DIVISION OF LABOR STANDARDS ENFORCEMENT
By LARRY BAIL
107 South Broadway
Room 5015
Los Angeles, California 90012

(213) 620-2500

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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

J. CLARK KEARNEY, JOSEPH RUBEL, JOHN ERIC BRENTON and GEORGE GUIBERT, dba BURLESQUE, Petitioners, v. RON SINGER, BOB COE, dba THE MANAGEMENT TREE, Respondents.	NO. MP-429 AM-211-MC DETERMINATION

The above entitled controversy came on regularly for hearing before the Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, on October 11, 1977, by LARRY BAIL, attorney for Division of Labor Standards Enforcement, under the provisions of § 1700.4 of the Labor Code of the State of California; Petitioners J. CLARK KEARNEY, JOSEPH RUBEL, JOHN ERIC BRENTON and GEORGE GUIBERT, dba Burlesque, appearing by and through their attorneys, COHEN and STEINHART,

by TERRY STEINHART, ESQ, and Respondents, RON SINGER, BOB COE, dba THE MANAGEMENT TREE, by and through their attorney, HOWARD L. THALER; evidence both oral and documentary having been introduced and the matter submitted for decision, the following Determination is made:

DETERMINATION

It is the determination of the Labor Commissioner that the contract entered into between petitioners and respondents of January 1, 1975 is void and that no rights flow therefrom. Commissions for all club dates heretofore paid ought to be retained by respondents who can claim no further rights under the contract including their claimed right to arbitration before the American Arbitration Association.

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FINDINGS OF FACT AND CONCLUSIONS

Title 8 of the California Administrative Code at § 12000 (b) provides the following definition of an ARTISTS' MANAGER:

> "A person who, for a consideration, advises, counsels or directs artists in the development or advancement of their professional careers and who, in fact, either procures, offers, promises or attempts to procure employment or engagements for an artist shall be deemed to be an artists' manager even though the agreement or contract with an artist provides that there is no obligation to do so."

In the instant case before the Commissioner, we find a situation not atypical in that the written contract which is at the center of the controversy (petitioner's Exhibit #2) proclaims boldly that the document pertains to activity not that of an artists' manager. Yet, what "in fact" was agreed or intended or sublimated might well deny that pronouncement. We find that the facts in the instant case do divulge a relationship between petitioners and respondents of artist and unlicensed artist -manager. The written contract upon which respondents rely in support of their unlicensed activity is wracked with inconsistency and is but a ruse when viewed in the context of what was actually intended by both parties. We find this to be true because of the necessary quintessential relationshi

at the heart any artist's work vis vis his career and his manager. We further deem there to be no malice or conspiratorial fraud in this matter but rather view the Conference of Personal Managers' form contract to be a clever interpretive attempt to avoid a governmental licensing requirement in a manner that, nevertheless, cannot be condoned as it subverts a clearly established legislative plan to insure adequate supervision of those who are intimately related to the development of talent and its marketing.

On or about January 1, 1975, petitioners signed an agreement containing the title "Conference of Personal Managers" purporting to engage respondents as a "personal manager." By the terms of this written agreement (Petitioners Exhibit #2) respondents were to advise, counsel and direct the development of petitioners' artistic and theatrical career. The written contract contains a bold-faced pronouncement that respondents have advised petitioners that as "personal managers" they were not licensed to "seek or obtain employment" as would have been required by the Labor Code of the State of California.

However the document itself insinuates inconsistencies with respect to this admonition and suggests an underlying purpose clearly contrary to its presence within the document.

What was actually intended by the terms of this document might well be ascertained by reference to "riders" attached

thereto and mad a part thereof by inco_poration.

The first "rider" of interest declares in part:

"It is also agreed and understood that if in the course of the first or second year of our CEM agreement that either my gross income reaches $30,000.00 or that a recording deal is secured on my behalf that the lifetime of our agreement shall extend to the total of the one year with four one year options period or the lifetime of the recording deal with the recording company and/or independent production agreement."

This "rider" portrays a relationship which uses as a basis for its actual effective term the procurement of a "recording deal." To believe that respondents would deem such an eventuality as significant as this "rider" insists that it is on the one hand and then refrain from any activity aimed at securing such a deal would be akin to believing that a forest had no trees.

A second "rider" to the "Conference of Personal Managers" form provides:

"It is agreed and understood that if Artist receives an offer related to the entertainment industry, the Artist shall give said offer to the Manager. If the Manager cannot further said offer for the Artist then Artist shall have the option to give same offer to a representative of his choice and manager shall exempt said offer from any commission

We deem furthering an offer to be a significant aspect of procurement prohibited by law with regard to unlicensed persons in the entertainment business. Certainly, the negotiated terms of an engagement are necessarily a portion of the act of procurement. To argue as respondents do that furthering an offer and procuring an offer are distinct so as to negate the licensing provisions of the Labor Code is to ignore reality with respect to what procuring an engagement or contract actually is. We do not believe that an engagement is procured by opening or preliminary discussion alone. Procurement implies an arrangement including the determination of the specifics pertaining to the particular request for an artist's services. The intention of respondents to actively negotiate terms of specific proposed engagements is implied in the language of this rider which, in turn, colors the intentions with regard to the entire agreement. Although the agreement says clearly respondents are not acting as artists' manager their contradictions within the contract and their activities in this regard (referred to below) belie this assertion.

