

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
 2 Department of Industrial Relations
 State of California
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 7 BEFORE THE LABOR COMMISSIONER
 8 OF THE STATE OF CALIFORNIA
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10	DOUG APATOW dba DOUG APATOW AGENCY,)	Case No. TAC 75-92
)	
11	Petitioner,)	
)	
12	vs.)	DETERMINATION OF
)	CONTROVERSY
13	JOHN TINTORI,)	
)	
14	Respondent.)	
)	

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 16 INTRODUCTION

17 On October 7, 1992, Petitioner DOUG APATOW dba DOUG
 18 APATOW AGENCY filed a petition to determine controversy pursuant
 19 to Labor Code §1700.44, alleging that Respondent JOHN TINTORI
 20 failed to pay him for his services in procuring employment for
 21 Respondent as a film editor in the production of the movie "Mr.
 22 Wonderful". By his petition, APATOW seeks payment of commissions
 23 in the amount of 10% of Respondent's gross earnings from his
 24 employment with the "Mr. Wonderful" production. TINTORI filed an
 25 answer to the petition, denying that APATOW was entitled to
 26 commissions in an amount any greater than 5% of Respondent's
 27 gross earnings from his employment with the movie production.
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1 A hearing was held on May 24, 1993 in Los Angeles,
2 California, before Miles E. Locker, attorney for the Labor
3 Commissioner. Petitioner appeared in propria persona and
4 Respondent appeared by counsel Michael R. Blaha. Based upon the
5 testimony and evidence received, the Labor Commissioner adopts
6 the following determination of controversy.

7 FINDINGS OF FACT

8 1. On or about December 1, 1990, APATOW, a licensed
9 talent agent, entered into an oral agreement with TINTORI,
10 whereby APATOW was to serve as Respondent's exclusive talent
11 agent for the purpose of procuring employment for TINTORI as a
12 television and motion picture editor, for which TINTORI was to
13 pay APATOW commissions based upon a percentage of Respondent's
14 gross earnings from his employment. Commissions were to be paid
15 at the rate of 10% on any employment resulting from an agreement
16 entered into during the period of Petitioner's representation of
17 TINTORI whether or not the employment had been procured by
18 APATOW, and at the rate of 5% on any employment resulting from an
19 agreement entered into subsequent to Petitioner's representation
20 of TINTORI if, during the period when APATOW was representing
21 TINTORI, APATOW made any contacts in an effort to procure to the
22 subsequently obtained employment. The oral agreement further
23 provided that the period of representation was to be terminable
24 at will by either party. The agreement was not reduced to
25 writing until almost two years later, when APATOW prepared a
26 unilateral "subsequent reconstruction" of the agreement for the
27 purpose of these proceedings.

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1 2. Beginning in July 1991, APATOW engaged in numerous
2 communications with Marianne Moloney, the producer of the
3 upcoming motion picture "Mr. Wonderful", in an attempt to procure
4 employment for TINTORI as the film editor for the "Mr. Wonderful"
5 production.

6 3. On July 15, 1992, Moloney contacted APATOW and
7 advised him of her intent to hire TINTORI as the editor for the
8 "Mr. Wonderful" production. However, Moloney indicated that
9 before offering any employment, she needed to speak with TINTORI.
10 APATOW advised Moloney to contact TINTORI at his residence in
11 Brooklyn, New York. APATOW immediately called TINTORI, leaving a
12 message concerning these developments.

13 4. During the hearing, APATOW testified that his
14 July 15, 1992 conversation with Moloney did not constitute the
15 commencement of Respondent's employment on the "Mr. Wonderful"
16 production, since there was still a possibility that the terms
17 the employment would not be settled and an agreement might not
18 reached.

19 5. On July 16, 1992, TINTORI telephoned APATOW, and
20 advised him that he no longer wanted to retain his services as an
21 agent; that he was going to be represented by a new agency; and
22 that this new agency would negotiate his employment agreement
23 with the "Mr. Wonderful" production. TINTORI offered to pay
24 commissions to APATOW at the rate of 5% of his gross earnings in
25 connection with his prospective employment on this motion
26 picture. APATOW ultimately rejected this offer, and insisted
27 that he was entitled to commissions at the 10% rate.

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1 6. TINTORI then contacted Moloney and advised her that
2 he was now represented by Sanford-Skouras-Gross & Associates, and
3 that this new agency would handle his contract negotiations for
4 employment on the film. Employment negotiations quickly got
5 underway, and on July 22, 1992, the "Mr. Wonderful" production
6 company mailed a fully executed "deal memo" to Julia Kole of
7 Sanford-Skouras-Gross & Associates, setting forth the terms of
8 TINTORI's employment with the film production.

9 7. TINTORI commenced work as the film editor for "Mr.
10 Wonderful" on August 3, 1992. From August 1992 until April 26,
11 1993, he received \$138,814 in gross earnings from this
12 employment. Approximately 10% of these earnings were paid to
13 Sanford-Skouras-Gross & Associates in commissions. No
14 commissions have been paid to APATOW, and negotiations between
15 APATOW and TINTORI failed to result in a resolution of this
16 dispute.

17 CONCLUSIONS OF LAW

18 1. Petitioner is a "talent agency" within the meaning
19 of Labor Code §1700.4(a). Respondent is an "artist" within the
20 meaning of Labor Code §1700.4(b). The Labor Commissioner has
21 jurisdiction to determine this controversy pursuant to Labor Code
22 §1700.44(a).


23 2. Under the terms of the oral agreement between
24 APATOW and TINTORI, Petitioner is entitled to commissions in the
25 amount of 5% of Respondent's gross earnings in connection with
26 his employment as the film editor for the "Mr. Wonderful"
27 production. The employment agreement with the "Mr. Wonderful"
28 production company was not fully executed until one week after

1 Respondent's termination of APATOW's services. APATOW played no
2 role in negotiating the actual terms of this employment
3 agreement. Although it is true that APATOW was the procuring
4 cause of this employment agreement, the fact that the employment
5 agreement was negotiated and executed subsequent to APATOW's
6 termination is determinative. This is the only logical
7 interpretation of the distinction between 10% commissions and 5%
8 commissions, as a contrary interpretation, finding APATOW
9 entitled to the higher rate based on his efforts to procure an
10 employment agreement that was not negotiated and executed during
11 the period of his representation of TINTORI, would render the 5%
12 rate a nullity, and establish the 10% rate as the only rate.
13 This does not appear to have been the intent of the parties at
14 the time they entered into their oral agreement.

15 DETERMINATION

16 For all of the above-stated reasons, IT IS HEREBY
17 ORDERED that Respondent JOHN TINTORI pay Petitioner DOUG APATOW
18 dba DOUG APATOW AGENCY \$6,940.70 (5% of Respondent's gross
19 earnings received from August 1992 until April 26, 1993 in
20 connection with his employment with the "Mr. Wonderful"
21 production); plus 5% of any additional gross earnings that have
22 been or will be received in connection with this employment from
23 April 27, 1993; plus, pursuant to Civil Code §§3287 and 3289,
24 interest on the unpaid commissions at the rate of 10% per year
25 from the date each commission payment became due.

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27 DATED: 11/8/93


MILES E. LOCKER, Attorney for
the Labor Commissioner

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

DATED: 11-9-93

Victoria Bradshaw
VICTORIA BRADSHAW
STATE LABOR COMMISSIONER