DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

KEVIN BEYELER, Petitioner, vs. WILLIAM MORRIS AGENCY, INC, a corporation, Respondents.	No. TAC 32-00 DETERMINATION OF CONTROVERSY
WILLIAM MORRIS AGENCY, INC., a corporation, Cross-Petitioner, vs. KEVIN BEYELER, Cross-Respondent,	

INTRODUCTION

The above-captioned petition was filed on October 4, 2000, by KEVIN BEYELER (hereinafter "Petitioner" or "BEYELER"), alleging that WILLIAM MORRIS AGENCY, INC., and HENRY K. REISCH, as an individual, (hereinafter "Respondent" or "WMA"), violated the

California Talent Agencies Act by failing to send written confirmation of the terms of the employment agreement negotiated by WMA on Beyeler's behalf. And petitioner alleges WMA violated the Act by filing a breach of contract lawsuit with the Los Angeles Superior Court and failing to file the suit first with the Labor Commissioner. Finally, petitioner maintains any oral contract between the parties is procedurally and substantively unconscionable. Petitioner requests disgorgement of commissions paid, attorney's fees, and seeks the oral contract between the parties be deemed void *ab initio*.

Respondent filed its answer and cross-petition on December 10, 2000, alleging petitioner breached the oral agreement by failing to pay commissions for employment procured by the respondent. The respondent seeks an accounting to determine the actual compensation petitioner earned during the contract's term, 10% commissions on those earnings, and attorney's fees.

A hearing was scheduled before the undersigned attorney, specially designated by the Labor Commissioner to hear this matter. The hearing commenced on April 20, 2001 and concluded on April 25, 2001, in Los Angeles, California. Petitioner/cross-respondent was represented by Stephen D. Rothschild of King, Purtich, Holmes, Paterno, & Berliner, LLP; respondent/cross-petitioner was represented by Michael B. Garfinkel of Rintala, Smoot, Jaenicke & Rees. Due consideration having been given to the testimony, documentary evidence and arguments presented, the Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. The parties stipulated that Henry K. Reisch shall be removed as a named respondent.

2. The petitioner is a Los Angeles radio personality who along with his partner, Gene Baxter, makes up the popular morning show "Kevin & Bean" broadcast on radio station KROQ. Sometime in 1995, as a result of the popularity of "Kevin & Bean", Steven Weiss, of the William Morris Agency contacted the duo and suggested WMA could expand their presence into the television industry. Beyeler and Baxter accepted the offer and Weiss began to seek opportunities on behalf of "Kevin & Bean". In an attempt to reduce the agreement to a writing, WMA sent various general services agreements for Beyeler's signature, reflecting the terms of the deal. Beyeler didn't sign the various contracts, but it was clear through Beyeler's testimony that he accepted WMA's offer to represent him in the television industry.

3. The television opportunities for "Kevin & Bean" were sparse, but in the fall of 1996, Beyeler and Baxter's three-year employment contract with KROQ came up for renewal. Weiss introduced Beyeler to WMA Vice President, Henry Reisch. Reisch specialized in radio employment negotiations and it was Reisch who believed that Beyeler was being grossly undervalued by his employer. Beyeler agreed to have WMA negotiate his KROQ contract and it was Reisch who conducted the negotiations with Beyeler's employer. In early 1997, the new three-year contract valid through November 20, 1999, between Beyeler and KROQ was finalized. Reisch had negotiated many favorable terms as requested by Beyeler and Beyeler expressed contentment and gratification for the outcome of

the deal.

4. The representation agreement between Beyeler and WMA was never reduced to a writing, and it is the lack of specific contractual terms contained in a writing (i.e., duties and compensation) that propel this litigation.

5. Initially, Beyeler forwarded 10% commission payments based on his annual compensation and bonuses regularly to WMA over the next year. At some point in 1998, Beyeler began to fall behind in his payments and in June of 1998, Beyeler ceased his payment of commissions to WMA. During Beyeler's sporadic payment period, WMA believed that Beyeler was experiencing cash flow problems and WMA agreed to defer Beyeler's commission payments until 1999.

