DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

JASON BEHR, Petitioners, vs. MARV DAUER & ASSOCIATES, and MARV DAUER, Respondents.	Case No. TAC 21-00 **AMENDED** DETERMINATION OF CONTROVERSY

AMENDMENT

The original Determination of Controversy was issued and served on the parties on June 19, 2001. A portion of text was omitted from the original determination, creating culpability for otherwise proteced activity. The amended portion to the text is highlighted and found at page 9 lines 19-22 and 27-28. The remaining Conclusions of Law and the Order are unaffected.

INTRODUCTION

The above-captioned petition was filed on July 13, 2000,

by JASON BEHR, (hereinafter "BEHR" OR "Petitioner"), alleging that MARV DAUER dba MARV DAUER & ASSOCIATES, (hereinafter "DAUER" or "Respondent"), was acting as an unlicensed talent agent in violation of Labor Code §1700.5[1]. Petitioner seeks a determination voiding *ab initio* the 1993 management agreement between the parties and requests disgorgement of all commissions paid to respondent arising from this agreement.

Respondent filed his answer with this agency on May 1, 2000, denying any illegal conduct, and seeks a determination from the Labor Commissioner that the management agreement between the parties is enforceable for all purposes. A hearing was scheduled before the undersigned attorney, specially designated by the Labor Commissioner to hear this matter. After several continuances, The hearing commenced on February 5, 2001, and was completed on March 6, 2001, in Los Angeles California. Petitioner was represented by Michael B. Garfinkel of Rintala, Smoot, Jaenicke & Rees, LLP; respondent appeared through his attorney J.T. Fox. Due consideration having been given to the testimony, documentary evidence and arguments presented, the Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. On February 10, 1993, the parties entered into a management agreement. In return for 15 percent of petitioner's gross earnings as an actor for all entertainment related

[1] All statutory citations will refer to the California Labor Code unless otherwise specified.

activities, the respondent would act as petitioner's sole and exclusive personal manager. The original contract was for two years, and four (4), one (1) year options, all exercised by the respondent. The relationship lasted until April 15, 1999, when Behr terminated Dauer's services.

2. Behr alleges that throughout the length of the agreement, Dauer attempted to procure employment opportunities on his behalf. Behr opines that these actions on his behalf were done illegally without a California talent agency license and consequently the agreement should be voided *ab initio*.

3. The relationship began in Minnesota where an introduction was made between the parties. The petitioner was nineteen years old and aspiring to move to California in pursuit of an acting career. The respondent instructed Behr that if he did move to California, Behr should contact the respondent when he arrived. Behr did. And within 48 hours of moving to California and visiting the respondent's office, Dauer introduced Behr to Conan Carroll of The Artists Group. The Artists Group, a licensed talent agency, immediately offered Behr a contract to act as his agent, which he instantly accepted. Two days later, the parties signed the management agreement. After two days in California, Behr possessed an agent, a manager and was on his way to television success.

4. Throughout the relationship, Behr was continuously represented by a licensed talent agent. His agency representation changed several times, but never lapsed. Irrespective of perpetual agency representation, Behr testified that Dauer utilized his many connections in the entertainment industry to secure several

auditions without the assistance or knowledge of Behr's agents.

5. Dauer possesses a well-regarded reputation in the soap opera industry and has established close personal relations with various soap opera casting directors. Behr argued that these connections in the industry enabled Dauer to bypass the talent agent and seek auditions directly through Dauer's casting agent and producer friends. Behr testified that he personally witnessed Dauer directly seek soap opera auditions on his behalf without the knowledge of the talent agent and maintained that Dauer often told Behr he directly arranged soap opera auditions. Behr also argued that Dauer scoured the daily breakdowns, discussed these possible roles with casting agents on Behr's behalf and by doing so, we must conclude that Dauer acted as a talent agent.

