

(Endorsed)

DIVISION OF LABOR STANDARDS ENFORCEMENT
LOUIS GIANNINI, Supervising Special
Hearing Officer & LAURENCE T. EMERT,
Special Hearing Officer
107 South Broadway, Room 5015
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213/620-2500

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Labor Commissioner
State of California
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Attorney for the Labor Commissioner

BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

DENIS MAHAN, a/k/a DENEY TERRIO,
Petitioner,
vs.
KUTASH TALENT ENTERPRISES, INC.,
Respondent.

No. AM 8-78
MP-452

DETERMINATION

The above-entitled controversy came on regularly for hearing before the Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, on Feb. 18, 1980 by Laurence T. Emert, Senior Counsel for the Division of Labor Standards Enforcement, serving as Special Hearing Officer under the provisions of Section 1700.44 of the Labor Code of the State of California; petitioner, DENIS MAHAN, appearing by the Law Office of Lyle R. Mink, a Professional Corporation, by Lyle R. Mink and Richard A. Schulenberg; and respondent KUTASH TALENT ENTERPRISES, INC., appearing by Lanny P. Waggoner. Evidence, both oral and documentary having been introduced, and the matter being briefed and submitted for decision, the following determination is made:

DETERMINATION

It is the determination of the Labor Commissioner:

1. that during the time in question, respondent acted as an artist manager as that term is defined in Labor Code §1700.4 without a license;
2. that the Personal Management Agreement entered into between the parties is deemed void and of no effect;
3. that no sums shall be awarded to either party.

I

INTRODUCTION

On June 27, 1978, petitioner, DENIS MAHAN, a/k/a DENEY TERRIO, (hereinafter, petitioner) filed a Petition to Determine Controversy with the Labor Commissioner against respondent, KUTASH TALENT ENTERPRISES, INC., (hereinafter respondent). In its petition, it was alleged that the parties entered into a purported "Personal Management Agreement" dated September 28, 1975 in which petitioner is alleged to have engaged respondent as his personal manager; that as consideration and inducement for petitioner entering into the agreement, respondent provided petitioner with a promissory note in the sum of \$1,000, dated September 5, 1975; that in connection with the signing of the note, respondent had petitioner sign an "Exclusivity Agreement," which Agreement stated that the note "shall be a guarantee against actual payment received for services rendered as a dancer;" that as a result of the guarantee of earnings, respondent functioned

1 as an "Artists' Manager," as defined in Labor Code §1700.4 and
2 that therefore the Personal Management Agreement between the par-
3 ties should be voided.

4 In its answer, respondent alleged that it was a
5 personal manager; never functioned as an artists' manager; never
6 took an agent's percentage from petitioner; and had fully
7 licensed booking agents in its employ to do booking for acts it
8 managed during its relationship with petitioner. Respondent
9 further alleged that petitioner violated the Personal Management
10 Agreement by retaining a new manager, and that respondent is due
11 commissions of approximately \$100,000 under the terms of the
12 Agreement. Respondent prayed that the Personal Management Agree-
13 ment be upheld.

14 II

15 ISSUES

16 The issues presented are twofold:

- 17 1. Did respondent function as an artists' manager as
18 that term is defined in the Labor Code without a license?
- 19 2. If so, what relief, if any, is petitioner entitled
20 to?

21 III

22 APPLICABLE LAW

23 The law governing resolution of this controversy is
24 contained in Labor Code §1700-1700.47. Of particular interest
25 is Labor Code §1700.4, which as then applicable provided:

26 "An artists' manager is hereby defined to be a person
27 who engages in the occupation of advising, counseling,
or directing artists in the development or advancement

1 of their professional careers and who procures, offers,
2 promises or attempts to procure employment or engage-
3 ments for an artist only in connection with and as a
4 part of the duties and obligations of such person under
5 a contract with such artist by which such person con-
6 tracts to render services of the nature above mentioned
7 to such artist.

