

1 C. ROBERT SIMPSON, STATE LABOR COMMISSIONER
2 DIVISION OF LABOR STANDARDS ENFORCEMENT
3 By: Carl G. Joseph
4 107 South Broadway, Room 5015
5 Los Angeles, CA 90012
6 2/3/620-2500
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8 BEFORE THE LABOR COMMISSIONER
9 OF THE STATE OF CALIFORNIA
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11 RAY KENNEDY,) Case No. TAC 27-82
12)
13 Petitioner,) DETERMINATION
14 vs.)
15)
16 SCOTT J. LAVIN,)
17)
18 Respondent.)
19

20 The above-entitled controversy came on regularly for
21 hearing before the Labor Commissioner, Division of Labor Standards
22 Enforcement, Department of Industrial Relations, State of
23 California, by Carl G. Joseph, attorney for the Division of Labor
24 Standards Enforcement, serving as Special Hearing Officer under
25 the provisions of Section 1700.44 of the Labor Code of the State
26 of California, Petitioner Ray Kennedy appearing by the law offices
27 of Cooper, Epstein & Hurewitz, by Linda Rosenbaum, and Respondent
Scott Lavin appearing by the law offices of Glassman & Browning,
Incorporated, by Anthony Michael Glassman. Both oral and
documentary evidence having been introduced and the matter having

1 been briefed and submitted for decision, the following
2 determination is made:

3 It is the determination of the Labor Commissioner:

- 4 1. That from on or about April 14, 1981 through the
5 termination of Respondent's relationship with Petitioner,
6 Respondent agreed to act and acted as Petitioner's personal
7 manager and not as an employment agent, ~~theatrical agent~~, or
8 talent agent as that term is defined in Section 1700.4 of the
9 California Labor Code.
- 10 2. That the Labor Commissioner is therefore without
11 jurisdiction to adjudicate the dispute between the parties.
- 12 3. That the petition to determine controversy is therefore
13 dismissed.

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16 I

17 INTRODUCTION

18 On June 21, 1982, Petitioner filed a Petition to
19 Determine Controversy pursuant to Labor Code Sections 1700 et seq.
20 with the Labor Commissioner of the State of California, against
21 Respondent Scott Lavin. The Petition alleged that Respondent
22 acted as an unlicensed artists' manager and talent agent in the
23 State of California during his representation of Petitioner.

24 In Petitioner's prayer for relief, Petitioner has
25 requested:

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1 1. A determination that the Agreement of April 14,
2 1981, is void and illegal and that Petitioner has no liability
3 thereunder to Respondent, and Respondent has no rights or
4 privileges thereunder;

5 2. A determination denying Respondent any reimburse-
6 ment, claim or offset, for any monies purportedly spent by
7 Respondent allegedly in furtherance of Petitioner's career; and

8 3. An award of reasonable attorney's fees and other
9 costs incurred by Petitioner.

10 Respondent filed a Response to the Petition and admitted
11 that he had never held a valid artists' manager's license as that
12 term is defined in Section 1700.3(a) of the California Labor Code
13 and that he had advanced Petitioner over \$100,000 in furtherance
14 of Petitioner's career. Respondent denied all other allegations
15 of the Petition and prayed for:

16 1. A determination that the Agreement between the
17 parties of April 14, 1981 was valid and enforceable and the
18 Petitioner has liability to Respondent thereunder and

19 2. For an award of reasonable attorney's fees and
20 other costs incurred by Respondent.

21 After both sides presented their case and rested, briefs
22 were submitted by Petitioner and Respondent and the matter was
23 submitted to the Special Hearing Officer for a Determination.

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II

ISSUES

The issues presented are twofold:

1. Did Respondent function as an artists' manager and talent agent, as those terms are defined in the Labor Code, without a license?
2. If so, to what relief, if any, is Petitioner entitled?

III

APPLICABLE LAW

The law which will determine the outcome of the claim asserted by Petitioner is contained in Labor Code Sections 1700-1700.47, which is known as the Talent Agencies Act.

Section 1700.5 of the Act prohibits anyone from engaging in the occupation of an artists' manager or talent agent without having first obtained a license from the California Labor Commissioner. Respondent has admitted that he never sought or obtained such a license.

The critical issue to be decided is whether Respondent performed the services of an artists' manager or talent agent on Petitioner's behalf.

IV

DISCUSSION AND FINDINGS

The Personal Management Agreement (the "Agreement") which is the subject of this dispute provides that "Manager is not expected to, nor shall Manager, procure or secure employment for artist. Manager is not an employment agent, theatrical agent, or talent agent" and that Respondent had "not offered, agreed,

1 promised or attempted to seek or obtain or provide information for
2 obtaining employment."