6. After several witnesses and impeachment documents were offered into evidence by the respondent, Behr's credibility was severely called into question and this hearsay testimony based on circumstantial evidence, absent supporting documents or testimony was unconvincing. The petitioner's credibility was not the only party whose testimony was unreliable. The respondent was also impeached several times and his self-serving, often contradictory testimony was unable to establish his defense and ultimately confirmed his culpability.

7. In prior sworn deposition testimony, Dauer admitted that he introduced his clients to "major producer[s] of films" for meetings, but was unable to provide an explanation why he would do so, other than stating, "it was just a meeting. It wasn't going to be a film or anything. [sic] Just to meet him." This explanation was not believable. Mr. Dauer introduced his clients to major

producers and the reason he did, was to get his clients employment.

8. The Labor Commissioner is mindful that holding Dauer in violation of the Talent Agencies Act, simply for introducing his clients to a "major producer of films" without further inquiry, may interfere with the constitutionally protected principles of freedom of association. The Labor Commissioner will not enforce laws that restrain Dauer's exercise of his rights protected by the first and fourteenth amendments. To do so would be an impermissible holding, exceeding the scope and authority entrusted to this administrative proceeding. But this holding is not based solely on one introduction of a client to a friend. Other factors taken in conjunction with Dauer's admitted behavior provide the basis for a conclusion that Dauer engaged in illegal activity.

9. Dauer also admitted that if he had a better relationship with a casting director than Behr's talent agent, he would directly contact the casting director. Dauer added he would do this only if requested to do so by the agent, ostensibly seeking protection under Labor Code §1700.44(d)[2]. Dauer also added, he would discuss auditions with casting directors if the casting director was unable to contact the agent. Again, the explanation following Dauer's admissions were not credible.

10. Clearly, Mr. Dauer has established a large network of industry executives, friends and associates from which he draws on. The frequency and to what extent he draws on these contacts were not established, but his ability to garner friends and utilize

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[2] Labor Code §1700.44(d) states, "it is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with and at the request of a licensed talent agency in the negotiation of an employment contract."

those friendships for the benefit of his clients was.

11. In one such case, Dauer testified that he and his friend of many years, James Woods, always kept business and friendship apart. Dauer testified that he would never discuss business with Woods because commingling his business with his friend would compromise the relationship. Dauer went to great lengths to establish this fact, until it was elicited that several of his clients worked on Mr. Woods latest film. In fact, Behr introduced evidence that Dauer obtained an audition for Behr for the Woods movie "Race to Space". In support of the conclusion that Dauer created an audition opportunity for Behr, was the testimony of Behr's talent agent. Jeff Witjas testified that he was Behr's point agent at William Morris, and it is inconceivable if William Morris was involved, that Behr would have had an audition for a film without his knowledge. Witjas testified he absolutely had no knowledge of this audition, thus establishing that William Morris was not involved. The casting director and producer for the film, Joey Paul, testified unconvincingly that she utilized a William Morris liaison to handle all of the William Morris talent on the film, but that testimony was contradicted by the credible testimony of Witjas. If Behr's agent was not involved, the only logical conclusion that can be drawn is Dauer created this audition opportunity.

12. Notably, Joey Paul testified that she called Dauer and wanted to meet him because he had a reputation for handling quality talent. Dauer then visited Paul and soon thereafter three of Dauer's clients were slotted to appear on the Woods film. The totality of the evidence demonstrated that Dauer introduced his

clients to casting directors and producers; called casting directors directly if his relationship with the casting director was better than that of the agent; and if the agent was incommunicado, Dauer would set the auditions directly with his artist.

13. The petitioner sought to establish that Dauer made a pattern and practice of setting up auditions for Behr. That was not accomplished. To Dauer's credit, he did obtain the agent for Behr, encouraged constant agency representation and did not conduct talent agent endeavors throughout the majority of the relationship, with the exception of the aforementioned activities on the occasional basis by his own acknowledgment.