6. Beyeler's account was in direct contradiction. Beyeler maintained he authorized his accountant, Joanne Waldo, to terminate the relationship in June of 1998. Waldo did not testify and there were no supporting documents reflecting this alleged termination. The crux of Beyeler's claim is that Beyeler believed WMA would seek extra work (i.e., voice-overs) on his behalf, in addition to the contract negotiations conducted for Beyeler between him and KROQ. That didn't occur. After the employment contract was completed, WMA, Weiss and Reisch expended minimal effort on Beyeler's behalf. According to Beyeler, he agreed to pay 10% of his commissions for "as long as we [Beyeler and Reisch] were working together.[1]" Beyeler contends after the KROQ negotiation,

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[1] Beyeler testified, "I probably wrongly assumed that when you get somebody from William Morris, they continue to work on your behalf, and I assumed that he was going to continue to work on my behalf. And after ... a year and a half or two years of paying and he did nothing on my behalf, **I decided I didn't want to pay anymore** because he wasn't doing anything ... My only regret is that I paid for two years for nothing."

Reisch and the WMA abandoned him. Notably, Beyeler never complained or requested Reisch or anyone from WMA to continue seeking other employment opportunities for him.

7. According to Henry Reisch, he had no personal knowledge of the specific terms between Beyeler and WMA. Reisch testified it was his understanding that Beyeler was simply a client of WMA and as a client it was his responsibility to obtain "more money, more vacation, [and] enhance his bonus schedule", as requested by Beyeler[2]. It is WMA's position that they are entitled to a 10% commission on Beyeler's annual compensation plus bonuses for the duration of the employment agreement negotiated by WMA. WMA also contends that Beyeler knew the arrangement, agreed to its terms, which are industry standards and customs and performed under those terms.

8. In 1999, after failing to receive commissions, WMA's accountant began collection activity and contacted Beyeler's accountant. Business records produced by WMA, established that on November 17, 1999, Beyeler's authorized accountant[3] agreed with WMA to reduce his monthly payment plan, but still collect on the full

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[2] Documentary evidence produced at the hearing confirmed that, *inter alia*, Beyeler's bonus, vacation and salary were all substantially increased through the efforts of Reisch.

[3] Petitioner expended a significant amount of testimony arguing that Joanne Waldo was not authorized by Beyeler to enter into a payment plan and any evidence of a payment plan constitutes inadmissible settlement negotiations. First, Beyeler clearly testified that he "authorized" and "commissioned" Waldo to pay his commissions to WMA and instructed her to terminate his relationship with WMA. It was clear that in Beyeler's mind, Waldo was authorized to enter into a payment plan with WMA. Second, Waldo acknowledged the full amount of commissions outstanding. Third, Cal. Code of Regulations §12031 states, "the Labor Commissioner is not bound by the rules of evidence or judicial procedure." In short, Waldo's agreement to compensate WMA for the full amount in November 1999, was reliable evidence establishing that Beyeler had not expressed his intent to cease commission payments and/or terminate the relationship in June of 1998.

$75,249.96[4] owed on the delinquent account by extending his repayment time. This agreement between Waldo and WMA never materialized. Documents revealed when Beyeler's accountant took the payment agreement to her superior for final approval, the payment plan became contingent upon speaking with Beyeler's legal representation. It was after discussions with counsel that on November 22, 1999, WMA received correspondence from Beyeler's legal representation maintaining Beyeler had terminated the relationship "prior to June 30, 1998" and Beyeler was relieved from any further payment obligation. Again, there was no written evidence nor additional testimony reflecting the June 1998 termination.

9. On May 18, 2000, WMA assigned their right to the alleged outstanding commissions to L.A. Commercial Group, Inc., dba Continental Commercial Group (CCG). CCG then filed a breach of contract lawsuit in the Los Angeles Superior Court seeking $75,249.96 in unpaid commissions. After the Talent Agencies Act was invoked, WMA substituted back as the party in interest and the superior court lawsuit was stayed pending resolution of this administrative proceeding.