3 The powers and duties specifically delineated to
4 Respondent under the Agreement underscore the fact that Respondent
5 was not to be Petitioner's talent agent. For example, he was to
6 advise and counsel Petitioner with respect to the selection of
7 literary, artistic and musical material, he was to approve all
8 publicity and he was to assist in developing the proper format in
9 which to present Petitioner's talents. In short, there is nothing
10 in the Agreement which dictates, suggests or even hints that
11 Respondent was authorized, much less encouraged, to seek employ-
12 ment for Petitioner.

13 It is well established that an agreement between the
14 parties is not absolutely determinative of the issue as to whether
15 someone actually promised to procure employment for an artist.
16 Petitioner's claim that the Agreement, which is clear and
17 unambiguous on its face, was a mere subterfuge is, however,
18 unsupported by the evidence. Not only did Respondent testify that
19 he understood the duties of a manager and the prohibition against
20 acting as an unlicensed agent, but also David Rudich, counsel to
21 both parties, testified that to his knowledge Respondent never
22 violated the Agreement or the Labor Code by performing prohibited
23 services for Petitioner--even though Petitioner demanded that
24 Respondent seek and obtain employment for him. Given Petitioner's
25 background and obvious talent, and Respondent's huge investment in
26 him, it is indisputable that if Respondent wanted to violate the
27 Labor Code and act as an unlicensed agent, he could have obtained

1 employment for Petitioner, thereby entitling him to earn
2 commissions to help repay the money which he had advanced to
3 Petitioner. Respondent's failure to do so supports his and
4 Rudich's testimony and demonstrates that no violation of the
5 Labor Code occurred.

6 The evidence showed that during the course of their
7 relationship, Respondent furnished more than \$120,000 to
8 Petitioner. Petitioner contends that the largest part of said
9 sum represents costs necessarily incurred by Petitioner's
10 production company to record songs Petitioner wrote and performed.
11 Such expenditures (according to a schedule offered by Respondent)
12 included payments to producers (\$30,500), rental charges for
13 recording studios and instruments (\$18,567.42), salaries for
14 musicians and background vocalists (\$15,396.96) and fees for
15 engineering services (\$6,342.57). In addition, Petitioner
16 apparently received cash from Respondent on three separate
17 occasions. These cash payments total \$39,200.

18 All told, according to the evidence produced by
19 Respondent, he has made cash payments and incurred expenses for
20 Petitioner in the total sum of \$122,167.82.

21 It is axiomatic that one who does not procure, offer to
22 procure, or attempt to procure employment for artists is not a
23 talent agent in contemplation of the Talent Agencies Act. Raden
24 v. Laurie, 120 Cal.App.2d 778, 262 P.2d 261 (1953). That being
25 so, he need not obtain a license in order legally to manage the
26 artists' affairs. California Labor Code Section 1700.5; cf.
27 Raden, supra, 262 P.2d at 65. Necessarily, therefore, his

1 contracts with the artists he manages are not unenforceable owing
2 to his failure to obtain a license. See Buchwald v. Superior
3 Court, 254 Cal.App.2d 347, 62 Cal.Rptr. 364 (1967).

4 Petitioner has contended, as noted, however, that
5 Respondent acted as an unlicensed talent agent and, therefore,
6 the Agreement is unenforceable. It is significant that the only
7 facts that Petitioner offers in support of this claim are the
8 promises of employment upon signing the Agreement, which both
9 Respondent and David Rudich refute, and the negotiation with
10 Atlantic Records, which the evidence has demonstrated, was handled
11 exclusively by Rudich, an attorney who acted on Petitioner's
12 behalf.

13 While it appears to be true that Respondent knew of the
14 possibility of a record production contract and on one occasion
15 met with Paul Cooper to tell him of his support for Petitioner and
16 his willingness to back Petitioner, dollar for dollar with
17 Atlantic, this in no way constituted prohibited conduct by
18 Respondent. First, it is important to bear in mind that the
19 record production deal was never even completed. Moreover, as
20 noted, the discussions regarding deal points which did occur
21 appear to have been initiated and conducted exclusively by David
22 Rudich.

23 The correspondence between Rudich and Cooper tends to
24 indicate that Rudich was the driving force in the negotiations and
25 that Respondent's role was to support Petitioner and to agree to
26 offer further financial support if necessary.

