DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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Our File # VN823

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

JOANNA KERNS, Petitioner, vs. ARLENE DAYTON, Respondent.	CASE NO. TAC 2-90-SF DETERMINATION OF HEARING OFFICER RE STATUTE OF LIMITATIONS [Labor Code §1700.44(c)]

This matter arose pursuant to the provisions of the Labor Code ("L.C.") §§1700 et seq., upon filing of a petition under Labor Code §1700.44 by Joanna Kerns ("KERNS") with the Labor Commissioner on April 3, 1990. Initial hearings on the controversy were held on September 20, 1991, September 27, 1991, November 15, 1991 and January 17, 1992. Petitioner KERNS was represented by LAVELY & SINGER, JOHN H. LAVELY, JR. and JOSEPH D. SCHLEIMER, and Respondent Arlene Dayton ("DAYTON") was represented by ALAN G. DOWLING, Of Counsel to SHAPIRO, POSELL & CLOSE. JOHN T. REVIS, Attorney for the State Labor Commissioner served as Hearing Officer as assigned by the Labor Commissioner.

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I

INTRODUCTION

On or about January 1, 1977, KERNS and DAYTON executed a "Personal Management Agreement" ("PMA") which expressly stated that DAYTON would serve KERNS as a personnel manager and career advisor but not as a "talent agent". The original contract provided a percentage compensation based upon KERNS' gross income earned as an entertainer. It also provided that after the contract ended, commissions would continue upon earnings based upon contracts and agreements entered into during the term of the PMA. The orignal PMA was to run for three (3) years (thus expiring on December 31, 1979) but the parties continued as though there had been a formal extension. On or about January 1, 1982 another PMA was executed which contained the following provision:

> "You also agree to pay us fifteen percent (15%) of such gross monies after the expiration of the term with respect to any engagements, contracts and agreements entered into or substantially negotiated during the term hereof in connection with any of the aforementioned activities and upon all extensions, modifications, amendments, renewals and substitutions thereof."

The second PMA would have expired on December 31, 1984 but the parties continue to treat the relationship as though that contract was in full force and effect. On or about January 1, 1986, the parties signed a letter agreement, reciting the PMA as "dated January 1, 1977 which expired on December 31, 1985" and thus extending it for three (3) years, until December 31, 1988.

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The PMA was not renewed after December 31, 1988, although KERNS continued to pay commissions for about ten (10) months thereafter. After the commissions stopped, on or about February 7, 1990, DAYTON filed a complaint for breach of contract in the Los Angeles Superior Court, case no. C751716. On or about March 30, 1990, KERNS filed a motion to stay proceedings until the Labor Commissioner determined the validity of the contract under jurisdiction granted by Labor Code §§1700 et seq. Before that motion was heard and granted, on April 3, 1990 KERNS filed a petition with the Labor Commissioner alleging the PMA was void because DAYTON had acted as a "talent agency" (L.C. §1700.4) without the required license (L.C. §1700.23). KERNS asked for return of all monies paid under the PMA. In response, DAYTON denied all the petitioner's allegations and pleaded a number of affirmative defenses, the significant one being that the proceeding before the Labor Commissioner was barred because none of the alleged violations occurred within the one (1) year period prior to filing the petition (L.C. §1700.44[c]).

In February, 1991, the present hearing officer was assigned the case and the file transferred to Van Nuys from San Francisco. At that time there was pending a motion by petitioner to take out-of-state depositions. The motion was denied under the requirements of Code of Regulations, Title 8, §12028 because the purpose of the depositions as stated by petitioner was for "information-gathering (sic) opportunities", thus their purpose was for discovery and not for use as evidence.

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The first hearing date set was July 19, 1991. The matter was continued a number of times at the request of petitioner to accomodate KERNS' TV shooting schedule.

At the first actual hearing held on September 20, 1991, DAYTON contended that KERNS' petition alleged no dates to show that alleged violations had occurred within the one (1) year period of the Labor Code §1700.44(c), and argued that this unnecessary delay was costly and prejudicial to the rights of DAYTON. At that time the hearing officer decided to proceed to give petitioner opportunity to present evidence that Labor Code §1700.44(c) did not apply.