CONCLUSIONS OF LAW

1. Labor Code §1700.4(b) includes "radio artists" in the definition of "artist" and petitioner is therefore an "artist" within the meaning of Labor Code §1700.4(b).

2. It was stipulated that the William Morris Agency,

Inc., is a California licensed talent agency.

3. 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," and 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. Garson v. Div. Of Labor Law Enforcement (1949) 33 Cal.2d 861, Robinson v. Superior Court (1950) 35 Cal.2d 379. Therefore the Labor Commissioner has jurisdiction to determine this matter.

4. The issues in this case are as follows:

a) Was a contract formed?

b) If so, what were the terms?

c) Was there a valid termination in June 1998, excusing the petitioner's continued performance?

d) Is the contract void for unconscionability?

e) Does a violation of Title 8 California Code of Regulation §12002, or failure to first file this case with the Labor Commissioner require a voiding of the contract?

a) Was a Contract Formed?

5. The essential elements of a contract were present. Parties capable of contracting who consented with a lawful object and sufficient consideration. (C.C. 1550.) The parties' agreement for the procurement of employment in the entertainment industry was

for a lawful purpose and the oral agreement for WMA to negotiate employment contracts on behalf of Beyeler for a 10% commission established sufficient consideration for both parties. Beyeler's acceptance and the requisite "meeting of the minds" were established through his conduct. Beyeler paid 10% of his employment compensation to WMA for more than one year. Consequently, an implied oral contract, "one the existence and terms of which are manifested by conduct", was formed. (C.C. 1621)

b) If So, What Were the Terms?

6. It was clear Beyeler agreed to pay 10% of his income for WMA's negotiation of his employment contract. And it was clear WMA agreed to represent Beyeler in the negotiation of his employment contract for 10% of his compensation. The question is whether the contract was conditioned upon the rendering of future services and whether the breach of that covenant extinguished the petitioner's promise to pay. There simply was no evidence that the breach of a duty to render future services excused the petitioner's obligation to pay for services previously rendered. Despite the lack of express terms, the intent of the parties could be ascertained from the surrounding circumstances, including payment history, testimony of Beyeler, and industry custom.

7. In addition to paying 10% of his salary for over a year, Beyeler manifested his intent to pay 10% for the entire duration of the employment contract, by authorizing his accountant to accept the payment plan to reduce the monthly amount but extend the duration for repayment, which equaled exactly 10% of the total

value of the employment contract. Moreover, an inference may be drawn that Beyeler was aware that the 10% commission owed to WMA for their efforts created an obligation for him to pay for the duration of the employment agreement, because those are the precise terms every agreement sent by WMA to Beyeler stated. In fact, all of the contracts offered to Beyeler for signature contained the same compensation terms. Indeed, identical or similar compensation terms are industry standards, including the following provision of a standard, exclusive, agency contract approved by the American Federation of Television and Radio Artists (AFTRA) presented to Beyeler from the WMA:

> "The Artist agrees to pay to the agent a sum equal to ten percent (10%) ... of all moneys or other consideration received by the Artist directly or indirectly, under contracts of employment entered into during the term specified herein as provided by the regulation. Commissions shall be payable when and as such moneys or other consideration are received by the Artist or by anyone for or on the Artist's behalf."

8. Beyeler embraced the work performed by WMA, but unilaterally determined after an arbitrary time period he didn't want to pay anymore. Courts have long held, "he who shakes the tree is the one to gather the fruit." Willison v. Turner 89 Cal.App.2d 589 (1949). Beyeler testified that "after ... a year and a half or two years of paying and he did nothing on my behalf, **I decided I didn't want to pay anymore.**" Certainly, Beyeler may terminate a personal services agreement if he feels that his agent is not providing the services contracted for. But he may not unilaterally determine that he has no further obligation to pay for

work already performed.

c) Was There a Valid Termination in June 1998?