8 The word 'artists' as used herein refers to actors and
9 actresses rendering services on the legitimate stage
10 and in the production of motion pictures; radio artists;
11 musical artists; musical organizations; directors of
12 legitimate stage, motion picture and radio productions;
13 musical directors; writers; cinematographers; composers;
14 lyricists; arrangers; and other artists and persons
15 rendering professional services in motion picture,
16 theatrical, radio, television and other entertainment
17 enterprises.¹

18 The case law construing the provisions of the Labor
19 Code dealing with artists' manager controversies are Raden v.
20 Laurie, 120 C.A. 2d 778, 262 P. 2d 61(1953) and Buchwald v.
21 Superior Court, 254 C.A. 2d 347; 62 Cal Rptr. 364(1967).

22 //

23
24
25
26
27 ¹Effective January 1, 1979, Labor Code §1700.4 was
28 amended to read as follows:

29 "A talent agency is hereby defined to be a person or
30 corporation who engages in the occupation of procuring,
31 offering, promising, or attempting to procure employ-
32 ment or engagement for an artist or artists. Talent
33 agencies may, in addition, counsel or direct artists in
34 the development of their professional careers.
35 The word 'artists' as used herein refers to actors
36 and actresses rendering services on the legitimate stage
37 and in the production of motion pictures; radio artists;
38 musical artists; musical organizations; directors of
39 legitimate stage, motion composers; lyricists; arrangers;
40 and other artists and persons rendering professional
41 services in motion picture, theatrical, radio, tele-
42 vision and other entertainment enterprises."
43 Since the petition was filed before the change in the
44 law, the statute set forth in the body of the determin-
45 ation is controlling.

IV

STATEMENT OF FACTS

1
2
3 Petitioner is a professional dancer who performs on
4 stage and television and as such comes within the definition of
5 "artist" as that term is defined in Labor Code §1700.4.

6 Petitioner first met Jeffrey Kutash, president of respondent,
7 during the Summer of 1974, when ^{petitioner} A was auditioning for a Las
8 Vegas show called, "Good Ole Rock n' Roll". Kutash was managing
9 the dance group called "Greasy Kids" which was performing at
10 the show. Kutash's production company, the respondent herein,
11 was producing the show. Respondent hired petitioner to dance
12 with the "Greasy Kids." Petitioner was hired under an agreement
13 entitled "Artist's Independent Contractor's Agreement" and was
14 paid for his performance by respondent.

15
16 After the Las Vegas show, the name of the dance group
17 was changed to the "Dancin' Machine". Petitioner performed as a
18 dancer with the "Dancin' Machine" on a sporadic basis over the
19 next several months as work became available. When work was
20 available, petitioner normally signed an agreement with respondent
21 similar to the one signed on the Las Vegas show. During the
22 period after the Las Vegas show, when work could not be found,
23 Kutash kept in contact with members of the "Dancin' Machine,
24 scheduled rehearsals and tried to keep the group in tact. Neither
25 Kutash nor respondent received any compensation for these services.

26 Since petitioner was not making a living performing
27 with the "Dancin' Machine", he became disenchanted with his

1 relationship with respondent and the group, and threatened Kutash
2 that he would sever his relationships with both. Beginning in
3 the Spring of 1975, and continuing on an on-again-off-again basis
4 over the next six months, Kutash, on behalf of respondent, spoke
5 with petitioner about the possibility of respondent serving as
6 petitioner's personal manager. At first, petitioner was reluctant
7 to enter into a personal management agreement since he did not
8 wish to get tied down for any period of time. By letter to
9 respondent dated October 21, 1975, petitioner expressed his
10 reservations as follows:

11 " . . . I am reluctant to sign a one year contract
12 at this time, which I feel would limit my future
13 unless I am guaranteed a salary during the fiscal
14 year."

15 However, respondent then offered to guarantee petitioner \$1,000
16 in earnings over a six month period if petitioner would agree to
17 sign an Agreement, pledging his services, as a dancer, exclusive-
18 ly to the Dancin' Machine for a six month period. Petitioner
19 agreed to sign this Exclusivity Agreement, and at or about the
20 same time (October 28, 1975) agreed to retain respondent as his
21 personal manager as well.

22 Under the terms of the Personal Management Agreement,
23 respondent was to serve as petitioner's personal manager for a
24 one year term, with four separate consecutive irrevocable options
25 to renew the agreement an additional term of one year. The option
26 to renew was deemed exercised, unless respondent notified
27 petitioner of his failure to exercise an option by written notice.

