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Department of Industrial Relations
Division of Labor Standards Enforcement
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

THE STEIN AGENCY, Petitioner, vs. JAMES TRIPP-HAITH, an individual, Respondent.	CASE NO. TAC 46-05 **DETERMINATION OF CONTROVERSY**

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on May 22, 2006 in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner THE STEIN AGENCY, a California Corporation, (hereinafter, referred to as "Petitioner"), appeared through its President, Mitch Stein and was represented by Max Sprecher, Esq. Respondent JAMES TRIPP-HAITH, (hereinafter, referred to as "Respondent"), appeared and was represented by Joseph S. Ford, Jr., Esq.

Based on the evidence presented at this hearing and on the other papers on file in this

matter, the Labor Commissioner hereby adopts the following decision.

FINDINGS OF FACT

1. Petitioner is a licensed talent agency.

2. Respondent is an experienced producer who has worked on the television sitcoms "Moesha" and "Eve." The procurement, negotiation and terms of "Eve" are the subject of this controversy.

3. In February of 2001, Respondent met with Petitioner's President, Mitch Stein, through the recommendation of a mutual acquaintance, Bob Kerner of Big Ticket Entertainment. After the parties met, they agreed that Petitioner would represent Respondent as his talent agent. Consequently, on February 22, 2001, Petitioner sent Respondent copies of the Agency agreement for his review and signature. Respondent testified that he never signed the Agency agreement because he wanted Petitioner to first obtain work for him before signing anything.

4. Mr. Stein testified that he set up at least half a dozen interviews for Respondent with production executives in 2001 and 2002. Petitioner submitted copies of e-mails sent to various studios in attempts to procure work for Respondent. Respondent confirmed this during his direct examination by testifying that he attended at least 7 interviews set up by Petitioner during this time.

5. In early 2003, Henry Johnson of Warner Brothers, and also a mutual acquaintance of Mr. Stein and Respondent, approached Respondent about performing work as a Line Producer and Unit Production Manager on the pilot for "Eve." Respondent testified that because Mr. Johnson was both his friend and mentor, he did not want to negotiate directly with him for this job. As a result, he asked Petitioner to handle the negotiations.

There was conflicting testimony as to who set up the meetings with the production company Greenblatt Janolari and Executive Producer Meg Deloatch.

Respondent testified that he would have been the one to set up the meetings since he was in charge of his calendar. Mr. Stein, on the other hand, testified that Mr. Johnson, who knew Petitioner represented Respondent, contacted him about the pilot opportunity and told him that he should try to arrange for Respondent to meet with Greenblatt Janolari. In response to Mr. Johnson's call, Mr. Stein contacted Mr. Janolari and his associates Mr. Cox and Mr. Spencer, sent Respondent's credits and resume to Greenblatt Janolari and eventually set up a meeting between Mr. Janolari and Respondent. After the meeting with Mr. Janolari, Mr. Stein testified that he followed up by setting up a meeting with Ms. Deloatch.

Soon thereafter, Respondent was offered the Line Producer and Unit Production Manager positions for the pilot, which was eventually picked up as a series.

6. There was also conflicting testimony as to how the salary was reached for Respondent's services as a Line Producer and Unit Production Manager on the three series options. Respondent testified that Mr. Henry notified him that the $15,000 per episode being offered for the first season was the "standard deal" and that he could take it or leave it. Mr. Stein, however, testified that initially Mr. Henry had offered to pay Respondent only $13,000 per episode for Season 1 and that he, (Mr. Stein), responded that it was too low given that Respondent had been earning $14,000 per episode during his last year producing "Moesha." Mr. Stein testified that finally, after many discussions, he was able to negotiate for Respondent $15,000 per episode for Season 1, which would increase to $16,000 per episode if Season 2 was picked up and $17,000 per episode if Season 3 was picked up.

7. Mr. Stein also testified that he was able to negotiate a"retroactive compensation" plan for Respondent, which provided that if the "presentation"[1] (as opposed to the pilot) ran as long as a pilot, Respondent would be compensated an additional $5,000.00 on the $17,500.00 he was already going to be paid on the "presentation."

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[1]A "presentation" was defined as a shorter version of a pilot (which is only 22 minutes + commercials). A "presentation" could be as few as 10 minutes. Because it is shorter than a pilot, the artist is paid less than they would be on a pilot.

8. The Warner Brothers "Eve" contract, signed by Respondent, expressly provided that all notices and payments be sent to Petitioner and specifically, to the attention of Mitch Stein. Respondent admitted that this was done because Petitioner was Respondent's talent agent at the time the "Eve" contract was signed.

