomas S. Kerrigan
Special Hearing Officer

1 The above Determination is adopted by the Labor Commissioner in its
2 entirety.

3 Dated:

Marcy Saunders
State Labor Commissioner

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The above Determination is adopted by the Labor Commissioner in its entirety.

Dated: April 22, 1999


Marcy Saunders
State Labor Commissioner