14. In 1998 Behr was eventually cast in a lead role for the WB's new hit series "Roswell". The petitioner continued to make commission payments and on April 15, 1999, Behr terminated Dauer's services and at some point thereafter ceased commission payments. Dauer filed a superior court breach of contract lawsuit against Behr seeking unpaid commissions. In response, Behr filed this petition requesting the contract be deemed illegal and unenforceable. The superior court action was stayed pending the results of this petition.

CONCLUSIONS OF LAW

1. Labor Code §1700.4(b) includes "actors" in the definition of "artist" and petitioner is therefore an "artist" within the meaning of §1700.4(b).

2. The primary issue is whether based on the evidence

presented at this hearing, did the respondent operate as a "talent agency" within the meaning of §1700.40(a). Labor Code §1700.40(a) defines "talent agency" as:

> "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists."

3. Labor Code section 1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."

4. In Waisbren v. Peppercorn Production, Inc (1995) 41 Cal.App.4th 246, the court held that any single act of procuring employment subjects the agent to the Talent Agencies Act's licensing requirements, thereby upholding the Labor Commissioner's long standing interpretation that a license is required for any procurement activities, no matter how incidental such activities are to the agent's business as a whole. Applying Waisbren, it is clear respondent acted in the capacity of a talent agency within the meaning of §1700.4(a).

5. Respondent argued the petitioner did not establish a violation by "clear and convincing" evidence and consequently has not met his burden of proof. The proper burden of proof is found at Evidence Code §115 which states, "[e]xcept as otherwise provided by law, the burden of proof requires proof by preponderance of the evidence." Further, McCoy v. Board of Retirement of the County of Los Angeles Employees Retirement Association (1986) 183 Cal.App.3d 1044 at 1051 states, "the party asserting the affirmative at an administrative hearing has the burden of proof, including both the

initial burden of going forward and the burden of persuasion by preponderance of the evidence(cite omitted). "Preponderance of the evidence" standard of proof requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. In re Michael G. 74 Cal.Rptr.2d 642, 63 Cal.App.4th 700.

6. The petitioner has established by a preponderance of the evidence that the respondent procured employment by contacting casting agents and producers directly in connection with securing auditions for Behr. The respondent miscalculated the scope in which he could deal with perspective employers. Dauer believed that if the agent is unavailable, a manager could discuss the role with the casting director, set up the audition and contact the artist to inform him of the time, place and circumstance surrounding the tryout. Also Dauer assumed if he had a favorable relationship with a casting director or producer and was instructed by the agent to discuss a potential role with that casting director or producer, that those types of communications would be protected. They are not, **absent convincing testimony from the artist's agent that the agent instructed the manager to conduct those specific communications. That convincing testimony was absent from this proceeding.**

A clear line must be drawn and managers must shield themselves from activities that may be construed as attempting to procure employment. The act of discussing roles with casting directors and contacting casting directors directly on behalf of an artist, **absent testimony an agent requested each and every alleged improper communication**, is a violation of the Talent Agencies Act.

7. In 1982, AB 997 established the California Entertainment Commission. Labor Code §1702 directed the Commission to report to the Governor and the Legislature as follows:

> "The Commission shall study the laws and practices of this state, the State of New York, and other entertainment capitals of the United States relating to the licensing of agents, and representatives of artists in the entertainment industry in general,..., so as to enable the commission to recommend to the Legislature a model bill regarding this licensing."

8. Pursuant to statutory mandate the Commission studied and analyzed the Talent Agencies Act in minute detail. The Commission concluded that the Talent Agencies Act of California is a sound and workable statute and that the recommendation contained in this report will, if enacted by the California Legislature, transform that statute into a model statute of its kind in the United States. All recommendations were reported to the Governor, accepted and subsequently signed into law.

