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

OF THE STATE OF CALIFORNIA

DINA PADILLA, on behalf of LEAH PADILLA, a minor, Petitioner, vs. PENNY CLYMER, Individually dba PENNY CLYMER'S MODELING & TALENT AGENCY, Respondent.	No. TAC 60-94 DETERMINATION ON PETITION TO DETERMINE CONTROVERSY

This proceeding arose under the provisions of the Talent Agencies Act (the "Act"), California Labor Code Sections 1700 through 1700.47.

On August 18, 1994, Petitioners DINA PADILLA, mother of LEAH PADILLA, a minor, ("Padilla") filed a petition with the Labor Commissioner pursuant to Section 1700.44 seeking determination of an alleged controversy with Respondent, PENNY CLYMER'S MODEL & TALENT AGENCY which is a sole proprietorship owned by PENNY CLYMER ("Clymer").

On June 23, 1995, a full evidentiary hearing was held before Robert N. Villalovos, Attorney for the Labor Commissioner,

assigned as a hearing officer. Present at the hearing were Petitioners Leah Deanne Padilla, the minor artist, and her mother Dina Padilla. Respondents did not file any written response to the Petition within 20 days after the service of the Petition but present at the hearing was Respondent Penny Clymer, sole proprietor of Penny Clymer's Modeling & Talent Agency.

Due consideration having been given to the testimony, documentary evidence, and arguments submitted by the parties, the Labor Commissioner now renders the following decision.

PROCEDURAL AND FACTUAL BACKGROUND

On October 21, 1993, Petitioner Dina Padilla, as parent (mother) of Leah Padilla, then a minor, entered into a written agreement with Respondent under which Respondent agreed to serve as the talent agent for Leah Padilla and for which Petitioner agreed to pay a percentage of the artist's earnings from any employment procured by Respondent. There was testimony from Respondent that there had previously existed two corporations, Clymer's Modeling and Talent Agency, Inc. and Clymer's Studios, Inc., for which Penny Clymer was a corporate officer in both companies. Respondent further testified that the two corporations had since dissolved and filings of dissolution with the Secretary of State were made in 1994. The talent agency company was suspended by the Secretary of State for unpaid taxes owed to the Franchise Tax Board and has was not licensed with the State Labor Commissioner since 1988 due to failure to post the required bond for licensure. The testimony of all parties and the documentary evidence supports that the contract and relationship was entered into by Penny Clymer, individually and doing business as a sole

proprietorship under Penny Clymer's Modeling and Talent Agency. Since there were no representations of a corporation in the subject relationship nor evidence that the (suspended) corporations were parties to the subject contractual relationship, the caption of this proceeding is amended to state the more specifically named respondent pursuant to the proof presented at the hearing.

The written agreement was part of a package of material which included "Clymer's Modeling & Talent Agency Contract which consisted of three pages. Also included in the package (at pages 8-10) is material describing a "Model Workshop Program" available only to models under contract with Clymer. The stated price for the workshop was $2,550.00.

At the time the written agreement was entered into, Petitioner made payment of $600.00 towards the model workshop program with the balance to be made in monthly payments until paid in full. The remaining balance of $1,950.00 was to made in monthly installments. Petitioner Dina Padilla testified that she paid a total of $1,800.00 to Respondent and, at the hearing, stated she is seeking recovery of said amount along with wages for time taken from school by the artist which under testimony by Leah Padilla amounted to approximately 7 hours.

During the period covered by the written agreement, the artist testified that she participated in activities involving employment opportunities procured or promised to be procured by Clymer which included, but were not limited to, window modeling of prom dresses for Gantos, a Sony print ad, and a John L. Sullivan video taping.

Petitioner argued that the Respondent was not a licensed talent agent during all relevant periods stated in the Petition, acted as a talent agent by promising to procure and procuring employment opportunities, and that in reliance upon such representations and conduct, Petitioner incurred costs for which reimbursement is now sought. Petitioner stated that verbal and written representations of the model workshop program as part of the Clymer's Modeling and Talent Agency package which included the talent agent contract, workshop program information improperly represented Clymer as a talent agent and that the workshop program and fee were part of the services rendered by Penny Clymer. Although demanded, Respondent failed to reimburse Petitioners for the amounts paid. Petitioner thus seek reimbursement of the $1,800.00 as amounts paid to Clymer.

