

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
2 State of California
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8 BEFORE THE LABOR COMMISSIONER
9 OF THE STATE OF CALIFORNIA
10

11 TIMOTHY L. KERN and PAMELA KERN,) No. TAC 25-96
12)
13) Petitioners,)
14)
15) vs.)
16)
17) ENTERTAINERS DIRECT, INC., and) DETERMINATION OF CONTROVERSY
18) JOSEPH McGRIEVY,)
19) Respondents.)
20)

21 INTRODUCTION

22 On July 26, 1996, Timothy L. Kern and Pamela G. Kern
23 (hereinafter "petitioners") filed the above-captioned petition to
24 determine controversy pursuant to Labor Code section 1700.44,
25 alleging that Entertainers Direct, Inc., and Joseph McGrievy
26 (hereinafter "respondents") failed to remit \$1,867.50 earned by
27 petitioners on entertainment work that had been procured by
28 respondents. The petition seeks recovery of petitioner's withheld
entertainment earnings, plus interest and attorney's fees. On
August 6, 1996, petitioners filed an amended petition, modifying
the amount allegedly owed to \$1,347.50, apparently based on
payment of some of the amounts previously alleged as unpaid.

1 Respondents were personally served with a copy of the amended
2 petition on October 10, 1996, and filed an answer thereto,
3 admitting that some of petitioners' entertainment earnings were
4 being withheld by respondents, but denying that respondents are
5 engaged in the occupation of a talent agency.

6 A hearing was scheduled for, and held, on July 3, 1997, in
7 San Diego, California, before the undersigned attorney for the
8 Labor Commissioner, specially designated to hear this matter.
9 Petitioners appeared in propria persona. Joseph McGrievy, the
10 president of Entertainers Direct, Inc. appeared on its behalf and
11 also as an individual in propria persona.

12 Based upon the testimony and evidence received at this
13 hearing, the Labor Commissioner adopts the following determination
14 of controversy.

15 FINDINGS OF FACT

16 1. Respondents operate a business providing entertainers,
17 such as clowns, magicians, or costumed characters such as a
18 pirate, the Easter bunny or 'Winnie the Pooh', to parties,
19 corporate events, and San Diego Padres baseball games.
20 Respondents business also operates under the fictitious business
21 names Magic Encounters and Just 4 Kidz. Prior to January 1, 1996,
22 this business was owned as a sole proprietorship by Joseph
23 McGrievy. On January 1, 1996, the business became incorporated as
24 Entertainers Direct, Inc., and has operated as a corporate entity
25 at all relevant times thereafter. Respondents advertise this
26 business, set the prices that are charged to customers for the
27 entertainer's services (indeed, these prices are published by
28 respondents in their advertisements), enter into agreements with

1 customers wishing to employ the services of entertainers, and then
2 send the entertainers to the customer's event. Respondents
3 determine the entertainers' compensation, and advise the
4 entertainer of the amount he or she will earn prior to sending the
5 entertainer out on the assignment. The customers are billed by
6 the respondents, and may either choose to pay the entertainer
7 directly at the time of the performance (in which case the
8 entertainer keeps his or her earnings and transmits the balance
9 collected to the respondents) or pay the respondents directly
10 either before or after the performance by mailing a check for the
11 amount owed to respondents' business. The respondents then pay
12 the entertainers the agreed upon compensation.

13 2. Pamela Kern performed twenty hours per week of clerical
14 and secretarial services for Respondents, working in Respondents'
15 office until April 1996, when McGrievy informed her that these
16 services were no longer needed. During the period of time that
17 she performed these clerical/secretarial services, Ms. Kern, along
18 with her husband, Timothy Kern, also worked as entertainers,
19 performing engagements for customers who had contracted with
20 Entertainers Direct, Inc. After being told that her clerical and
21 secretarial services were no longer needed, Ms. Kern filed a claim
22 for unemployment insurance with the Employment Development
23 Department ("EDD"). In processing this claim, the EDD discovered
24 that Respondents had failed to pay employment taxes on behalf of
25 Ms. Kern. Respondents have refused to pay employment taxes,
26 asserting that Ms. Kern was an independent contractor rather than
27 an employee. The EDD undertook an audit but, as of the date of
28 the hearing in this matter, had not yet reached a determination of

1 this issue.

2 3. At the time that Ms. Kern filed her complaint with the
3 EDD, Respondents had yet to pay her and Timothy Kern for several
4 entertainment jobs they had performed during the period from
5 December 1995 to April 1996. Angered by Ms. Kern's filing of a
6 claim with the EDD, McGrievy advised the petitioners of his
7 decision to terminate their services as entertainers. McGrievy
8 also decided to withhold payment for previously performed
9 engagements, reasoning that if EDD were to decide that he must pay
10 employment taxes on behalf of Ms. Kern, he would use these
11 withheld earnings for that purpose. Despite repeated demands for
12 payment of these withheld entertainment earnings, Respondents have
13 refused to pay the Kerns the amounts they are owed.

