

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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9
10 BEFORE THE LABOR COMMISSIONER
11 OF THE STATE OF CALIFORNIA
12

13 HARRY L. HARTMAN,) Case No. TAC 01-99
14 vs.) DETERMINATION OF
15) CONTROVERSY
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INTEGRITY CASTING, CALIFORNIA,
Respondent.

28 INTRODUCTION

29 The above-captioned petition was filed on January 13,
30 1999, by HARRY L. HARTMAN, (hereinafter "Petitioner"), alleging
31 that INTEGRITY CASTING, CALIFORNIA, (hereinafter "Respondent" or
32 "Integrity"), acted as an unlicensed talent agency in violation of
33 Labor Code §1700.5¹. Petitioner further alleges respondent
34 collected commissions stemming from petitioner's earnings without
35 petitioner's knowledge. Petitioner seeks disgorgement of alleged
36 illegally obtained commissions.

37 Respondent filed an answer on March 8, 1999, stating in

¹ All statutory citations will refer to the California Labor Code unless otherwise indicated.

1 short, respondent did not have a contractual relationship with the
2 artist, did not act as a talent agency, and did not collect any
3 monies intended for the artist. A hearing was held on May 25,
4 1999, before the undersigned attorney for the Labor Commissioner.
5 The petitioner appeared in propria persona. The respondent did not
6 appear. Based upon the testimony and evidence presented at this
7 hearing, the Labor Commissioner adopts the following Determination
8 of Controversy.

9
10 FINDINGS OF FACT

11 1. At all relevant times, petitioner was represented by
12 a licensed talent agency. POW Model & Talent Agency represented
13 petitioner from February 1998 through July 1998. In July of 1998,
14 petitioner replaced POW with JAV Talent Agency who gave way to
15 Reise Talent Agency on January 6, 1999, who continues to represent
16 petitioner today.

17 2. Early 1998, Mervyn's of California contracted with
18 Respondent, Integrity Casting, to provide models for a series of
19 fit sessions. The contract granted respondent a fee for each job
20 performed by any model introduced to Mervyn's via respondent.
21 Respondent contacted several talent agencies in the area,
22 requesting those agencies send models to Integrity for an interview
23 and body measurements.

24 3. On February 5, 1998, POW contacted petitioner,
25 informing him that respondent was having an open call for fit
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1 models². Petitioner attended the open call along with dozens of
2 other models. All attending models had their pictures and
3 measurements taken. Integrity transferred this information to
4 Mervyn's, who then selected the appropriate models according to
5 their specifications. The models were told if they were selected
6 by Mervyn's, the model would be contacted through their talent
7 agency.

8 4. A few days later Mervyn's contacted respondent, who
9 informed petitioner's agent (POW), that petitioner had been
10 selected as a fit model by Mervyn's and was required to attend an
11 interview with Mervyn's on February 17, 1998.

12 5. After the interview, Mervyn's informed respondent,
13 who in turn informed POW, that petitioner would indeed be called as
14 a regular fit model. Respondent indicated Mervyn's would pay the
15 model a firm \$65.00 an hour and \$25.00 for travel expenses. POW
16 would then deduct 20% (\$18.00) for their agency fee pursuant to a
17 written agreement between POW and petitioner. Petitioner would net
18 \$72.00 for a one hour session.

19 6. Soon thereafter, petitioner attended regular fit
20 sessions with Mervyn's. Each time Mervyn's requested petitioner's
21 services, the request was communicated to respondent, who then
22 relayed that information to petitioner's agent. At the end of each
23 fit session, petitioner was issued a payment invoice reflecting the
24 billing cost to Mervyn's. The invoices disclosed \$65.00 an hour,

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26 ² Refers to models who wear clothing for designers and buyers, so those
27 parties can see the actual fit of the clothing on a live model prior to full-
scale production.

1 \$25.00 travel payment and a \$13.50 agency fee. Most fit sessions
2 lasted one hour and payment made by Mervyn's totaled \$103.50.
3 Petitioner inquired about the \$13.50 agency fee and was told this
4 amount went directly to the respondent pursuant to a previously
5 entered contractual relationship between respondent and Mervyn's.
6 Petitioner knowing POW was deducting 20% prior to him receiving
7 payment, contests the \$13.50 (15%) paid to respondent was an
8 additional talent agency commission deducted from his compensation,
9 thus constituting an illegal double collection of commissions.
10 Petitioner argues that if Mervyn's is paying \$103.50 per hour, he
11 should be entitled to at least 80% of that figure, or \$82.80 an
12 hour. Petitioner alleges respondent is not a licensed talent
13 agency, did not have a contract with him and is therefore not
14 entitled to any commissions stemming from his work. Petitioner
15 requests disgorgement of any monies paid from Mervyn's to
16 respondent for petitioner's work.