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1 Moreover, according to Respondent's evidence the
2 proposed agreement that was discussed was a record production and
3 not a recording--contract; the former contemplates a record
4 production company creating (producing) one or more recordings
5 ("masters") and delivering them to a record company, whereas the
6 latter contemplates employment, by the record company, of the
7 artist's personal services. Thus, if a contract had been signed,
8 Petitioner's production company would have been contractually
9 required to produce record masters and to deliver them to Atlantic
10 Records. It would also have been the production company's
11 responsibility to hire the musicians, the arranger, the studio and
12 to supply the tape. Respondent argues that such terms are typical
13 and entirely characteristic of record production contracts and
14 have nothing to do with employment contracts.

15 Respondent contends that the distinction between the
16 record production contract and a recording contract is critical.
17 He argues that in California, the former are not treated as
18 employment contracts, but rather as contracts for the sale of
19 tangible personal property (the completed master) by the artist
20 to the record company. Accordingly, sales tax is applicable to
21 such transfer. Thus, California Revenue and Taxation Code
22 Section 6006, 6010 and 6362.5 provide in pertinent part as
23 follows:

24 Section 6006. Sale

25 "Sale" means and includes:

26 (a) Any transfer of title or possession,
27 exchange, or barter, conditional or otherwise,
in any manner or by any means whatsoever, of
tangible personal property for a consideration.

1 "Transfer of possession," includes only
2 transactions found by the board to be in
3 lieu of a transfer of title, exchange, or
4 barter.

5 (b) The producing, fabricating,
6 processing, printing, or imprinting of
7 tangible personal property for a consideration
8 for consumers who furnish either directly or
9 indirectly the materials used in the producing,
10 fabricating, processing, printing, or
11 imprinting.

12 Section 6010. Purchase

13 "Purchase" means and includes:

14 (a) Any transfer of title or possession,
15 exchange, or barter, conditional or otherwise,
16 in any manner or by any means whatsoever, of
17 tangible personal property for a consideration.
18 "Transfer of possession," includes only
19 transactions found by the board to be in lieu
20 of a transfer of title, exchange, or barter.

21 Section 6362.5. Master tape or records

22 (a) There are exempted from the taxes
23 imposed by this part the gross receipts from
24 the sale or lease of, and the storage, use, or
25 other consumption in this state of, master
26 tapes or master records embodying sound,
27 except amounts subject to the taxes imposed
by other provisions of this part paid by a
customer in connection with the customer's
production of master tapes or master records
to a recording studio for the tangible elements
of such master records or master tapes.

See also, Board of Equalization Res. 1527 Section (a)(4) (1975).

Thus, the agreement in question (had it been consummated) would
appear to have created sales tax liability for Petitioner's
company, and would not, therefore, have been a contract of
employment. Stated otherwise, under a record production contract,
the artist is an independent contractor and not an employee.

However, regardless of the impact of the distinction
between a record production contract and a recording contract, the

1 evidence demonstrated that Respondent did not procure, offer to
2 procure, or attempt to procure employment for Petitioner.

3 Any decision which violated the agreement in question
4 based on a finding that Respondent "procured employment" would
5 disregard both the sworn evidence in this case and the important
6 distinctions between a recording contract and a record production
7 agreement, and would further ignore the fact that Respondent's
8 only role in the negotiations with Atlantic Records was to agree
9 to back Petitioner with one dollar for every dollar that Atlantic
10 advanced. Moreover, such a decision would clearly be contrary to
11 the spirit of the recent amendment to the Talent Agencies Act
12 which provides that, as of January 1, 1983, "the activities of
13 procuring, offering or promising to procure recording contracts
14 for an artist or artists shall not of itself subject a person or
15 corporation to regulation and licensing under this chapter."
16 Labor Code Section 1700.4 (as amended August 31, 1982). While it
17 is clear that Section 1700.4 was not intended to have retroactive
18 effect, the public policy embodied by this recent amendment cannot
19 be ignored.

20 Lastly, the evidence strongly supports the conclusion
21 that Petitioner regarded Respondent not as his agent but as his
22 "backer," and that he constantly demanded funds from Respondent.

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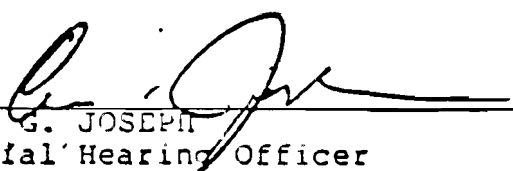
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1 Thus, the petition to determine controversy is hereby dismissed.

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3 DATED: 7/25/83


CARL G. JOSEPH
Special Hearing Officer


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6 ADOPTED:

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8 DATED: 7/25/83


C. ROBERT SIMPSON
Labor Commissioner
State of California

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