By the end of the third hearing on November 15, 1991, the transcript totalled 559 pages with 76 exhibits, and petitioner had presented almost all of her case except for the testimony of KERNS herself. After one-half of the fourth hearing on January 17, 1992, when no testimony or evidence had been offered regarding any event in connection with this controversy occurring within the one year prior to April 3, 1990, the hearing officer asked KERNS attorney if there was any evidence whatsoever of any violation that occurred within the one year prior to April 3, 1990. When the reply was negative, the hearing officer instructed the parties to prepare and submit briefs on the issue of statute of limitations, and advised that a determination of that affirmative defense would be made before further proceedings were held.

Both parties have submitted extensive and exceptionally well prepared briefs. DAYTON's argument, basically, is that none of the events occurred within the one (1) year limitation period.

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KERNS argues that the evidence shows that DAYTON acted as an unlicensed talent agent, making the PMA null and void. Thus, argues KERNS, this is a defense raised in the Superior Court case in defense of a breach of contract suit, and as a defense is not denied by virtue of the Statute of Limitations. Both arguments are well-taken and thoroughly supported by case citations. However, one misses the point completely.

II

DISCUSSION

Without in any way deciding the merits of this controversy, particularly since KERNS has not completed her presentation and DAYTON has had no opportunity to present any evidence, it does appear that the arrangement commenced as an undisputed personal management agreement which became a much closer personal relationship than that of principal and agent. This is shown by the informal way in which the contract was executed, amended and extended.

Thus far, the evidence also would seem to prove that after a number of years, about nine (9) to be exact, DAYTON started actively procuring and negotiating for KERNS' services, conduct that would clearly be covered by Labor Code §1700.4 and require a talent agency license (L.C. §1700.23). But all of that type of conduct ended by the time the PMA agreement ended, and none of the services so negotiated and/or completed occurred after December 31, 1988.

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The real controversy here, stems from the fact that in 1985 KERNS signed a contract to appear in the television series "GROWING PAINS", and that series and those services have continued ever since and apparently will continue into the future.

Under the provisions of the last PMA, DAYTON was entitled to her commission based on the compensation KERNS receives and will receive in the future from "GROWING PAINS". KERNS, understandably, does not wish to continue paying a fee to a personal manager who no longer provides any services.

Nothing in the evidence shows that DAYTON in any way acted as unlicensed talent agent in procuring the "GROWING PAINS" contract. However, the evidence does indicate that DAYTON acted as an unlicensed talent agent for six (6) or seven (7) other projects between 1986 and 1988 and was paid a commission therefor. Assuming that evidence is correct and unrebuttable, the issue then is whether or not the entire PMA agreement(s) which lasted for twelve (12) years is void and unenforceable because of a few unlicensed actions which occurred between 1986 and 1988, particularly when most of those actions actually benefited KERNS as well as DAYTON.

While some of the evidence indicates that in at least one case, a major arrangement procured and negotiated by DAYTON was eventually lost because of what might be described as conduct prejudicial to the interests of KERNS, that one incident hardly constitutes a basis for negating at least nine (9) years of beneficial counseling and completely legal activity.

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It is clear that at least some of the incidents that occurred between 1986 and 1988 appear to have been unlicensed talent agent activity for which compensation should be returned to KERNS, but none occurred within the one (1) year prior to April 3, 1990, and thus the Labor Commissioner has no jurisdiction to order such reimbursement.

