

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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5
6 BEFORE THE LABOR COMMISSIONER
7 OF THE STATE OF CALIFORNIA
8
9

10 BURT BLUESTEIN, aka BURTON IRA)
BLUESTEIN) Case No. TAC 24-98
11 vs.) Petitioner,)
12) DETERMINATION OF)
13) CONTROVERSY)
13 PRODUCTION ARTS MANAGEMENT;)
14 GARY MARSH; STEVEN MILEY; MICHAEL)
WAGNER;)
15 Respondents.)
16)

17 INTRODUCTION

18 The above-captioned petition was filed on August 13,
19 1998, by BURT BLUESTEIN (hereinafter "Petitioner"), alleging that
20 GARY MARSH; STEVEN MILEY; and MICHAEL WAGNER dba PRODUCTION ARTS
21 MANAGEMENT, (hereinafter "Respondents" or "PAM"), acted as
22 petitioner's exclusive talent agent with respect to all areas
23 concerning petitioner's services within the entertainment industry.
24 Petitioner alleges that respondent induced petitioner to entering
25 into the representation agreement by misrepresenting themselves as
26 a talent agent, when in fact respondent did not possess a talent
27 agency license as required by Labor Code §1700.5. Petitioner
28 alleges respondents breached their fiduciary duty owed to
petitioner by not using their best efforts on his behalf. By this

1 petition, petitioner seeks the contract be deemed void *ab initio*
2 and requests reimbursement for all commissions paid to respondents
3 during the life of the contractual relationship.

4 ~~Respondents through their attorney filed a response on~~
5 November 6, 1998, stating in short, respondents were managers; they
6 did not procure employment for petitioner; did not act in the
7 capacity of a talent agent; and in the event incidental procurement
8 activity existed, a talent agency license was secured during the
9 applicable time period. A hearing was held on October 13, 1999,
10 before the undersigned attorney for the Labor Commissioner.
11 Petitioner appeared through his counsel Cynthia E. Fruchtman.
12 Respondent, Production Arts Management, appeared through counsel
13 Gregory T. Victoroff of Rhode & Victoroff; Michael Wagner as an
14 individual appeared through his counsel Gregory S. Chudacoff.
15 Based upon the testimony and evidence presented at this hearing,
16 the Labor Commissioner adopts the following Determination of
17 Controversy.

18
19 **FINDINGS OF FACT**

20 1. In 1995, Michael Wagner, then an employee of
21 Production Arts Management, pursued petitioner seeking a
22 supplemental client for respondents management group. PAM was
23 formed for the purpose of guiding, counseling and directing careers
24 in the entertainment industry. Mr. Wagner promised petitioner,
25 that PAM would use best efforts to advise and counsel petitioner in
26 all areas of the entertainment industry, as well as, actively
27 pursue employment on petitioner's behalf.

28 2. On October 3, 1995, petitioner entered into a

1 contractual relationship with respondents for the above described
2 services. Respondents compensation was 10% of petitioner's gross
3 earnings for all work performed in the entertainment industry,
4 throughout the world as a production manager/line producer. It was
5 stipulated that respondents were not licensed talent agents when
6 the parties entered into the management agreement.

7 3. During the relationship, petitioner obtained
8 numerous employment opportunities with various production
9 companies. Respondents collected 10% for each job petitioner
10 performed as a production manager/line producer.

11 4. Petitioner's duties and responsibilities as a
12 production manager/line producer primarily included working in
13 conjunction with and maintaining the production companies proposed
14 budget. Petitioner testified, "I hold the line on the budget."
15 When asked to describe exactly what "holding the line on the budget
16 meant", petitioner stated, "I convince the creative people, the
17 canvas has a size." Petitioner added, "the script is the blueprint
18 and I turn it into time and money." Upon supplemental testimony
19 buttressing these abstract answers, it became clear that
20 petitioner's responsibility and input toward the creation of the
21 production fell within the ambit of maintaining the financial
22 structure of the project. When asked specifically what his day to
23 day duties entailed, petitioner stated, "I advise the people who
24 provide the money. We share that responsibility and once the money
25 is out, I sign the checks."

26 5. Petitioner's creative responsibilities were a
27 significant interest to the hearing officer. When asked whether
28 petitioner took any part in the creative process of the production,

1 he stated, "no, I do not". The parties were instructed the
2 creative aspect of petitioner's duties were dispositive of the
3 Labor Commissioner's jurisdiction, and complete testimony was
4 necessary regarding this issue. Petitioner's wife testified that
5 her husband at times acted as a second director. When asked to
6 describe exactly petitioner's duties as a second director for
7 purposes of examining creative input, petitioner testified, "if
8 there is a time consuming stunt, the principle director will design
9 the shot so that second unit can do the stunt. Then the principle
10 can go film the actors and get the words." The petitioner stated
11 this process was conducted for the purpose of saving time and
12 money, as the actors need to be paid for intervening time and it
13 was his responsibility to keep the actors working in an efficient
14 manner.