9. The major, and philosophically the most difficult, issue before the Commission, the discussion of which consumed a substantial portion of the time was whether a personal manger, or anyone other than a licensed Talent Agent may procure employment for an artist without obtaining a talent agent's license from the Labor Commissioner? (Commission Report p. 15)

10. The Commission considered and rejected alternatives which would have allowed the personal manager to engage in "casual conversations" concerning the suitability of an artist for a role or part, and rejected the idea of allowing the personal manager to act in conjunction with the talent agent in the negotiation of

employment contracts whether or not requested to do so by the talent agent. (Commission Report P. 18-19)

13. As noted, all of these alternatives were rejected by the Commission. The Commission concluded:

> "[I]n searching for the permissible limits to activities in which an unlicensed personal manger or anyone could engage in procuring employment for an artist without being license as a talent agent, . . . there am no such activity, there are no such permissible limits, and that the prohibitions of the Act over the activities of anyone procuring employment for an artist without being licensed as a talent agent must remain, as they are today, total. Exceptions in the nature of incidental, occasional or infrequent activities relating in any way to procuring employment for an artist cannot be permitted: one either is, or is not, licensed as a talent agent, and, if not so licensed, one cannot expect to engage, with impunity, in any activity relating to the service which a talent agent is licensed to render. There can be no `sometimes' a talent agent, just as there can be no `sometimes' doctor or lawyer or any other licensed professional." (Commission Report P. 19-20)

14. The Commission was very clear in their conclusion that a personal manager may not negotiate an employment contract unless that negotiation is done "at the request" of a licensed talent agent. It is not enough, as indicated in the Commission's Report, that the talent agent grants overall permission. The agent must advise the manager or request the manager's activity for each and every submission. At the very minimum an agent must be aware of the manager's procurement activity. In our case, the testimony was clear that at times the petitioner spoke directly with casting agents that lead to auditions without the talent agents knowledge, and therefore, was not "at the request of" petitioners' licensed talent agent. Notably, the evidence did not establish the respondent acted in this fashion for the purpose of evading licensing requirements, however, to allow these activities to go

unregulated would create a gap in the Act that could be utilized to evade the Act's licensing requirements. This would defeat obvious legislative intent.

15. A bright line rule must be established to further legislative intent. Again, one either is an agent or is not. The person who chooses to manage an artist and avoid statutory regulation may not cross that line, unless that activity falls squarely within the narrow exception of §1700.44(d). Critics may argue that this rule works against an artist by discouraging creativity of a manager, which after all is conducted for the artist's benefit. Others may suggest this creates a chilling effect on the artists representatives working together in concert for the artist's benefit. Still others may argue this "bright-line rule" does not consider the realistic operations of the entertainment industry. Until case law or the legislature redirects the Labor Commissioner in carrying out our enforcement responsibilities of the Act, we are obligated to follow this path.

16. Behr seeks disgorgement of all commissions paid to the petitioner during the relationship between the parties. Behr filed his petition on July 13, 2000. Labor Code §1700.44(c) provides that "no action or proceeding shall be brought pursuant to [the Talent Agencies Act] with respect to any violation which is alleged to have occurred more than one year prior to the commencement of this action or proceeding." As a result, Behr is entitled to a return of commissions for any commissions paid to petitioner during the period of July 14, 1999, through July 13, 2000.

17. The aforementioned 1993 written agreement and four

subsequent one-year options between respondent and petitioner are hereby void *ab initio* and are unenforceable for all purposes. Waisbren v. Peppercorn Inc., supra, 41 Cal.App. 4th 246; Buchwald v. Superior Court, supra, 254 Cal.App.2d 347.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the aforementioned contracts between petitioner JASON BEHR and MARV DAUER & ASSOCIATES, are unlawful and void *ab initio*. Respondent has no enforceable rights under that contract and its options.

The respondent must provide an accounting to petitioner within 30 days of this determination of all commissions received from petitioner during the period of July 14, 1999, through July 13, 2000 and shall reimburse the petitioner for those monies within sixty (60) days from the date of this determination.

Dated: 8/16/01

David L. Gurley
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: AUG 16 2001

THOMAS GROGAN
Deputy Chief