Respondent's duties included the rendition of the
following services:

1 "advise and counsel in the selection of literary,
2 artistic and musical material; advise and counsel
3 in any and all matters pertaining to publicity,
4 public relations and advertising; advise and
5 counsel with relation to the adoption of proper
6 format for presentation of my artistic talents
7 and in the actormination of proper style, mood,
8 setting, business and characterization in
9 keeping with my talents; advise, counsel and direct
10 in the selection of artistic talent to assist,
11 accompany or embellish my artistic presentation;
12 advise and counsel with regard to general practices
13 of the entertainment and amusement industries
14 and with respect to such matters of which you may
15 have knowledge concerning compensation and
16 privileges extended for similar artistic values;
17 advise and counsel concerning the selection of
18 theatrical agencies, artists' managers, and
19 persons, firms and corporations who will counsel,
20 advise, seek and procure employment and engagements
21 for me."

22 On page 3 of this 7 page Agreement in block letters, the following
23 language appeared:

24 "IT IS CLEARLY UNDERSTOOD THAT YOU ARE NOT AN
25 EMPLOYMENT AGENT OR THEATRICAL AGENT OR ARTISTS'
26 MANAGER, THAT YOU HAVE NOT OFFERED OR ATTEMPTED
27 OR PROMISED TO OBTAIN, SEEK OR PROCURE EMPLOYMENT
28 OR ENGAGEMENTS FOR ME, AND THAT YOU ARE NOT
29 OBLIGATED, AUTHORIZED, LICENSED OR EXPECTED TO
30 DO SO."

31 Page 6 of the Agreement contained similar language.² Compensation

32 ²The fact that the Personal Management contract contains
33 this disclaimer is not dispositive. It is the substance
34 of the agreement that is controlling and not its form.
35 As stated in Buchwald v. Superior Court, 254 C.A. 2d
36 347 at 355 (1967):

37 "It is a fundamental principle of law that in
38 determining rights and obligations, substance
39 prevails over form. (Cite omitted)

40 The Court, or as here, the Labor Commissioner,
41 is free to search out illegality lying behind
42 the form in which a transaction has been cast
43 for the purpose of concealing such illegality."
44

1 for respondent's services was 25% of all gross monies received
2 by petitioner as a result of his artistic activities.

3 After the Personal Management Agreement was signed,
4 petitioner performed as a member of Dancin' Machine on at least
5 two occasions--at the Thunderbird Hotel in Las Vegas in
6 November of 1975, and at Mother's Club in Kansas City in January
7 of 1976. On both occasions, petitioner signed an Artist's
8 Independent Contractor's Agreement with respondent and was paid
9 by respondent.

10 Apparently after the Mother's Club engagement, there
11 was a falling out between the parties and petitioner never again
12 danced with the Dancin' Machine. Petitioner was not asked to
13 accompany the Dancin' Machine on a European tour. Respondent
14 instead asked petitioner to rehearse a new group called Dancin'
15 Machine #2 for a San Francisco engagement. The San Francisco
16 engagement fell through.

17 After the unsuccessful San Francisco engagement, the
18 parties went their separate ways. Other than a few chance
19 meetings at different night clubs where petitioner was performing
20 alone or as a member of a dance group other than Dancin' Machine,
21 there was little communication between the parties for approxi-
22 mately two years. In June 16, 1978, respondent sent petitioner
23 the following letter:

24 "This is to advise you of an interview we would[sic]
25 like to schedule for you concerning a network
26 television disco series as a dancer/actor lead.
27 Please respond as soon as possible to arrange an
interview."

1 A follow-up letter dated June 28, 1978 read as follows:

2 "We are pleased that you have taken your interview
3 for the disco series "Stayin' Alive" that we
4 advised you of in our letter dated 6/16/78. We
5 apprised Paramount TV of your Dancin' Machine
6 credentials and they were very enthusiastic.

7 We will advise you as soon as we have further
8 communication with Paramount and ICM regarding
9 your status as actor/dancer.

10 We are going on record for same."

11 Although petitioner auditioned for the show he didn't get the
12 job. At or about the time the second letter was received,
13 petitioner filed this Petition to Determine Controversy.

