

1 **STATE OF CALIFORNIA**
2 Department of Industrial Relations
3 Division of Labor Standards Enforcement
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12 **BEFORE THE LABOR COMMISSIONER**
13 **OF THE STATE OF CALIFORNIA**

14 DANIEL RODRIGUEZ and D&G
15 MUSIC,

16 Petitioners,

17 vs.

18 PATTY ANN NICHOLS,

19 Respondent.

20 CASE NO. TAC 49-05

21 **DETERMINATION OF**
22 **CONTROVERSY**

23 The above-captioned matter, a petition to determine controversy under Labor Code
24 §1700.44, came on regularly for hearing on August 14, 2006 in Los Angeles, California,
25 before the undersigned attorney for the Labor Commissioner assigned to hear this case.
26 Petitioners DANIEL RODRIGUEZ and D&G MUSIC, (hereinafter, collectively referred to
27 as "Petitioner Rodriguez"), appeared and were represented by Robert S. Besser, Esq.
28 Respondent PATTY ANN NICHOLS, (hereinafter, referred to as "Respondent Nichols"),
appeared and was represented by Michael R. Sohigian, Esq.

1 Based on the evidence presented at this hearing and on the other papers on file in this
2 matter, the Labor Commissioner hereby adopts the following decision.

3 **FINDINGS OF FACT**

4 Petitioner Rodriguez is a singer who began pursuing singing professionally
5 after September 11, 2001. Petitioner D&G Music is the company through which Petitioner
6 Rodriguez provides his performing services. Prior to September 11, 2001, Petitioner
7 Rodriguez primarily served as a New York City Police officer. Petitioner Rodriguez
8 testified that even as a police officer, he was known as the "singing cop." After the events
9 of September 11, 2001, (hereinafter, referred to as "9/11"), Petitioner Rodriguez was asked
10 to perform at various events such as CNN, the Yankees' first game post 9/11, David
11 Letterman, and at least 150 funerals of fallen officers and fallen victims from 9/11.

12 Petitioner Rodriguez met Tom Scott, also an artist, in 2001 at the taping of the
13 Grammy Awards Show, which was eventually canceled when the United States bombed
14 Afghanistan. Mr. Scott, impressed with Petitioner Rodriguez's performance of "America
15 the Beautiful," at the taping, offered to work with Petitioner Rodriguez on recording a single
16 of "God Bless America," with the proceeds going to the Twin Towers fund. Soon
17 thereafter, Petitioner Rodriguez and Mr. Scott agreed to work together again on recording a
18 second album.

19 Due to the demand after 9/11 for Petitioner Rodriguez's performing services,
20 Petitioner Rodriguez decided to hire a personal manager and a talent agent. Mr. Scott
21 agreed to represent Petitioner Rodriguez as his manager and suggested to Petitioner
22 Rodriguez that he also hire Respondent Nichols, who had been working in the industry as a
23 personal manager, to be a co-manager. Petitioner Rodriguez agreed and in January 2002,
24 entered into an oral management agreement with Mr. Scott and Respondent Nichols. Mr.
25 Scott also introduced Petitioner Rodriguez to Terry Rindal of POW MIA company, who
26 eventually agreed to represent Petitioner Rodriguez as his talent agent.

1 In July, 2002, Petitioner Rodriguez terminated the management agreement with
2 Mr. Scott. Likewise, in October, 2002, Petitioner Rodriguez terminated the management
3 agreement with Respondent Nichols.

4 On October 27, 2004, two years after her termination, Respondent Nichols filed an
5 action in the Los Angeles Superior Court, (hereinafter, referred to as "superior court
6 action"), against Petitioner Rodriguez for unpaid commissions allegedly due under the
7 management agreement. The superior court action has been stayed pending resolution of
8 this case.

9 As a defense to the superior court action and in this petition, Petitioner Rodriguez
10 alleges that the management agreement with Respondent Nichols is void and illegal because
11 Respondent Nichols attempted to procure employment for Petitioner Rodriguez with Jeep
12 vehicles.

13 Petitioner Rodriguez testified that in July, 2002, he was booked to perform at an
14 outdoor camp festival sponsored by Jeep. At some point during this festival, Petitioner
15 Rodriguez and Respondent Nichols discussed doing a SWAG¹ with Jeep. Petitioner
16 Rodriguez testified that he understood Respondent Nichols to be working out a deal with
17 Jeep wherein he would sing or represent Jeep in some type of advertising capacity and be
18 paid in part with a Jeep vehicle.

19 In support of this assertion, Respondent Nichols' deposition taken in the superior
20 court action was introduced and the following was read into the record:

21 Mr. Besser: Well, you told me about for one of your client you got him a deal with a
22 tape company, I believe, where he got recording tape because he was a
23 recording engineer, so I could understand he would need a lot of
24 recording tape. Did you do anything similar for Daniel?