9. During Season 1 of the "Eve" show, Respondent became increasingly dissatisfied with his employment as a Line Producer and Unit Production Manager and repeatedly requested that Petitioner find him a new job. Respondent paid petitioner 10% of all earnings for Season 1. However, when Petitioner failed to find Respondent a new job, Respondent terminated Petitioner's services on April 23, 2004.

10. Two days prior to Respondent terminating Petitioner's services as a talent agent, Mr. Stein informed Respondent that he had been notified by Warner Brothers that Season 2 was being picked up.

11. After receiving a voice mail message from Respondent on April 23, 2004, Mr. Stein wrote Respondent a letter notifying him that Petitioner expected to be paid commissions on the next two seasons, should Respondent continue working as a Line Producer and Unit Production Manager for "Eve" and should the option for Season 3 also be exercised.

12. At no time during the agency relationship, did Respondent sign the Agency agreement provided to him by Petitioner.

13. Respondent continued to work as a Line Producer and Unit Production Manager for the "Eve" show for Seasons 2 and 3. While Respondent eventually paid Petitioner 10% of all earnings for Season 2, he failed to pay any commissions to Petitioner for Season 3. Respondent testified that he paid Petitioner for Season 2 because the option had been picked up prior to Respondent terminating Petitioner's services as a talent agent. Prior to paying the commissions to Petitioner for Season 2, Respondent approved a letter dated July 26, 2004 from his counsel Joseph S. Ford to Petitioner's then counsel, Michael

Plonsker of Alschuler, Grossman, Stein & Kahan, stating that Respondent would pay Petitioner all commissions due and owing for payments made to him for Season 2. The letter also stated that Respondent would deliver to Petitioner any *future* commissions that may become due and owing to Petitioner under the "Warner Agreement" (also known as the "Eve" contract). Notwithstanding this letter, approximately one year later, Respondent's counsel, Mr. Ford, requested a copy of the written Agency agreement from Petitioner knowing that Respondent had never signed such an agreement. Respondent now argues that no commissions are due Petitioner for Season 3 since Petitioner was terminated long before the option for Season 3 was exercised.

14. Respondent testified that he performed work on 22 episodes in Season 3 and was paid $17,000 per episode.

LEGAL ANALYSIS

1. Respondent is an "artist" within the meaning of Labor Code §1700.4(b).[2]

2. Petitioner is a licensed talent agent.

3. Labor Code §1700.44(a) provides that in cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the matter shall be heard de novo.

4. Labor Code §1700.23 provides that the Labor Commissioner is vested with jurisdiction over "any controversy between the artist and the talent agency relating to the terms of the contract." The Labor Commissioner's jurisdiction has been held to include the resolution of contract claims brought by artists or agents seeking damages for breach of a talent agency contract. See *Garson v. Div. Of Labor Law Enforcement* (1949) 33 Cal.2d

[2]A producer may or may not be considered an "artist" within the meaning of Labor Code §1700.4(b). The burden was on the Respondent to show that he didn't provide "creative" services, and thus, didn't fall within the definition of an "artist" under the code. Having failed to even raise this issue, we have decided to proceed.

861, *Robinson v. Superior Court* (1950) 35 Cal.2d 379. Accordingly, the Labor Commissioner has jurisdiction to determine this matter.

5. As Petitioner points out in its closing brief, this case is factually and legally similar to a prior talent agency determination entitled *Beyeler v. William Morris Agency, Inc.*, TAC 32-00. In response to a suit filed by William Morris for unpaid commissions, Kevin Beyeler of the "Kevin & Bean" morning show broadcast on the radio station *KROQ*, brought an action before the Labor Commissioner alleging that William Morris violated the Talent Agencies Act by failing to send written confirmation of the terms of the employment agreement negotiated on Beyeler's behalf with the radio station. Although Beyeler never signed a written agency agreement with William Morris, it nonetheless allowed William Morris to negotiate a three-year contract with *KROQ*. Beyeler paid William Morris 10% of all earnings for the first year and part of the second year, terminated William Morris during the second year and thus, refused to pay the remaining commissions for the 2nd and 3rd years of the three year contract. As in this case, Beyeler argued that absent a written agency contract, he had no legal obligation to pay William Morris for future commissions that became due after he terminated William Morris. As we pointed out in the decision, *California Code of Regulations,* Title 8, Section 12001 provides that "a talent agency contract may provide for the payment of compensation after the termination thereof with respect to any employment contracts entered into or negotiated for or to any employment accepted by the artist during the term of the talent agency contract, or any extensions, options or renewals of said employment contracts or employment."