14 4. In order to recover the withheld entertainment earnings,
15 the Kerns filed this petition to determine controversy, asserting
16 that Respondents acted as a talent agency in procuring these
17 engagements for the Kerns, and that therefore, their dispute with
18 the Respondents over these unpaid earnings should be heard and
19 determined by the Labor Commissioner under the provisions of the
20 Talent Agencies Act (Labor Code sections 1700, et seq.). McGrievy
21 contends that Respondents are not a talent agency, and that the
22 Kerns were independent contractors, and that therefore, the Labor
23 Commissioner has no jurisdiction over this dispute.

24 5. Respondents have never been licensed by the State Labor
25 Commissioner as a talent agency.

26 6. As indicated above, petitioners seek payment of \$1,347.50
27 in allegedly unpaid earnings, based on eleven separate performance
28 engagements during the period from December 16, 1995 to April 28,

1 1996. Respondents concede that petitioners are owed their unpaid
2 earnings in connection with eight of these engagements, for which
3 petitioners are owed \$1,087.50. During the hearing, petitioners
4 admitted that one of the engagements on their list of unpaid
5 engagements for which \$60 in earnings were purportedly withheld,
6 had been listed in error, as the supporting invoice, obviously
7 generated in an attempt at satire after this dispute arose,
8 identifies the client as "Joseph McGreedy" of "Sub-Standard
9 Entertainers." The petitioners stipulated that on June 4, 1996
10 they had been paid \$60 as payment in full for another one of the
11 engagements they had listed as unpaid, identified by the show
12 date of April 13, 1996. Thus, the only remaining engagement in
13 dispute was identified on the petitioners' list as 'Kids Corner-
14 Goldbar', with a show date of April 13, 1996, for which
15 petitioners were purportedly owed \$150. According to McGrievy,
16 the petitioners were not paid for this job because they failed to
17 collect the money that was owed by the customer at the time of the
18 performance, that it was the petitioners' responsibility to
19 collect any money owed by the customer, and that the respondents
20 have never been paid by the customer. According to Pamela Kern,
21 petitioners asked the customer to pay at the conclusion of their
22 performance; the customer stated that he did not have his check
23 book, but promised to mail the amount he owed to the respondents'
24 business; that shortly thereafter, Ms. Kern informed McGrievy that
25 the customer owed this money, and that it then became McGrievy's
26 responsibility to collect the money. McGrievy conceded that he
27 did not take steps to collect the amount owed by this customer,
28 and for that reason, we conclude that petitioners are entitled to

1 payment of the \$150 they were promised for the performance of this
2 engagement. Thus, adding this \$150 to the \$1,087.50 concededly
3 owed by respondents, we conclude that petitioners are owed a total
4 of \$1,237.50 in unpaid entertainment earnings. Of this total
5 owed, only \$50 is owed for work performed prior to January 1, 1996
6 (that is, while the business was a sole proprietorship), the
7 balance of \$1,187.50 is owed for work performed for the corporate
8 respondent. The only issue that remains is the legal question of
9 whether the Labor Commissioner has jurisdiction, in a proceeding
10 brought under the Talent Agencies Act, to order the payment of
11 these amounts owed.

12 CONCLUSIONS OF LAW

13 1. Under the Talent Agencies Act, a "talent agency" is
14 defined as "a person or corporation who engages in the occupation
15 of procuring, offering, promising, or attempting to procure
16 employment or engagements for an artist or artists." Labor Code
17 section 1700.04(a). The term "artists" includes "persons
18 rendering professional services in motion picture, theatrical,
19 radio, television, and other entertainment enterprises." Labor
20 Code section 1700.04(b). A talent agency procures employment for
21 an artist when the agency represents the artist in locating
22 employment and negotiating the terms of that employment; that is,
23 a talent agency is not the employer of the artist but rather the
24 artist's agent for purposes of employment procurement with a
25 third-party employer. (See Chinn v. Tobin, Case No. TAC 17-96)
26 A talent agency does not set the artist's compensation; rather,
27 the agency negotiates with the third party employer of the
28 artist's services to secure the best possible deal for the artist.