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26 ¹A "SWAG" was understood by the hearing officer to mean a "trade." For example, Petitioner
27 Rodriguez would perform on behalf of Jeep and in exchange, he would be paid a Jeep, instead of cash,
28 as he was normally paid.

1 Ms. Nichols: We were—I was looking around and had met with people about some
things. There were a couple times they didn't go through.

2 Mr. Besser: What kinds of things were you looking for, though? That's what I'm
3 asking.

4 Ms. Nichols: We did a show for Jeep Liberty. Originally they were interested in him
5 possibly working with Jeep Liberty in commercials, but after I talked to
them a few times, they did not—they decided not to.

6 Mr. Besser: Who did you talk to at Jeep Liberty?

7 Ms. Nichols: It was a gentleman—I would have to look it up, but it was a gentleman
8 we met at the Jeep Liberty show.

9 Mr. Besser: What is Jeep Liberty?

10 Ms. Nichols: That's the name of the Jeep, you know, Jeep Cherokee, Jeep Liberty.

11 Mr. Besser: I didn't know. Thank you for telling me.

12 Ms. Nichols: Oh, because that year they had a Liberty version out and it was red,
white, and blue.

13 Mr. Besser: So Daniel had done a show for Jeep Liberty?

14 Ms. Nichols: Yes.

15 Mr. Besser: What kind of a show?

16 Ms. Nichols: Camp—they have a Camp Jeep where they invite everybody who owns a
17 Jeep to come camp for the weekend and they provide entertainment and
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18 Mr. Besser: Okay. And Daniel provided - - he performed?

19 Ms. Nichols: Yes, he performed.

20 Mr. Besser: And you were there?

21 Ms. Nichols: Yes.

22 Mr. Besser: And you met people from Jeep Liberty?

23 Ms. Nichols: Yes.

24 Mr. Besser: So then did you later approach somebody from Jeep Liberty and say do
you want to do an endorsement deal?

25 Ms. Nichols: Yes.

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Deposition of Patty Ann Nichols, R.T. 170:12-172:2.

1 Respondent Nichols testified at the hearing on this petition that Jeep eventually
2 decided not to use Petitioner Rodriguez's services for any type of commercial or
3 endorsement deals. Moreover, Respondent Nichols testified that she pursued this
4 opportunity for Petitioner Rodriguez at the request of and in conjunction with Petitioner
5 Rodriguez's agent, Mr. Rindal.

6 Through the testimony of both parties, it was revealed that Mr. Rindal was not
7 licensed with the State of California as a talent agent during the period that Respondent
8 Nichols worked as Petitioner Rodriguez's manager.

9 LEGAL ANALYSIS

10 Petitioner Rodriguez is an "artist" within the meaning of Labor Code §1700.4(b). At
11 no time, has Respondent Nichols been licensed as a talent agency with the State of
12 California.

13 Labor Code §1700.5 provides that "[n]o person shall engage in or carry on the
14 occupation of a talent agency without first procuring a license...from the Labor
15 Commissioner." The Talent Agencies Act, (hereinafter, referred to as "Act"), is a remedial
16 statute that must be liberally construed to promote its general object, the protection of artists
17 seeking professional employment. *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347,
18 354. For that reason, the overwhelming weight of judicial authority supports the Labor
19 Commissioner's historic enforcement policy, and holds that "even the incidental or
20 occasional provision of [talent agency] services requires licensure." *Styne v. Stevens* (2001)
21 26 Cal.4th 42, 51. These services are defined at Labor Code §1700.4(a) to include offering
22 to procure or promising to procure or **attempting to procure** or procuring employment for
23 an artist.

24 "Under certain very narrow circumstances set out at Labor
25 Code §1700.44(d), a person who is not licensed as a talent
26 agency may engage in limited activities that would otherwise
27 require licensure. Section 1700.44(d) provides: 'It is not
28 unlawful for a person or corporation which is not licensed
pursuant to this chapter to act in conjunction with, and at the

1 request of, a licensed talent agency in the negotiation of an
2 employment contract.' This exception to the general remedial
3 license requirement must be read narrowly. The exception
4 must be limited to the express language of the statute..."

5 *Massey v. Landis* TAC 42-03, p.11.

6 In defense to the allegation of attempted procurement, Respondent Nichols argues
7 that Petitioner Rodriguez has not met his burden in establishing that she attempted to
8 procure "employment" for him. We disagree.