15 6. Again, when asked to describe **any** creative functions
16 or activities petitioner provided as a production manager/line
17 producer, petitioner stated, "the creative aspects [of the job] is
18 how to schedule." Petitioner states it was his responsibility to
19 schedule the shots, schedule construction, and keep the production
20 moving efficiently. Petitioner added, at times he chose the
21 stuntmen, the camera angles and occasionally assisted in choosing
22 the location to shoot a particular scene.

23 7. In April of 1998, disenchanted with respondent's
24 performance, petitioner executed a severance letter terminating the
25 relationship between the parties. Petitioner's subsequent
26 investigation into the licensing history of respondents, unveiled
27 respondent's unlicensed talent agency status throughout the
28 majority of the relationship. Petitioner realizing that without a

1 talent agency license, respondents were precluded from engaging in
2 talent agency activities, namely the procurement of employment.
3 Petitioner filed the instant petition to determine controversy with
4 ~~the Labor Commissioner, pursuant to Labor Code §1700.44, seeking a~~
5 determination that respondent's, PAM; Gary Marsh; Steven Miley; and
6 Michel Wagner, violated Labor Code §1700.5 by having functioned as
7 talent agents without a license. As a consequence of this alleged
8 violation of the Talent Agencies Act, petitioner seeks the parties
9 agreements are void *ab initio* and that respondent's have no rights
10 thereunder.

11 CONCLUSIONS OF LAW

12 1. Labor Code §1700.44 vests the Labor Commissioner with
13 exclusive and primary jurisdiction in cases arising under the
14 Talent Agencies Act. The Act governs the relationship between
15 artists and talent agencies.

16 2. The issue at bar is whether petitioner's job
17 responsibilities as a production manager/line producer performed
18 during the life of the management agreement fall within the
19 definition of "artist" found at Labor Code §1700.4(b).

20 3. Labor Code §1700.4(a) defines "talent agency" in
21 pertinent part as: "a person or corporation who engages in the
22 occupation of procuring, offering, promising, or attempting to
23 procure employment or engagements for an artist or artists..."
24 Therefore, if petitioner does not fall within the definition of
25 "artist", it follows that respondents could not have acted as a
26 talent agency, which divests the Labor Commissioner of jurisdiction
27 to hear this matter.
28

1 Labor Code §1700.4(b) defines "artists" as:

2 actors and actresses rendering services on the legitimate
3 stage and in the production of motion pictures, radio
4 artists, musical artists, musical organization, directors
5 of legitimate stage, motion pictures and radio
6 productions, musical directors, writers,
7 cinematographers, composers, lyricists, arrangers,
8 models, and other artists rendering professional services
9 in the motion picture, theatrical, radio, television and
10 other entertainment enterprises."

11 4. Although Labor Code §1700.4(b) does not expressly
12 cover the term "line producer" or "production manager" within the
13 definition of "artist", the broadly worded definition does leave
14 room for interpretation. The statute ends with the phrase, "**and**
15 **other artists and persons rendering professional services in...**
16 **other entertainment enterprises.**" This open ended phrase indicates
17 the Legislature's anticipation of occupations which may not be
18 expressly listed but warrant protection under the Act, or industry
19 developments not contemplated at the time of drafting.

20 5. The Labor Commissioner has historically taken the
21 following position with respect to this phrase. As discussed in a
22 1996 Certification of Lack of Controversy, the special hearing
23 officer held, "[d]espite this seemingly open ended formulation, we
24 believe the Legislature intended to limit the term 'artists' to
25 those individuals who perform creative services in connection with
26 an entertainment enterprise. Without such a limitation, virtually
27 every 'person rendering professional services' connected with an
28 entertainment project - - would fall within the definition of
"artists". We do not believe the Legislature intended such a
radically far reaching result." *American First Run Studios v.*
Omni Entertainment Group No. TAC 32-95, pg. 4-5.

6. This is not to imply that production managers or

1 line producers can never be considered "artists" within the meaning
2 of 1700.4(b), only there must be a significant showing that the
3 producer's services were creative in nature as opposed to services
4 of an exclusively managerial or business nature. Here, petitioner
5 testified he did not occupy such a role and conversely testified
6 the bulk of his responsibility was maintaining the budget through
7 schedule enforcement. Occasionally assisting in shot location or
8 stepping in as a second director as described by petitioner, does
9 not rise to the creative level required of an "artist" as intended
10 by the drafters. Virtually all line producers or production
11 managers engage in de minimis levels of creativity. There must be
12 more than incidental creative input. The individual must be
13 primarily engaged in or make a significant showing of a creative
14 contribution to the production to be afforded the protection of the
15 Act. We do not feel budget management falls within these
16 parameters.