Respondent Penny Clymer testified that the model training workshop and fee charged thereunder was a service completely independent of the talent agency and was a separate transaction providing services to train, develop, and manage Padilla who had no prior modeling experience. Respondent further argued that such services did not constitute activities subject to coverage under the Talent Agency Act (Labor Code Sections 1700, et seq.) . Respondent further maintained that there were no promises of wages for time taken from school nor for the Sony print ad shoot which was only an audition. Regarding the latter, Respondent maintained that statements made by an independent photographer (not employed by nor an agent of Respondent) regarding wage payment for the shoot cannot render her liable for the requested wages.

DECISION

1. THE CONTRACT IS ILLEGAL UNDER THE ACT AND PADILLA IS NOT OBLIGATED TO PAY COMPENSATION OR OTHERWISE PERFORM FURTHER UNDER THE CONTRACT

Section 1700.5 of the Act provides, in pertinent part, as follows:

> "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."

Section 1700.4 of the Act defines the terms "talent agency" and "artist" in pertinent part as follows:

> "(a) 'Talent agency' means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, ... Talent agencies may, in addition, counsel or direct artists in he development of heir professional careers.
>
> (b) 'Artists' means ... actors and actresses ..., radio artists, ..., models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises.

"Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [talent agent] and an artist is void." Buchwald v. Superior Court (1967) 254 Cal.App.2d 347, 351; Waisbren v. Peppercorn Productions, Inc. (1995) 41 Cal.App.4th 246, 261. Under Civil Code Section 1667, contracts that are contrary to express statutes or public policy as set forth in statutes are illegal contracts; the illegality voids the entire contract. Absent a savings clause, the entire contract must fall if it purports to bind the parties to an arrangement expressly forbidden by statute.

Dina Padilla's status as an artist is undisputed. Therefore, the sole question presented is whether Respondent contracted to engage in the occupation of a talent agent for Dina Padilla. The answer is that the named Respondents did so.

The true contractual and business relationship between Padilla and Clymer was defined at the outset by the provisions of the executed written contract. The "Talent Agency Contract" (at pages 5-7 in the package) expressly engage Respondent to act as the "exclusive agent, advisor, and representative with respect to [the artists] services, activity, and participation in all branches of the entertainment, publications photography, modeling, and related fields throughout the world, ..." (Contract, page 5, paragraph 1). The Contract also provided that the talent agency agreed "to use all reasonable efforts to procure employment for [the artist]." (Contract, page 5, paragraph 3). The conduct of Clymer supports a finding that the workshop program was provided as a service arising from the talent agency since the workshop program material with quoted price of $2,550.00 was part of the same package containing the "Talent Agency Contract" which described the duties and obligations of the artist and agent.

Clymer's most recent license expired in 1988 and that license was for the former corporation for which Respondent was a corporate officer. Penny Clymer was not licensed as a talent agent at the time the Talent Agent Contract was entered into on October 21, 1993. Since the contract was entered into by an unlicensed agent, the contract is void in its entirety and Petitioner is entitled to amounts paid thereunder which is $1,800.00.

2. **UNDER MORE RECENT AUTHORITY, CLYMER WAS NOT OTHERWISE EXEMPT FROM THE LICENSING REQUIREMENT FOR THE SUBJECT ACTIVITIES PERFORMED BY CLYMER UNDER WACHS v. CURRY**

Respondent nonetheless argues that she was not required to have a license since she was neither engaged in the occupation of a talent agent in connection with the subject fees. It is elemental that ambiguities in contracts are construed against the person who drafted them. Here again, the contractual and business relationship between the parties, as outlined in the agreement drafted by Clymer and executed on October 21, 1993, establishes that Clymer expressly promised to undertake the duties of a talent agent for the subject artist.

Nonetheless, Clymer maintains that the fees sought to be recovered in the instant petition were not incurred as a result of the talent agency relationship but constituted separate and independent services to train, develop, counsel, and manage the artist's career, citing the case of Wachs v. Curry (1993) 13 Cal.App.4th 616.[1]

The Wachs court was faced with a constitutional challenge of the Act, on its face, as violative of equal protection and due process, the latter based upon the contention that the word "procure" was unconstitutionally vague. Significantly, in rejecting the contentions of vagueness, the court stated that "the only question before us is whether the word `procure' in the context of the Act is so lacking in objective content that it provides no

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[1] However, it is significant that the subject model workshop program was advertised and presented as a part of the talent agency contract and accompanying materials. The program material expressly provides that it is not open to the public and is available only to models under contract with Clymer's. (Model Workshop Program, Package page 8).

standard at all by which to measure the agents conduct." Wachs, supra, 13 Cal.App.4th at 628. In its analysis, the court noted that the Act applies to persons engaged in the "occupation" of procuring employment for artists and, in defining "occupation" as one's principal line of work, stated that the licensing scheme does not apply unless a persons's procurement activities constituted a `significant part' of his business. Id., at 626-628. The court expressly declined to state what would constitute "significant" since such was necessary under the facial challenge analysis of the Act.

