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1978
Labor Commissioner
State of California

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11 BEFORE THE LABOR COMMISSIONER
12 STATE OF CALIFORNIA



13 ROSEMARY ROGERS,)
14)
15 Petitioner,)
16 vs.)
17 HOWARD PORTNOY,)
18)
19 Respondent.)

20 NO. SF MP 40
21 DETERMINATION AND AWARD

22 The above-entitled controversy came on regularly for
23 hearing before the Labor Commissioner of the State of California,
24 before Richard N. Dinallo, attorney for the DIVISION OF LABOR
25 STANDARDS ENFORCEMENT, Department of Industrial Relations, State
26 of California, and Special Hearing Officer, appointed under the
27 provisions of Section 1700.4 of the Labor Code of the State of
California, on November 7 and 8, 1977. Petitioner was present
with her attorneys, David C. Phillips, of Goldstein & Phillips,
and Richard Schindler, and respondent was present with his
attorney, A. David Parnie, Jr., of Thompson, Hubbard and Parnie,
a Law Corporation.

1 Witnesses were sworn and examined, and documentary
2 evidence was introduced; and the matter having been argued and
3 submitted for decision and after deliberation thereon, the follow-
4 ing determination and award is made:

5
6 DETERMINATION AND AWARD

7 The Labor Commissioner makes the following Findings of
8 Fact:

9 1. Respondent was not at any time licensed as an
10 Artist's Manager pursuant to Labor Code §§1700, et seq., and did not
11 comply with the provisions thereof.

12 2. Petitioner at all relevant times was and is a writer
13 and a best-selling author of entertainment "escapist" novels.

14 3. Beginning in October 1975, and at all times relevant
15 thereafter, respondent rendered career counseling services to
16 petitioner involving her publishers, agents, lawyers, accountants,
17 motion pictures, television, investments, cash flow, tax planning,
18 and other related matters.

19 4. Respondent attempted to procure employment engage-
20 ments for petitioner, including, but not limited to, engagements
21 in television, the movies and related entertainment enterprises
22 from January 1, 1976, until his termination, as follows:

23 a. In January of 1976, petitioner and respondent agreed
24 that respondent would undertake to renegotiate certain publishing
25 contracts (Exhibit 7 herein) which petitioner had entered into
26 with publisher AVON BOOKS, and petitioner and respondent further
27 agreed that respondent would also negotiate the sale of an eighth

1 novel to AVON BOOKS.

2 b. Respondent undertook such negotiations, and success-
3 fully renegotiated said contracts as well as a new contract for
4 the eighth novel known as "The Steve Morgan Sequel." The results
5 of those negotiations were embodied in Exhibit 10 herein.

6 c. Respondent discussed petitioner's talents with John
7 Payne, petitioner's literary agent for several books, Leon Memoli
8 and Owen Laster, employees of the William Morris Agency, a talent
9 agency, and Ron Konecky, an attorney in New York, and attempted to
10 get Leon Memoli and Owen Laster interested in her career.

11 d. Respondent advised and counseled petitioner concern-
12 ing her future plans as a writer; and discussed with her the
13 making of her novels into movies and TV shows.

14 e. Respondent encouraged petitioner to prepare two
15 short outlines (Exhibits 17 and 19) for concepts to be used as a
16 possible TV soap opera and a possible future book and TV series
17 and delivered those outlines to Leon Memoli, an employee of
18 William Morris Agency, a talent agency.

19 f. Respondent participated in negotiating employment
20 engagements for petitioner with her publisher, AVON BOOKS, in the
21 period February to April 1976.

22 g. Respondent promoted a potential writing contract with
23 the publishing firm of Simon and Schuster.

24 h. Respondent initiated discussions relating to obtain-
25 ing employment engagements for petitioner in television and the
26 movies.

27 i. Respondent advised petitioner that the proposed sale

1 of the rights to film her novels Sweet Savage Love and Dark Fires
2 to Dino DeLaurentis, which sale had been negotiated by Stuart
3 Miller for AVON BOOKS, was not a good contract for petitioner;
4 and further discussed the sale of those rights with an attorney
5 for Dino DeLaurentis.

6 j. Respondent arranged and had lunch with petitioner
7 and a San Francisco movie producer, James Palokoff.

8 5. Prior to January 1, 1976, respondent did not advise,
9 counsel, or direct petitioner in the development of her profes-
10 sional career, and did not procure, offer, promise, or attempt to
11 procure employment or engagements for petitioner.

12 6. Respondent advised and counseled petitioner rela-
13 tive to her career by advising her in the selection of an agent
14 during 1976.

15 7. The original oral agreement between the parties—that
16 respondent would handle all of petitioner's business affairs and
17 would be paid for his services at the rate of \$50.00 per hour--
18 was revised at the instance of respondent in December 1975 to
19 provide that respondent be paid a total of \$25,000.00, plus
20 expenses for the next twelve months, payable at \$2,000.00 a month
21 for ten months and \$2,500.00 for two months (January and July 8,
22 1976) with the agreement terminable at any time by either party.
23 There was no modification of agreement as to respondent's handling
24 all of petitioner's business affairs. Pursuant to these oral
25 agreements, petitioner paid respondent \$17,000.00 for the period
26 from October 1975, through July 1976; \$2,500.00 of which was paid
27 by petitioner and received by respondent during 1975.

1 8. In July of 1976, petitioner discharged respondent
2 and he performed no further services for her thereafter.