17 18 LEGAL ANALYSIS

19 1. Labor Code 1700.4(b) includes "models" in the
20 definition of "artist". Petitioner's is an "artist" within the
21 meaning of Labor Code §1700.4(b).

22 2. Respondent is not a licensed California talent agent
23 pursuant to Labor Code §1700.4(a)³.

24 3. The primary issue is whether based on the evidence

25
26 ³ The Labor Commissioner's Licensing and Registration Unit maintains records of
27 all talent agencies that are, or have been licensed by the State Labor Commissioner. A
search of these records reveals that no license has ever been issued to a business under
the name of "Integrity Casting-California".

1 presented at this hearing, did the respondent operate as a "talent
2 agency" within the meaning of §1700.4(a). Labor Code §1700.4(a)
3 defines "talent agency" as, "a person or corporation who engages in
4 the occupation of procuring, offering, promising, or attempting to
5 procure employment or engagements for an artist or artists."
6 §1700.5 provides that "no person shall engage in or carry on the
7 occupation of a talent agency without first procuring a license
8 therefor from the Labor Commissioner." In Waisbren v. Peppercorn
9 Production, Inc. (1995) 41 Cal.App.4th 246, the court held that any
10 single act of procuring employment subjects the agent to the Talent
11 Agencies Act's licensing requirement, thereby upholding the Labor
12 Commissioner's long standing interpretation that a license is
13 required for any procurement activities, no matter how incidental
14 such activities are to the agent's business as a whole. Applying
15 Waisbren's strictly construed application of procurement,
16 respondent did act in the capacity of a talent agency within the
17 meaning of Labor Code §1700.4(a) as intended by the legislature.

18 4. In respondent's answer, she argues that her only
19 contact with petitioner was the initial 15 minute measurement.
20 Though respondent only spent 15 minutes with petitioner, that time
21 period was instrumental in petitioner receiving the work for the
22 following reasons:

23 a. Respondent contacted the petitioner, albeit through
24 his talent agency, and set up the initial meeting.

25 b. Respondent then took pictures and measurements of
26 petitioner and relayed that information to Mervyn's in an attempt
27 to secure petitioner a job.

1 c. Mervyn's then contacted respondent who in turn
2 contacted Petitioner's representative setting up a subsequent
3 meeting between the artist and the employer.

4 d. The financial terms of the employment were
5 communicated to and negotiated by respondent.

6 e. Each time Mervyn's requested petitioner's services,
7 those employment opportunities were conducted through respondent,
8 and it was respondents repeated efforts that culminated in
9 petitioner's continued employment.

10 In short, but for, respondent acting as the intermediary,
11 and directly contacting the employer and visa versa, petitioner
12 would not have obtained employment. Respondent's actions clearly
13 establish procuring employment for an artist within the meaning of
14 Labor Code §1700.4(a).

15 5. The fact that Respondent did not contact any models
16 directly, and instead initiated contact through their licensed
17 talent agencies does not alter respondent's obligation to obtain a
18 license. Labor Code §1700.44(d), states, "[i]t is not unlawful for
19 a person or corporation which is not licensed pursuant to this
20 chapter to act in conjunction with, **and at the request of,** a
21 licensed talent agency in the negotiation of an employment
22 contract" is inapplicable. There was no evidence produced that
23 petitioner's licensed talent agency requested or worked in
24 conjunction with respondent. Alternatively, all of the evidence
25 produced at the hearing pointed to respondent contacting various
26 talent agencies directly and not the reverse as required by
27 statute. Additionally, respondent conducted all of the

1 negotiations with the employer, while the licensed talent agency
2 had no involvement with Mervyn's. Legislative intent was to
3 regulate the role an agent plays when acting as an intermediary
4 between an artist and third party employers. This is precisely the
5 case at bar.

6 6. The respondent may not circumvent the Act's licensing
7 requirements by claiming there is no contractual relationship with
8 petitioner. The benefit enjoyed by respondent is clear. Every
9 employment engagement of petitioner, resulted in respondent
10 collecting 15% of petitioner's earnings. The Act does not require
11 a written or oral contract between parties. Once a party acts as
12 a talent agency by procuring employment for an artist, that person
13 must procure a license from the Labor Commissioner.