More recently however, the courts have held that given the plain meaning of the Act, its remedial purpose, as well as previous interpretation by the Labor Commissioner and recent legislative action under the California Entertainment Commission, the "licensing scheme contemplates that the `occasional talent agent,' like the full-time agent is subject to regulatory control [under the Act]." Waisbren v. Peppercorn Productions, Inc. (1995) 41 Cal.App.4th 246, 255. Accordingly, "the Act requires a license to engage in any procurement activities." *Id.* at 259. In Waisbren, the court stated:

> "The statutory goal of protecting artists would be defeated if the Act applied only where a personal manager spends a significant part of his workday pursuing employment for artists. The fact that an unlicensed manager may devote an `incidental' portion of his time to procurement activities would be of little consolation to the client who falls victim to a violation of the Act....
>
> We refuse to believe that the Legislature intended to exempt a personal manager from the Act--thereby allowing violations to go unremedied--unless his procurement efforts cross some nebulous threshold from `incidental' to `principal.' Such a standard is so vague as to be

unworkable and would undermine the purpose of the Act. [Footnote omitted]" Id., at 254.

The court in Waisbren specifically rejected the language utilized in Wachs interpreting the term "occupation" (i.e., that a person's procurement activities under the Act must constitute a `significant' part of a person's business) by stating that even the Wachs court recognized the limited nature of the issue before it, and thus regarded the latter court's interpretation of the term "occupation" as dicta and declined to follow it. Waisbren, supra, 41 Cal.App.4th at 260-261.

Accordingly, the language in Wachs does not provide the correct standard for determining when a license is required under the Act; and further, under Waisbren, a person will be subject to regulation and licensure under the Act and liability for violations thereof even where his activities are incidental to his business.

In applying the above standard pursuant to Waisbren, the significance of the agent's employment procurement function compared to the agent's counseling function is neither dispositive nor relevant. Here, the written agreement between the parties expressly provided that Clymer was to engage in procurement of employment and, in fact, she procured employment opportunities which were, at least incidental, but at most, constituted the very activity the artist expected Clymer to perform, i.e., procuring employment. Although there was little, if any, actual compensation received, the agreement expressly referred to coverage by, and contained provisions from, the Act and the activities of the Respondent were covered under the Act.

Testimony of Clymer indicated she did not receive any compensation from the opportunities procured for Padilla but stated that discounts on products/services are often made by the customers of Clymer to the artists. For the Gantos job on April 5, 1994, Padilla received a 15% store discount for 3 hours of work modeling prom dresses in a store window. On another occasion where the artist was scheduled to attend a runway show at "Career Days" at Casa Robles School in Orangevale, $50.00 was to be paid to the artists attending. Clymer presented documents regarding another job on April 29, 1994 which indicated that Leah Padilla was a "no show." Clymer stated that the $50.00 amount given to the models was a "gratuity" from her company.

Significantly, the documents presented for both jobs are titled "Job Billing Information Form" on Respondent's letterhead and lists an "employer" (Gantos & Casa Robles, respectively), job name (Gantos Cocktail Mannequin & Casa Robles Career Days) and lists the models used including name, rate (15% discount & $50.00, respectively), and had a space for "hours" for each entry. The Respondent's form was, by its terms, created for and obviously used for billing jobs procured by her agency and such document is patently inconsistent with Clymer's testimony that her business is not utilized to procure employment opportunities.

Clymer's argument would have one disregard the express undertaking between the parties as indicated in the agreement and reflected in the workshop program provided under the putative talent agent's name. Clymer's position requires one to myopically view the specific activity for which the alleged losses were incurred (registration fees and other fees) to arrive at a

portrayal of her procurement activities smaller relative to the training, counseling, and directing of Padilla's career. Such analysis is contrary to Waisbren wherein the Court stated:

> "By creating the [California Entertainment] Commission, accepting the Report, and codifying the Commission's recommendations in the Act, the Legislature approved the Commission's view that `[e]xceptions in the nature of incidental, occasional or infrequent activities relating in any way to procuring employment for an artist cannot be permitted: one either is, or is not, licensed as a talent agent ...' (Report at p.11) This legislative approval extends to the Commission's finding that the Act imposes a *total* prohibition on the procurement efforts of unlicensed persons. (*Ibid.*) Given the Legislature's wholesale endorsement of the Report, we conclude, as did the Commission, that the Act requires a license to engage in *any* procurement activities. [Cf. citation omitted]" Waisbren, supra, 41 Cal.App.4th at 258-259 (bracketed material added).