However, in order to be entitled to the payment of compensation after termination of the contract between the artist and the talent agency, the talent agency shall be obligated to serve the artist and perform obligations with respect to any employment contract or to extensions or renewals of said employment contract or to any employment requiring the services of the artist on which such compensation is based. Because no continuing services

were required of William Morris on the three-year contract it negotiated for Beyeler with *KROQ*, we held that William Morris fully performed its duty and was therefore entitled to commissions for the entire three year term.

6. Similarly, in this case, Petitioner also performed all the duties necessary in regard to the "Eve" contract. It negotiated the salary and terms for the pilot/presentation, negotiated retroactive compensation in the event the presentation lasted as long as a pilot normally lasts, and it negotiated the base rate for Seasons 1-3 in the event those options were exercised.

7. Respondent argues that Petitioner's alleged oral agreement to receive commissions from future seasons of "Eve" is void due to Respondent's rejection of the agency agreement. We disagree. The evidence presented at the hearing established that an oral agreement was formed between the parties along the lines of the written agency agreement. While Respondent never signed the Agency agreement, he was aware of the terms, including the standard language reflecting industry custom and providing that commissions encompass all option periods where the initial engagement is procured during the agency.

8. Respondent also argues that under *California Code of Regulations*, Title 8, Section 12002, Petitioner is only entitled to commissions under an "oral contract" where the commission sought to be charged is procured directly through the efforts or services of such talent agency and is confirmed in writing within 72 hours thereafter. As we stated in the *Beyeler* decision, the Labor Commissioner has the discretion to determine whether an oral contract will be void. Moreover, in *Beyeler*, we held that the obvious intent of this regulation is to avoid unfair surprise and to facilitate full disclosure. Here, all the terms were disclosed to Respondent through the written agency agreement which he was provided with by Petitioner. Thus, there was no unfair surprise.

Additionally, we find that Petitioner didn't just "negotiate" the terms of the "Eve"

agreement with Warner Brothers, it was also instrumental in procuring the work. Black's Law Dictionary, Sixth Edition, defines the term "procure" as "to initiate a proceeding; to cause a thing to be done; to instigate; to contrive, bring about, effect or cause. To persuade, induce, prevail upon, or cause a person to do something." Here, Respondent did not secure the position as a Line Producer and Unit Production Manager until after Petitioner assisted in setting up meetings with Greenblatt Janolari and Meg Deloatch. Petitioner was instrumental in bringing about an offer for the Line Producer and Unit Production Manager jobs. Thus, we find that under Section 12002, the "Eve" show was procured directly through the efforts and services of Petitioner. Failure to confirm in writing within 72 hours thereafter, the particular employment for which such fee, commission or compensation is sought, in and of itself, is not sufficient to invalidate the oral contract between the parties herein.

9. Significantly, the evidence that convinces us the most that commissions are due Petitioner for Season 3, is the behavior of the parties. In a letter written to Respondent the day it received a voice mail stating that its services were being terminated, Petitioner made it clear to Respondent that it expected to receive commissions for any future options, including Season 3. No evidence was produced showing that Respondent took issue with this communication and understanding on Petitioner's part. Rather, in the months following the termination, Respondent approved several letters written by his counsel to Petitioner's counsel, agreeing to pay *future* commissions. Thus, as in *Beyeler*, Respondent's behavior in this case is determinative.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. Respondent pay to Petitioner $37,400.00 which reflects 10% of his earnings for the 22 episodes he worked on during Season 3 of the "Eve" show ($17,000.00 per episode).

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2. Respondent is also ordered to pay interest to date commencing on the date the last payment was received from Warner Brothers for his services as a Line Producer on the 3rd Season of the "Eve" show.

Dated: October 30, 2006

EDNA GARCIA EARLEY
Special Hearing Officer

Adopted:

Dated: Oct. 30, 06

ROBERT JONES
Acting State Labor Commissioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, 320 W. 4th Street, Suite 430, Los Angeles, CA 90013.

On **November 6, 2006**, I served the following document described as:

DETERMINATION OF CONTROVERSY

on the interested parties in this action [46-05] by placing

[ ] the originals

[x] a true copy thereof enclosed in a sealed envelope addressed as follows:

Max J. Sprecher, Esq.
Law Offices of Max J. Sprecher
5850 Canoga Avenue, 4th Floor
Woodland Hills, CA 91367

Joseph S. Ford, Jr., Esq.
Ford & Associates
11850 Wilshire Blvd., Suite 200
Los Angeles, CA 90025-6609

[ ] BY MAIL I deposited such envelope in the United States Mail at Los Angeles, California, postage prepaid.

[x] BY MAIL I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day.

Executed on November 6, 2006, at Los Angeles, California. I declare under penalty of perjury the foregoing is true and correct.

C Montano

Christine Montano