17 7. Who did the Legislature intend to include in the
18 protected class? In determining legislative intent, one looks at
19 both legislative history and the statutory scheme within which this
20 statute is to be interpreted.

21 Legislative History

22 8. In 1913 the "Employment Agencies Act" regulated a
23 select few industries, including California's entertainment
24 industries, namely circuses, vaudeville and theater. Protection
25 focused on exhibitors and performers.

26 9. In 1937 the California Labor Code was established.
27 The Legislature added "the motion picture employment agency" as an
28 industry that required regulatory controls.

1 10. By 1959 the Labor Code included regulation of four
2 categories of agents: employment agents; theatrical employment
3 agents; motion picture employment agent; and the so-called
4 "artists' manager." While the other categories were either
5 repealed or moved to a different body of law and placed under the
6 jurisdiction of other regulatory agencies, regulation of "artists'
7 managers" remained in the Labor Code and under the jurisdiction of
8 the Labor Commissioner. In 1978, the Act was renamed the Talent
9 Agencies Act (1978, Stats. Ch. 1382) and "artists' managers" became
10 "talent agents" and remains this way today. Throughout, the
11 definition of "artist" always expressly included only the creative
12 forces behind the entertainment industry.

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

16 The Commission shall study the laws and practices of this
17 state,...relating to the licensing of agents, and
18 representatives of artists in the entertainment industry
19 in general, ... so as to enable the commission to
20 recommend to the Legislature a model bill regarding this
21 licensing.

22 12. Pursuant to statutory mandate the Commission studied
23 and analyzed the Talent Agencies Act in minute detail. The
24 Commission concluded that the, "Talent Agencies Act of California
25 is a sound and workable statute and that the recommendation
26 contained in this report will, if enacted by the California
27 Legislature, transform that statute into a model statute of its
28 kind in the United States." (Report pg. 5) All recommendations

1 were reported to the Governor, accepted and subsequently signed
2 into law.

3 13. This is not to say the Legislature has never
4 ~~expanded on the term "artist". A very significant change made by~~
5 the Commission was to add the occupation of "models" to the
6 definition of artist as defined by Labor Code §1700.4(b). The
7 Commission reasoned that, "as persons who function as an integral
8 and significant part of the entertainment industry, models should
9 be included within the definition of artist." (Report p. 33-34) I
10 am not advocating that production managers and line producers are
11 not an integral and significant part of the entertainment industry,
12 I am simply stating that if the Commission, who by statutory
13 mandate analyzed the Act in minute detail, thought that production
14 managers and/or line producers required express protection under the
15 Act, they could have made this recommendation to the Legislature.
16 This was certainly the forum do make such a recommendation.
17 Production managers and line producers are not new occupations in
18 the entertainment industry resulting from industry evolution *i.e.*,
19 interactive media and digital animation. These are well
20 established industry occupations. The Commission's utter silence
21 with respect to production managers and line producers can only be
22 interpreted, that the Labor Commissioner's jurisdiction is invoked
23 if in the discretion of the hearing officer, a significant showing
24 of creative contribution is made.

25 14. The Division concludes that petitioner is not an
26 artist within the meaning of Labor Code 1700.4(b), not engaged in
27 the performing arts and hence, not a member of the protected class.

28 15. Once it is determined that petitioner was not an

1 "artist", it follows that respondents are not "talent agents", as
2 a talent agency is defined as procuring employment for "artists".

3 16. We therefore find the parties agreement does not
4 fall within the provisions of the Talent Agencies Act.

5 Consequently, there are no grounds under the Act to declare the
6 parties agreement void. The Labor Commissioner is without
7 jurisdiction to hear or decide the merits of this case.
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9

10 ORDER

11 For the above-state reasons, IT IS HEREBY ORDERED that
12 this petition is denied and dismissed on motion by the undersigned
13 hearing officer.
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18 Dated: 11/3/99

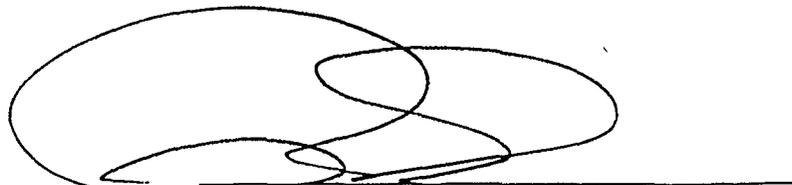


19 DAVID L. GURLEY

20 Attorney for the Labor Commissioner
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22 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:
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26 Dated: 11/3/99



27 RICHARD CLARK

28 Chief Deputy Labor Commissioner