9 "The burden of proof is found at Evidence Code §115 which states,
10 '[e]xcept as otherwise provided by law, the burden of proof requires
11 proof by preponderance of the evidence.' Further, *McCoy v. Board*
12 *of Retirement of the County of Los Angeles Employees Retirement*
13 *Association* (1986) 183 Cal.App.3d 1044 at 1051 states, 'the party
14 asserting the affirmative at an administrative hearing has the burden
15 of proof, including both the initial burden of going forward and the
16 burden of persuasion by preponderance of the evidence.' (cite omitted)
17 '**Preponderance of the evidence' standard of proof requires the
18 trier of fact to believe that the existence of a fact is more probable
19 than its nonexistence.**"

20 *In re Michael G.* 74 Cal.Rptr.2d 642, 63 Cal.App.4th 700 [Emphasis added]; See also *Robi*
21 *v. Wolf*, TAC No. 29-00 at pp.6-7, *Behr v. Dauer*, TAC No. 21-00 at pp. 8-9. We find that
22 Petitioner Rodriguez has met his burden of showing by a preponderance of the evidence that
23 Respondent Nichols attempted to procure employment for him with Jeep vehicles.

24 While "employment" is not defined under the Act, our state supreme court long ago
25 defined the term as follows: "Employment implies a contract on the part of the employer to
26 hire, and on the part of the employee to perform services." *Malloy v. Board of Education*
27 (1894) 102 Cal.642, 646. Additionally, Section 2(D) of Industrial Welfare Commission
28 (IWC) Order 12-01, regulating the wages, hours and working conditions in the motion
picture industry defines "employ" as, "...to engage, suffer, or permit to work." In her
superior court action deposition, Respondent Nichols admits that she approached a Jeep
Liberty official for the purpose of determining whether Jeep vehicles was interested in
entering into an endorsement deal with Petitioner Rodriguez. Significantly, Petitioner
Rodriguez testified that he understood the deal to include his services as a singer in

1 promoting Jeep in exchange for compensation which would be partly comprised of a Jeep
2 vehicle. "Clearly, 'employment' ... requires a duty of the employee to act. One cannot be an
3 employee if there is no affirmative duty to render services." *Jewel Kilcher v. Inga*
4 *Vainshtein, et al.* TAC No.02-99, p.23. Here, the implication, as well as the understanding
5 by Petitioner Rodriguez, was that he would be employed to sing on behalf of Jeep in
6 exchange for some type of compensation.

7 While Jeep decided not to go forward with such a deal, this does not negate the fact
8 that Respondent Nichols *attempted* to seek such a deal by soliciting the Jeep official. In past
9 decisions we have held that the act of procuring or attempting to procure work for an artist
10 includes solicitation. See *Hall v. X Management, Inc.* TAC 19-90; *Sevano v. Artistic*
11 *Productions, Inc.* 8-93.

12 Respondent Nichols argues that even if the solicitation to the Jeep official is
13 considered an attempt to procure employment, Respondent Nichols did not violate the Act
14 because she sought this opportunity for Petitioner Rodriguez "at the request of and in
15 conjunction with" Mr. Rindal, whom she believed to be a licensed talent agent. The
16 exemption found at Labor Code §1700.44(d) expressly requires that the act of procurement
17 or attempted procurement be done at the "request of and in conjunction with a **licensed**
18 talent agent." There is no defense under this section in a situation where a talent agent holds
19 himself out to be licensed when he's not. It is the responsibility of the manager who intends
20 on relying on this exemption, to verify that the talent agent he or she is working "at the
21 request of and in conjunction with," is licensed. A list of "licensed" talent agents is readily
22 available on the DLSE's website.² In fact, Respondent Nichols testified that she eventually
23 found out that Mr. Rindal was not licensed by looking him up on the website. However,
24 Respondent Nichols was obligated to look up this information *prior to* attempting to procure
25 the Jeep endorsement opportunity for Petitioner Rodriguez. Her failure to do so brings her

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27 ² www.dir.ca.gov

1 in violation of the Act.

2 Having found that Respondent Nichols violated the Act by acting as a talent agent
3 without the requisite license, we must necessarily conclude that the management agreement
4 between the parties is void *ab initio*, and that Respondent Nichols has no enforceable rights
5 thereunder.

6 **ORDER**

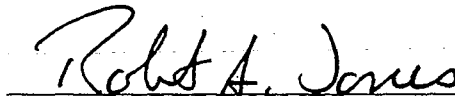
7 For the reasons set forth above, IT IS HEREBY DETERMINED that the
8 management agreement between Petitioners DANIEL RODRIGUEZ and D&G MUSIC and
9 Respondent PATTY ANN NICHOLS is void *ab initio* and that Respondent PATTY ANN
10 NICHOLS has no enforceable rights thereunder.

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12 Dated: January 29, 2007

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15 EDNA GARCIA EARLEY
16 Special Hearing Officer

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18 **Adopted:**

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28 Dated: *January 31, 2007*



ROBERT JONES
Acting State Labor Commissioner

