

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 those friendships for the benefit of his clients was.

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

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

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

4
5 "a person or corporation who engages in the occupation of
6 procuring, offering, promising, or attempting to procure
7 employment or engagements for an artist or artists."

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

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

21 5. Respondent argued the petitioner did not establish a
22 violation by "clear and convincing" evidence and consequently has
23 not met his burden of proof. The proper burden of proof is found
24 at Evidence Code §115 which states, "[e]xcept as otherwise provided
25 by law, the burden of proof requires proof by preponderance of the
26 evidence." Further, McCoy v. Board of Retirement of the County of
27 Los Angeles Employees Retirement Association (1986) 183 Cal.App.3d
28 1044 at 1051 states, "the party asserting the affirmative at an
administrative hearing has the burden of proof, including both the

1 initial burden of going forward and the burden of persuasion by
2 preponderance of the evidence (cite omitted). "Preponderance of the
3 evidence" standard of proof requires the trier of fact to believe
4 that the existence of a fact is more probable than its
5 nonexistence. In re Michael G. 74 Cal.Rptr.2d 642, 63 Cal.App.4th
6 700.

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

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

1 7. In 1982, AB 997 established the California
2 Entertainment Commission. Labor Code §1702 directed the Commission
3 to report to the Governor and the Legislature as follows:
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5 "The Commission shall study the laws and
6 practices of this state, the State of New
7 York, and other entertainment capitals of the
8 United States relating to the licensing of
9 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."

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

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

23 10. The Commission considered and rejected alternatives
24 which would have allowed the personal manager to engage in "casual
25 conversations" concerning the suitability of an artist for a role
26 or part, and rejected the idea of allowing the personal manager to
27 act in conjunction with the talent agent in the negotiation of
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1 employment contracts whether or not requested to do so by the
2 talent agent. (Commission Report P. 18-19)

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

5
6 "[I]n searching for the permissible limits to activities
7 in which an unlicensed personal manger or anyone could
8 engage in procuring employment for an artist without
9 being license as a talent agent, . . . there am no such
10 activity, there are no such permissible limits, and that
11 the prohibitions of the Act over the activities of anyone
12 procuring employment for an artist without being licensed
13 as a talent agent must remain, as they are today, total.
14 Exceptions in the nature of incidental, occasional or
15 infrequent activities relating in any way to procuring
16 employment for an artist cannot be permitted: one either
17 is, or is not, licensed as a talent agent, and, if not so
18 licensed, one cannot expect to engage, with impunity, in
19 any activity relating to the service which a talent agent
20 is licensed to render. There can be no 'sometimes' a
21 talent agent, just as there can be no 'sometimes' doctor
22 or lawyer or any other licensed professional."
23 (Commission Report P. 19-20)

24 14. The Commission was very clear in their conclusion
25 that a personal manager may not negotiate an employment contract
26 unless that negotiation is done "at the request" of a licensed
27 talent agent. It is not enough, as indicated in the Commission's
28 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.

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

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

18 16. Behr seeks disgorgement of all commissions paid to
19 the petitioner during the relationship between the parties. Behr
20 filed his petition on July 13, 2000. Labor Code §1700.44(c)
21 provides that "no action or proceeding shall be brought pursuant to
22 [the Talent Agencies Act] with respect to any violation which is
23 alleged to have occurred more than one year prior to the
24 commencement of this action or proceeding." As a result, Behr is
25 entitled to a return of commissions for any commissions paid to
26 petitioner during the period of July 14, 1999, through July 13,
27 2000.

28 17. The aforementioned 1993 written agreement and four

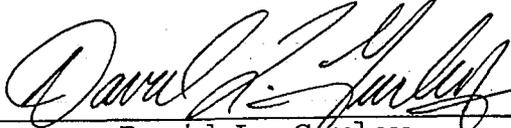
1 subsequent one-year options between respondent and petitioner are
2 hereby void *ab initio* and are unenforceable for all purposes.
3 Waisbren v. Peppercorn Inc., supra, 41 Cal.App. 4th 246; Buchwald
4 v. Superior Court, supra, 254 Cal.App.2d 347.

7 ORDER

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

12 The respondent must provide an accounting to petitioner
13 within 30 days of this determination of all commissions received
14 from petitioner during the period of July 14, 1999, through July
15 13, 2000 and shall reimburse the petitioner for those monies within
16 sixty (60) days from the date of this determination.

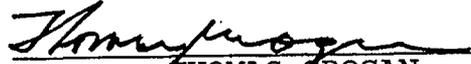
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18 Dated: 8/16/01



David L. Gurley
Attorney for the Labor Commissioner

23 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

27 Dated: AUG 16 2001



THOMAS BROGAN
Deputy Chief