Further analysis of the contract discloses a provision that authorizes and empowers respondents "to engage as well as discharge and/or direct for me [artist] and in my name theatrical agents, artists' managers, and employment agencies as well as other persons, firms and corporations who may be retained to obtain contracts, engagements or employment for me."

In this regard petitioners' arguments are well taken and we agree that the provision referred to can lead to no other conclusion than that respondents were acting as unlicensed artists' managers using as their legalistic basis a contract so replete in contradiction as to reduce it to a sham not worthy of enforcement under the laws of the State of California.

The Act which grants jurisdiction to the Labor Commissioner (Labor Code § 1700, et seq.)

" . . . is a remedial statute. Statutes such as the Act are designed to correct abuses that have long been recognized and which have been the subject of both legislative action and are enacted <u>for the protection of those seeking employment</u> . . ." [emphasis supplied]

<u>Buchwald v. Superior Court</u>, 254 C.A. 2d 347.

We deem the purpose of this statute as being an attempt to eliminate the evils and abuses which in the past had been perpetrated upon persons seeking employment from those who procured, offered, promised or attempted to procure employment. The Artists' Managers Act is specifically directed toward the regulation of employment of creative and performing artists.

In this regard the statutory purpose is to impose licensing and restrictions by regulations upon all persons acting in the capacity of an employment entity or agency with respect to artists for the purpose of attempting to prevent improper persons from engaging in such an occupation

for the protec on of the public. Thu with respect to any person acting as an employment agent, the Act imposes licensing and other requirements. In the instant case the above referred to clause brings respondents within the scope and purpose of the Act as Artists' managers.

Business and Professions Code, § 9902, provides the definition of "employment agency":

> " . . . any agency, business or office which procures, offers, promises or attempts to procure employment or engagements for others . . . or for giving information as to where and from whom such help, employment or engagement may be procured . . . where a fee or other valuable consideration is exacted, . . . " [Emphasis supplied]

Therefore, one who refers another to an employment agency or by analogy to an agent (artists' manager) is himself conducting an employment or artists' managers' agency. Pursuant to Business and Professions Code § 9940, anyone who conducts an employment agency must be licensed. Similarly, anyone who conducts an Artists' Managers Agency must also be licensed. (Labor Code § 1700, et seq.] Because the respondents were authorized to and, in fact, did engage, as well as discharge artists' managers and/or agents, respondents were acting themselves as unlicensed artists' managers in contravention of the spirit and letter of the remedial statute with which we deal.

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Although the testimony by petitioners and respondents was in conflict with respect to what oral representations were, in fact, made to members of petitioner musical group we find the more credible testimony to be that at various times throughout the course of the contractual relationship respondents did promise to obtain a record deal for the petitioner group. This promise, of course, being again in contravention of the licensing requirements of Labor Code § 1700 et seq. and inconsistent with the written contract's provisos relating to the duties of the "personal managers."

We further find that the actual intent of the respondents was at all times pertinent herein to be actively engaged in the procurement of not only recording contracts for the group but the procurement of any and all theatrical engagements available. Their stated intent to be able to improve upon or further any commitments otherwise obtained is pristine indicia of this, their most basic intent. As stated above, the terms of an engagement are certainly an essential element of its procurement. Procurement we deem to involve more than an initial overture.

The demand for arbitration submitted as Petitioners' Exhibit #3 is, again, illustrative of the absolute control respondents perceived as flowing from their "personal" management agreement. This complete control of the career direction of the signed artists is so necessarily entwined with the act of procurement of any specific engagement or recording arrangement that to divide the

functions of the so-called personal manager from an artist' manager in the case (or for that matter in any similar situation) becomes not more than a confusing, uncertain semantic puzzle, the pieces of which are faded by ambiguity. Essentially, we find that the distinction between "personal managers" who need not be licensed and artists' managers who are so required, is a curious invention too long condone The artificial distinction results in an uncertainty damagin to the sanctity of contracts in the entertainment business and a subversion of the legislative intent to protect entertainers who unlike many other extremely financially successful people are not necessarily wise in the ways of business.

We find it most unreasonable to conclude that artists such as petitioners in this matter would agree to pay substantial sums by way of commissions to persons not intimat related to the sale of the services of the artist. To believ that petitioners were agreeing to pay substantial commissions to listen to advice as to how to start and end their acts and where to stand on a stage mocks what is reasonable with a blunt thud. The testimony that was received with respect to promises by respondents that they would obtain a record deal for petitioners is the only reasonable and believable testimony in this regard.

Respondents attempts met with failure. Although the contract is void as per the lesson of Buchwald, Respondents received no benefits from their abortive attempts to procure

a record deal d ought not to be made to return commissions heretofore earned for club dates on the theory of quantum meruit as there was some evidence to suggest what we feel is this most equitable result.

We, therefore, finally determine that the contract of January 1, 1975 is void and that no rights or liabilities flow therefrom. Commissions for club dates heretofore paid ought to be retained by respondents who can claim no further rights under the contract including their claimed right to arbitration before the American Arbitration Association.

DATED: December 1, 1977

JAMES L. QUILLIN
LABOR COMMISSIONER
DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS
STATE OF CALIFORNIA

By _____
LARRY BALL, Attorney