1 Here, respondents' business did not involve the representation of
2 artists vis-a-vis third party employers or the negotiation of
3 artists' compensation. Instead, respondents' business operated as
4 a clearinghouse of entertainers who were provided by the
5 respondents to customers who contracted with the respondents
6 (rather than the entertainers) for these entertainment services.
7 Respondents established the rates charged to these customers, and
8 set the rates that were paid -- by respondents -- to the
9 entertainers that respondents provided to these customers. By
10 operating its business in this fashion, respondents became the
11 direct employer of the performers, rather than the performers'
12 talent agency. Consequently, this is not a dispute between a
13 "talent agency"; within the meaning of Labor Code section
14 1700.04(a), and an artist or artists, and as such, this dispute
15 does not arise under the Talent Agencies Act. Labor Code section
16 1700.44 vests the Labor Commissioner with jurisdiction to hear and
17 determine disputes between artists and talent agents that arise
18 under the Talent Agencies Act. Since this dispute does not
19 involve a "talent agency" and does not arise under the Talent
20 Agencies Act, the Labor Commissioner lacks jurisdiction to
21 determine this dispute under Labor Code section 1700.44.

22 2. Other sections of the Labor Code give the Labor
23 Commissioner jurisdiction to investigate disputes between
24 employees and employers involving unpaid wages, and to prosecute
25 court actions for the collection of wages and penalties payable to
26 employees. See Labor Code sections 96 and 98.3. To determine if
27 these statutes governing unpaid wage claims are applicable to this
28 dispute, it is necessary to determine whether the petitioners,

1 with respect to the work they did as entertainers, were
2 independent contractors or employees of the respondents. If the
3 petitioners were employees, the Labor Commissioner would have
4 jurisdiction to prosecute their claim for unpaid wages. If, on
5 the other hand, petitioners were independent contractors, the
6 Labor Commissioner would lack jurisdiction to grant any relief or
7 to prosecute any claim, and petitioners only avenue of redress
8 would be to file a court action for breach of contract..

9 3. Borello & Sons v. Department of Industrial Relations
10 (1989) 48 Cal. 3d 341, is the leading case on the issue of whether
11 a person engaged to provide services is an independent contractor
12 or an employee. In Borello, the Supreme Court rejected the
13 traditional common law focus on control of work details as the
14 critical determinative factor in analyzing a service relationship.
15 Instead, the Borello court adopted a multi-factor test, which
16 includes, in addition to the extent to which the principal
17 controls the manner in which the work is performed, the following
18 factors: whether the person performing the services is engaged in
19 a business or occupation distinct from that of the principal, or
20 whether the services rendered are part of the regular business of
21 the principal; whether the principal or the worker supplies the
22 instrumentalities, tools, and the place in which the work is
23 performed, that is, the extent to which each party to the
24 relationship has invested in the business; whether the person
25 providing the service has an opportunity for profit or loss based
26 on his managerial skill; the degree of permanence of the working
27 relationship; and whether the service requires special training
28 and skills characteristic of licensed contractors. The Supreme

1 Court noted that these "individual factors cannot be applied
2 mechanically as separate tests; they are intertwined and their
3 weight depends often on particular combinations." Id., at 351.
4 Thus, the absence of control over work details is of no
5 consequence "where the principal retains pervasive control over
6 the operation as a whole, the worker's duties are an integral part
7 of the operation, the nature of the work makes detailed control
8 unnecessary, and adherence to statutory purpose [of remedial laws
9 intended to protect workers] favors a finding" that the person
10 providing the service is an employee of the principal and not an
11 independent contractor. Yellow Cab Cooperative, Inc. v. Workers
12 Compensation Appeals Bd. (1991) 226 Cal.App.3d 1288, 1295. "The
13 label placed by the parties on their relationship is not
14 dispositive, and subterfuge will not be countenanced," and "one
15 seeking to avoid liability has the burden of proving that persons
16 whose services he has retained are independent contractors rather
17 than employees." Borello, supra, at p. 349.

18 4. Here, petitioners worked as entertainers for a business
19 that provides customers with entertainment services. The work
20 that petitioners performed, as clowns and other costumed
21 characters, was an integral part, if not the essential core, of
22 the respondents' business. "This permanent integration of the
23 workers into the heart of [the] business is a strong indicator
24 that [the principal] functions as an employer. . . . The modern
25 tendency is to find employment when the work being done is an
26 integral part of the regular business of the employer and when the
27 worker, relative to the employer, does not furnish an independent
28 business service." Ibid, at p. 357. Respondents paid for all