3 9. The parties' oral agreement relating to how respon-
4 dent would be compensated by petitioner was further revised on or
5 about January 6, 1976, to provide that petitioner pay respondent
6 a percentage of any sums from employment as a writer -- which
7 employment respondent was able to obtain for her in excess of her
8 pre-existing employment engagements. No fees were received by
9 respondent as to these commissions, however, as none were paid by
10 third parties prior to respondent's termination.

11 10. The extent of respondent's financial counseling to
12 petitioner was advice relating to four investments, all made during
13 1975. During 1976, his role with petitioner as a financial advisor
14 was of a very minor nature, and the vast majority of his services
15 was related to career counseling and promotion and attempting to
16 procure employment engagements for petitioner's career as a writer
17 of original fiction, including as a writer in television, the
18 movies and related entertainment enterprises.

19 CONCLUSIONS OF LAW

20 The Labor Commissioner makes the following Conclusions
21 of Law:

22 11. At all times relevant, petitioner was an "artist"
23 as defined in Labor Code §1700.4.

24 12. The Labor Commissioner has jurisdiction to hear the
25 controversy between petitioner and respondent as to all aspects of
26 their contractual relationship with each other.

27 13. Respondent acted in the capacity of an "artists'

1 manager" as defined in Labor Code §1700.4 in performing his duties:
2 for petitioner subsequent to December 31, 1975, through July of
3 1976, but in so acting, he was not duly licensed as an "artists'
4 manager", and, therefore, respondent was in violation of the
5 Artist's Managers' Act, Labor Code §§1700, et seq., between
6 January 1, 1976, through July of 1976.

7 14. Respondent was not an artists' manager prior to
8 January 1, 1976.

9 ISSUES

10 I. WAS PETITIONER AN "ARTIST" FOR PURPOSES OF §1700.4
11 OF THE LABOR CODE?

12 II. WAS RESPONDENT AN "ARTISTS' MANAGER" FOR PURPOSES OF
13 LABOR CODE §1700.4?

14 III. ASSUMING THAT RESPONDENT WAS AN UNLICENSED ARTISTS'
15 MANAGER, MUST HE DISGORGE FEES RECEIVED FROM THE PETITIONER?

16 I.

17 Was petitioner an "artist" for purposes of §1700.4
18 of the Labor Code?

19 Section 1700.4 of the Labor Code defines an artist as
20 follows:

21 The word 'artists' as used herein refers
22 to actors and actresses rendering services
23 on the legitimate stage and in the pro-
24 duction of motion pictures; radio artists;
25 musical artists; musical organizations;
26 directors of legitimate stage, motion
27 picture, and radio productions; musical
directors; writers; cinematographers;
composers; lyricists; arrangers; and other
artists and persons rendering professional
services in motion picture, theatrical,
radio, television and other entertainment
enterprises. (Emphasis supplied.)

1 or absurdity." (Citations omitted.) id at 354-355.

2 "Clearly the Act may not be circumvented by allowing
3 language of the written contract to control...The form of the
4 transaction, rather than its substance, would control." id at
5 355. No discernable difference applies in a situation involving
6 an oral contract as allegedly existed between Rogers and Portnoy.
7 Accordingly,/^{one}who functions as an artists' manager is an artists'
8 manager and must, therefore, be licensed under the Act.

9 The fact that respondent did not refer to himself as an
10 "artists' manager" is, therefore, not dispositive of his status.
11 During the period of his dealings with petitioner, he, and he
12 alone, acted as the vehicle between her and the outside business
13 world. No evidence adduced at the Hearing was introduced or
14 admitted to the contrary.

15 In this regard, respondent, with the exception of four
16 investments made on petitioner's behalf, sought to "advise, counsel
17 or direct" petitioner in the "development or advancement" of her
18 professional career and did, in fact, "procure, offer, promise or
19 attempted to procure employment or engagements" for petitioner
20 pursuant to a modified agreement from the beginning of 1976 until
21 July 1976, when respondent was terminated. The fact that respon-
22 dent did not actually reap harvest from his purported percentage
23 interest with regard to petitioner's theatrical and literary
24 successes--albeit through respondent's efforts--rendered him no
25 less accountable for having acted as an artists' manager, since all
26 of respondent's efforts and dealings in 1976 vis-a-vis petitioner
27 and third parties were directed towards effectuation of her

1 manager."

2 And the Court of Appeal of the State of California has
3 held that "...a contract between an unlicensed artists' manager
4 and an artist is void... and as to such contracts, artists--being
5 of the class for whose benefit the Act was passed--are not to be
6 ordinarily considered as being in pari delicto;" Buchwald v.
7 Superior Court, 254 C.A. 2d 347, 351; 62 Cal.Rptr. 364 (1967).
8 Moreover, the Court in Buchwald held that "...Artists' managers...
9 whether they be licensed or unlicensed, are bound and regulated
10 by the Artists' Managers' Act." id. at 355. Additionally, "the
11 Labor Commissioner is free to search out illegality lying behind
12 the form in which a transaction has been cast for the purpose of
13 concealing such illegality." id. at 355.

14 The December agreement between petitioner and respondent
15 as to prospective compensation during 1976 being void, supra,
16 Buchwald at 351, it is clear that "no rights...can be derived from
17 it." id. at 360.

18
19 WHEREFORE, THE FOLLOWING Award is made:

20 That the management renegotiated contract in December
21 of 1975 between petitioner and respondent is void; all moneys
22 received by respondent from petitioner, to-wit: \$14,500 during
23 the calendar year of 1976 is, and has remained, the sole property
24 of petitioner and she is not subject to any claim by respondent
25 for service fees or other remuneration; and further, petitioner is
26 released from any obligations or liabilities arising thereunder;
27 that in addition, no moneys expended by respondent during the