The only other fact that might prevent the statute of limitations (L.C. §1700.44[c]) from running would be if DAYTON had acted as an unlicensed talent agent to procure the "GROWING PAINS" contract, because it is DAYTON's complaint to seek current compensation based on that current income from "GROWING PAINS" that is the real controversy between the parties. However even KERNS' attorney LAVELY makes no such claim, having expressly stated in his opening statements (Hearing Transcript, Volume 1, page 18, lines 13 through 24):

> "... it would be unconscionable to have a determination that Arlene Dayton is entitled to commission, gross compensation, each year throughout the series, even though the management agreement expired December 31, 1988, even though Arlene Dayton hasn't rendered services thereafter and had no responsibility in procuring Joanna Kerns's involvement on that ["GROWING PAINS"] series.
>
> We're not saying that she was obligated to be a procuring cause of that series, and, in fact, if she had been, it would have been a violation of the Labor Code; but the point is that she wasn't a procuring cause ...". [emphasis added]

The situation here is almost a replica of that which occurred in BANK OF AMERICA et al. v. ERIN FLEMING et al., Labor Commissioner case No. 1098 ASC MP-432 (1982). There, respondent FLEMING was as much personal confidant of Groucho Marx as a per-

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sonal manager. There, as here, there were some incidences of FLEMING acting as an unlicensed talent agent. The Labor Commissioner concluded that while reimbursement had to be made for commissions received for services as an unlicensed talent agent, it would be unconscionable to require FLEMING to repay all compensation received from MARX.

The reasoning might be better explained by considering a hypothetical analogy. Suppose an individual had a valid contract to work 12 years as a building maintenance man, 8 hours a day, 5 days a week. Suppose for a period of two years, he spent part of his working time constructing an add-on to the building which benefited the employer. Clearly by law, he could not collect compensation for the construction service performed as an unlicensed contractor; he might even be liable for the return of his maintenance man wages for that "maintenance time" he devoted to unlicensed construction work. But it would be unconscionable to void his entire 12-year maintenance employment agreement and require him to return all wages paid during that time for services other than as an unlicensed contractor.

III

DETERMINATION

Assuming for these purposes, that all of the evidence presented by petitioner KERNS is true and not rebuttable, in the opinion of the hearing officer the 12-year Personal Management Agreement (with amendments and extensions) is not void and unenforceable and thus the question of current commissions is not within the jurisdiction of the Labor Commissioner.

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KERNS' attorney expressly stated that DAYTON did not procure, and thus could not have acted as an unlicensed talent agent in the procurement of the "GROWING PAINS" contract. Therefore, the issue of whether current compensation should be paid DAYTON based on that current series cannot be considered as justification for staying the requirements of L.C. §1700.44(c).

The petitioner's argument that the statute of limitations does not apply to a "defense" (i.e., KERNS' defense in Superior Court in a breach of contract action) is refuted by petitioner's own brief ("PB"). As cited on page 16, commencing at line 17:

> "A defense is never barred by the statute of limitations so long as the main action itself is timely."
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> BULL v. UNITED STATES (1935) 295 U.S. 247, 55 S.Ct. 695. [emphasis added]

Further, referring to petitioner's brief, page 23, commencing at line 1:

> "[We] do not think the statute operates to bar reference to the commission of questions raised by way of defense in suits which are themselves timely brought."
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> UNITED STATES v. WESTERN PACIFIC RAILROAD COMPANY (1956) 352 U.S. 59, 77 S.Ct. 161. [emphasis added]

Thus we have the basic situation that the Labor Commissioner has no jurisdiction to determine the validity of the original personal management contract as amended and extended, because it expired on December 31, 1988, more than a year before the petition was filed (see PB page 23, commencing at line 26).

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Furthermore, the Labor Commissioner has no jurisdiction over restitutions for alleged unlicensed talent agency activities since none of those occurred within one year prior to filing the petition. (See PB page 9, commencing at line 11).

Lastly, the Labor Commission has no jurisdiction to decide if current commissions are owed under the PMA condition subsequent since they clearly do not involve any unlicensed talent agency activity on the part of DAYTON, and thus would be a matter for the Superior Court to decide in the breach of contract action.

Accordingly, it is determined this petition should be dismissed under the provisions of Labor Code §1700.44(c) which states:

> "(c) No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding."

Nothing in this determination prejudices the rights of KERNS to raise all of her defenses, legal and equitable, in the Superior Court case now pending.

DATED: January 30, 1992

John T. Revis

JOHN T. REVIS
Hearing Officer

The above Determination is adopted by the Labor Commissioner in its entirety.

Victoria Bradshaw

VICTORIA BRADSHAW
State Labor Commissioner