14 7. In respondent's papers filed with this agency,
15 respondent states, "Integrity never deducted a cent from the Agents
16 or their talent(s) earnings." I disagree. Examination of the
17 subsequent conduct of the parties establishes the opposite. When
18 the petitioner confronted Mervyn's regarding respondent's fees,
19 Mervyn's suggested petitioner obtain another agent. Petitioner
20 terminated his relationship with POW and obtained Reise as his
21 agent. Reise, like respondent had a similar contractual
22 relationship with Mervyn's. Respondent voluntarily stopped
23 receiving fees from petitioner and new representation was created.
24 Petitioner now collects \$87.98 (85% of \$103.50) in lieu of the
25 previously collected \$72.00 for the same hour of work. This
26 increase in compensation clearly establishes that respondent's
27 collection of fees are derived directly from petitioner's earnings,
notwithstanding respondent's disclaimer.

1 8. In a July 7, 1993 opinion letter, the Labor
2 Commissioner held, "[a] 'casting director', who is an employee
3 employed by one production company rather than an independent agent
4 in business for him or herself, and whose job duties consist of
5 hiring actors and actresses to work for that one production company
6 for whom he or she is employed, is not a 'talent agency' and need
7 not be licensed." This case presents a different situation. There
8 was no evidence presented during the hearing that respondent was
9 employed by Mervyn's. The only evidence offered which would assist
10 the Labor Commissioner in determining the relationship between
11 Mervyn's and respondent were the invoices given to the petitioner.
12 An examination of the invoices prepared by Mervyn's, does not
13 indicate an employee/employer relationship and instead suggests an
14 agency relationship between the artist and respondent reflected by
15 the express 15% agency fee term written on the invoices.

16 9. Respondent acting as a talent broker hired to
17 initiate communications between artists and third party employers,
18 whereby the respondent seeks to continue the relationship and
19 financially benefits directly from that relationship creates a
20 fiduciary duty owed to those artists by her procurement activities.
21 Here, respondent essentially created dual talent agencies, each
22 collecting fees for petitioner's services. This activity breached
23 respondent's fiduciary duty to petitioner.

24 10. This is not to infer that all casting agents are
25 within the scope of the Talent Agencies Act licensing requirements.
26 The acts of a casting agent must be closely scrutinized. Though a
27 single act of procurement may trigger the Act's licensing
requirement, we do not believe a casting agent who is directly

1 employed by a production company would require licensure. That
2 would radically expand the Talent Agencies Act beyond recognition.

3 11. The respondent did procure, promise, offer, or
4 attempt to procure employment on behalf of the petitioner within
5 the meaning of 1700.4(a) without a license. "Since the clear
6 object of the Act is to prevent improper persons from becoming
7 [talent agents] and to regulate such activity for the protection of
8 the public, a contract between and unlicensed agent and an artist
9 is void." Buchwald v. Superior Court (1967) 254 Cal.App.2d 347,
10 351; Waisbren v. Peppercorn supra, at 261. Though traditional
11 contract elements including mutual assent are not present here, a
12 contract implied in law will be imposed. As the respondent
13 benefitted from petitioner's work without procuring a license, the
14 respondent has been unjustly enriched and the law must impose
15 protections on behalf of the public. Accordingly, respondent has
16 no right to commissions collected from petitioner.

17 12. Petitioner is entitled to recover all commissions
18 paid to respondent for the one year period preceding filing of the
19 petitioner pursuant to labor Code §1700.44(c). The evidence
20 produced at the hearing established respondent collected \$1,032.46
21 on behalf of the petitioner within one year from the filing of this
22 petition.


23
24 ORDER

25 For the above-state reasons, respondent collected
26 commissions stemming from petitioner's earnings, procured by
27 respondent without a license. Petitioner shall recover all sums in
the amount of \$1,032.46 from the respondent. IT IS SO ORDERED.

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Dated:

10/4/99



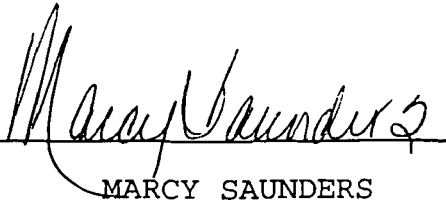
DAVID L. GURLEY

Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated:

10/5/99



MARCY SAUNDERS

State Labor Commissioner