In the context of the foregoing, a petitioner who asserts a licensing violation under the Act satisfies his burden if he establishes that the Petitioner was involved in a contractual relationship with Respondent procuring employment or that a relationship included any employment procurement activities undertaken or promised to be undertaken by Respondent. The testimony of both Leah and Dina Padilla establish from the outset that employment opportunities were going to occur (e.g., that "Leah would be working within 10 days") as a result of the relationship with Clymer. Such a showing supports an inference that these activities were some part of the Respondents' business as well as the specific undertaking by Respondent, and thus, suffices to establish a *prima facie* case of violation of the Act. At that point, the burden shifts to the Respondent to come forward with sufficient evidence to sustain a finding that procurement functions were not any part of the Respondent's activities.

In the present case, the verbal and written representations in the package presented to Petitioner at the outset, which includes the talent agent agreement, and the express individual representations by Clymer lead to the inescapable conclusion that the activities performed by Respondents were to undertake on a professional basis the duties of a talent agent with respect to matters not subject to the recording industry exclusion contained in the Labor Code.

Consequently, Respondent was not exempt from the licensing requirement for the undertaken activities. Clymer's argument that the specific activities (giving rise to the claim for reimbursement of fees) were activities not requiring a license and/or that such activities do not involve procurement of employment (and thus, excuses Clymer's failure to have a license) fails under the foregoing analysis.

3. COLLECTION OF THE SUBJECT FEES WERE NONETHELESS PROHIBITED BY THE ACT

Notwithstanding the above analysis rendering the illegal contract void, the talent agent improperly collected fees which are prohibited under the Act. Under the Act (which, incidently, the subject contract expressly referred to and incorporated), Labor Code Section 1700.40 prohibits talent agents from collecting any "registration fees" as defined by Section 1700.2(b) which includes "any charge made or attempted to be made to an artist for ... (B) photographs, film strips, video tapes, or other reproductions of the applicant ..." or "(5) any activity of a like nature." Here, the registration fee for the model workshop program was presented in writing and verbally by Clymer as a service

of the talent agency requiring payment for services which would not have been incurred but for the talent agency relationship.[2]

Since the amounts paid consist of payments for the model program workshop prohibited by Section 1700.40, including the photo portfolio of the artist, and registration for a modeling workshop which are proscribed by Section 1700.2(b), said fees charged to Petitioner were prohibited by Section 1700.40 and Respondent must reimburse Petitioner the $1,800.00 which constitute amounts paid to Respondent as unlawful fees collected pursuant to the provisions of the Act.

4. PETITIONER IS NOT ENTITLED TO COLLECTION OF CLAIMED WAGES FROM RESPONDENT FOR TIME TAKEN FROM SCHOOL

At the hearing, Petitioner also sought recovery of wages from time taken from school and provided testimony that approximately 2½ - 3 hours were spent from school doing the Sony print shoot on March 16, 1994 and 4 hours for the Gantos modeling job. Dina Padilla maintains that time was taken off from school because it was thought that Leah would get paid and there was never mention of volunteer work for the shoots. However, no specific evidence, by expressions or conduct, was presented by Petitioner to establish such a promise by Respondent to pay for time taken from school enforceable as a direct employment by Clymer nor pursuant to the provisions under the Talent Agency Act.

The evidence does not support a specific wage obligation against Clymer for time taken from school for the two above-

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[2] The Model Workshop Program was not open to the public and, by its terms, was available only to models under contract with Clymer.

mentioned jobs and Petitioner is not entitled to recovery thereon under the provisions of the Talent Agency Act.

DISPOSITION

Accordingly, it is hereby ordered as follows:

1. The contract between Petitioner Padilla and Respondent Clymer is declared to be illegal, void, and unenforceable, and Padilla shall have no further obligation to Clymer under the contract for commissions or otherwise.

2. Respondent Clymer shall pay to Petitioner Padilla a total of $1,800.00 for reimbursement of unlawfully collected fees, and $1,800.00 for penalties pursuant to Labor Code Section 1700.40, for a total of $3,600.00.

DATED: 1-9-98

Robert N. Villalovos
ROBERT N. VILLALOVOS
Attorney and Special Hearing Officer
for the Labor Commissioner

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

DATED: 1/15/98

Jose Millan
JOSE MILLAN
State Labor Commissioner