9. There was not a shred of credible evidence establishing the relationship was terminated in June of 1998. Termination did not occur until the November 22, 1999 letter to WMA was received from Beyeler's legal representation. Additionally, California Code of Regulation Title 8 §12001 states, 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.

10. 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. WMA was willing and able to service that employment contract should it have been necessary. In this case, there were no continuing services required of that employment contract and consequently WMA fully performed their duty with respect to the KROQ employment contract.

d) Is the Contract Void for Unconscionability?

11. Petitioner argues that the contract should be void because the contract meets the elements of both procedural and substantive unconscionability. C.C. §1670.5. states:

> (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

12. Here, neither the terms, [10% commission], nor the alleged unequal bargaining power of the parties rises to a level that would require this oral contract to be void for unconscionability. The petitioner is an intelligent sophisticated individual, who had entered into several lengthy employment contracts in the past. The standard agency representation agreement entered into between the parties was both fair, disclosed, understood and not prejudicial to the artist.

e) Does a Violation of Title 8 CCR §12002, or Failure to First File this Case with the Labor Commissioner, Require a Voiding of the Contract?

13. Finally, the petitioner alleges that respondent violated Title 8 California Code of Regulation §12002, requiring a voiding of the contract? §12002 states:

> A talent agency shall be entitled to recover a fee, commission or compensation under an oral contract between a talent agency and an artist as long as the particular employment for which such fee, commission or compensation is sought to be charged shall have been procured directly through the efforts or services of such talent agency and

shall have been confirmed in writing within 72 hours thereafter. Said confirmation may be denied within a reasonable time by the other party. However, the fact that no written confirmation was ever sent shall not be, in and of itself, be sufficient to invalidate the oral contract.

14. It was not established that WMA complied with this regulation and it should be stressed that a violation of this regulation could serve to repudiate an oral contract between an agent and an artist. The obvious intent of this regulation is to avoid unfair surprise and facilitate full disclosure. All terms of an employment contract must be disclosed to the artist, so that the artist is aware of his duties and responsibilities and the duties and responsibilities of his employer. Here, the duties between Beyeler and KROQ were not in issue. So, notwithstanding the fact that no written confirmation was sent to Beyeler of the KROQ agreement, it was determined that Beyeler was aware of all of the essential terms of that agreement and that he benefitted considerably. In fact, Beyeler received almost every single term he requested. As a result, the noncompliance of this regulation under these circumstances is not sufficient to invalidate the oral contract between the parties.

15. The petitioner cites several cases in support of his proposition, but all of those Labor Commissioner's determinations cited by petitioner are distinguishable for several reasons. First, all of the cases occurred prior to the 1989 amendment to the regulation, which now affords the Labor Commissioner with discretion to determine whether an oral contract will be void. Second, in each case cited by Beyeler, the

petitioner was injured as a result the failure to send confirmation by unfair surprise. Here, the petitioner benefitted dramatically from WMA's negotiations and must not be allowed to avoid financial responsibility to his agent.

16. Similarly, the filing of a breach of contract case with the superior court before first filing with the Labor Commission is not grounds to void the contract between the parties. As the California Supreme Court recently decided, "[w]hen an issue under the Act arises in this fashion, the appropriate course is simply to stay the superior court proceedings and file a "petition to determine controversy" before the Commissioner. Styne v. Stevens 26 Cal.4th 42 at. 58.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the 1997 oral contract between petitioner KEVIN BEYELER and respondent WILLIAM MORRIS AGENCY, INC., is lawful. Respondent/Cross-petitioner is entitled to 10% commission for all earnings connected with the 1997 KROQ employment agreement. The petitioner/cross-respondent shall provide an accounting to the respondent/cross petitioner for all earnings, including bonuses, to the respondent within 20 days of receipt of this determination and shall provide those commissions to the respondent within 20 days after the accounting has been provided.

The petitioner's claim is dismissed.

Dated: September 4, 2001

DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 9-05-01

ARTHUR S. LUJAN
State Labor Commissioner