1 advertising, and maintained an office from which the business was
2 run. Also, respondents provided the petitioners, and the other
3 entertainers who were sent out on performances, with any necessary
4 costumes. Petitioners' investment in the business, in contrast,
5 was at best negligible. These facts also point towards an
6 employee/employer relationship. Petitioners had no opportunity to
7 profit, and faced no risk of loss, as a result of their
8 "management" of the business, as the facts show that they did not
9 play any "managerial" role. Prices charged to customers were set
10 by the respondents; the petitioners had no authority to negotiate
11 with customers with respect to prices. Petitioners did not
12 possess any business or occupational licenses. Finally, whatever
13 acting skills were required in performing the work as clowns
14 costumed entertainers, these skills do not differentiate the
15 petitioners from clowns employed by a circus, or costumed
16 characters employed by Disneyland; that is, these skills are not
17 particularly indicative of independent contractor status. These
18 various factors, taken as a whole, compel the conclusion that
19 petitioners worked for the respondents as employees, and that the
20 Labor Commissioner therefore has jurisdiction over petitioners'
21 claim as a claim for unpaid wages.

22 5. It is unlawful for an employer to deduct money from an
23 employee's wages unless the deduction is authorized by Labor Code
24 §224, which authorizes deductions made pursuant to a written
25 agreement with the employee, a collective bargaining agreement, or
26 a federal or state statute that requires the employer to make the
27 deduction from the employee's wages. Respondents' purported
28 withholding of petitioners' wages is not authorized under Labor

1 Code §224, and hence, is unlawful.

2 6. These unpaid withheld wages owed to petitioners for the
3 work they performed as clowns and costumed entertainers on behalf
4 of respondents' business are long overdue. Labor Code section 201
5 provides that when an employer discharges an employee, all earned
6 and unpaid wages are due and payable immediately at the time of
7 the discharge. Pursuant to Civil Code §§3287 and 3289,
8 petitioners are also entitled to interest on the unpaid wages, at
9 the rate of 10% per annum from the date the wages became due.
10 Petitioners are therefore entitled to payment of \$1,237.50 for
11 unpaid wages, plus \$164.99 in interest, for a total of \$1,402.49,
12 apportioned as follows: respondent McGrievy is liable for \$50 in
13 unpaid wages and \$6.67 as interest, for a total of \$56.67, and
14 respondent Entertainers Direct, Inc., is liable for \$1,187.50 in
15 unpaid wages and \$158.32, for a total of \$1,345.82.

16 7. Petitioners are not seeking any penalties in this
17 proceeding. We note, however, that under Labor Code section 203,
18 an employer who willfully fails to pay all earned and unpaid wages
19 immediately at the time of an employee's discharge is liable for
20 penalties, in an amount equal to thirty days' wages of the
21 discharged employee.

22 8. Having determined that respondents are not a "talent
23 agency" within the meaning of the Talent Agencies Act, it is
24 beyond the scope of the Labor Commissioner's jurisdiction to grant
25 relief *in this proceeding*, a determination of controversy under
26 the Talent Agencies Act. We cannot issue an order, in this
27 Determination, that respondent pay the money that is owed to the
28 petitioners because such an order could only be made if there is a

1 controversy within the meaning of the Talent Agencies Act, and
2 here, there is none. But that does not end this matter. Having
3 found that petitioners were employed by respondents, and that
4 ~~petitioners are owed unpaid wages for services performed during~~
5 this employment, we may use this Determination to apprise
6 respondents that unless full payment of the unpaid wages and
7 interest, in the total sum of \$1,402.49, is made within ten days
8 of the date of this Determination, the Labor Commissioner will
9 file a civil action against respondents, pursuant to Labor Code
10 §98.3, to recover the unpaid wages, interest, and also, if
11 appropriate, penalties pursuant to Labor Code section 203.

12 ORDER

13 For the above-stated reasons, IT IS HEREBY ORDERED that the
14 petition to determine controversy under Labor Code section 1700.44
15 is dismissed due to a lack of controversy within the meaning of
16 the Talent Agencies Act. However, the parties are to report back
17 to the undersigned attorney within ten days as to whether full
18 payment in the amount of \$1,402.49 has been made to the
19 petitioners for unpaid wages and interest. Absent proof of such
20 payment, the Labor Commissioner will file a civil action pursuant

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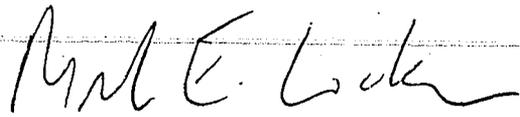
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1 to Labor Code §98.3 for the collection of said wages, interest,
2 and also, if appropriate, penalties pursuant to Labor Code §203.

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Dated: 8/17/98


MILES E. LOCKER
Attorney for the Labor Commissioner

The above decision is adopted in its entirety as the
Determination of the Labor Commissioner.

Dated: 8/20/98


JOSE MILLAN
State Labor Commissioner