14 V

15 DISCUSSION

16 The first question that must be resolved is whether
17 respondent acted unlawfully, in violation of the Labor Code by
18 procuring, offering, promising, or attempting to procure employ-
19 ment or engagement for petitioner without a license. The answer
20 to this question is in the affirmative.

21 There was a dispute in the testimony concerning who
22 procured employment for petitioner. Petitioner testified that
23 respondent was responsible for finding him work as a dancer with
24 the Dancin' Machine; that he observed and heard Kutash, on behalf
25 of respondent, talking with night club owners on many occasions
26 concerning employment for the group, and that part of the induce-
27 ment for signing the Personal Management Agreement was respondent's
28 representation that it would get work for him. Kutash, on behalf
29 of respondent, denied that he or respondent had anything to do

1 with procuring employment for petitioner. Kutash contended that
2 throughout respondent's relationship with petitioner, respondent
3 was represented by licensed artists' managers who were responsible
4 for finding work for petitioner. Respondent introduced various
5 agreements with licensed artists' managers which it alleged
6 supported its position.

7 A review of the agreements does not support respondent's
8 allegations. The first agreement in evidence ~~was~~ between
9 Jeffrey A. Kutash as an individual and the William Morris Agency.
10 The General Services Agreement, which was dated March 23, 1974,
11 was for a term of three years. Neither respondent nor petitioner
12 were parties to this agreement.³

13 Walter Zifkin, Vice-President in charge of business
14 operations for the William Morris Agency, testified that this
15 agency never represented respondent nor petitioner as an artists'
16 manager. He further testified that the William Morris Agency
17 never received any commissions for finding work for petitioner.
18 Two bookings were found for Kutash as an individual--but since
19 both jobs fell through, no commission was ever paid.

20 Kutash testified that he had an oral understanding with
21 an individual with the William Morris Agency to the effect that
22 this agency would not demand any commissions from him until he
23 began receiving sufficient revenue to justify it. However, the
24

25 ³There were other agreements between Kutash and the
26 William Morris Agency, covering radio, TV and the
27 theaters. Neither respondent nor petitioner were
parties to these agreements.

1 Morris Agency file had no notation to that effect. Mr. Zifkin
2 testified that any agreement to waive commissions would have been
3 reflected in the file. The William Morris Agency sent Kutash his
4 individual release on April 5, 1976..

5 There was a hiatus of 15 months where neither Kutash,
6 nor respondent, nor petitioner had any contractual relationship
7 with a licensed artist manager. On July 28, 1977, Jeffrey A.
8 Kutash, as an individual, signed an agreement with ICA Talent
9 Artists Manager. As with the agreements with the William Morris
10 Agency, neither respondent nor petitioner were parties to this
11 agreement. Paragraph 16 of the General Services Agreement states:

12 "In the event this document is signed by more
13 than one person, firm or corporation, it shall
14 apply to the undersigned jointly and severally,
15 and to the compensation, activities, interests
16 and contracts of each and all of the undersigned.
17 If any of the undersigned is a corporation or other
18 entity, and/or if this document is signed by more
19 than one person, corporation or other entity,
20 the pronouns 'I', 'me' or 'my' as used herein
21 shall apply to each such person, corporation
22 and other entity."

23 No person, firm or corporate name appeared other than that of
24 Mr. Kutash . The agreement with ICA lasted only four months.

25 On December 1, 1977, Jeffrey A. Kutash and the Dancin'
26 Machine entered into an Artists' Manager Contract with Agency
27 for the Performing Arts, (APA). Burt Taylor, a theatrical agent
28 employed by the APA, testified that APA got no bookings for Kutash
29 nor the Dancin' Machine and that APA never received any
30 commission. Neither petitioner nor respondent were parties to
31 the agreement with APA. Taylor testified that APA never repre-
32 sented petitioner nor respondent as an artists' manager. The

1 agreement with APA lasted two months.

2 The last agreement offered into evidence was an artist
3 management materials agreement between respondent and Interna-
4 tional Creative Management (ICM) dated March 28, 1978. This was
5 the only artist management agreement where respondent, Kutash
6 Talent Enterprises, Inc., was the contracting party. The agree-
7 ment, for a term of 3 years, was for purposes of ". . . negotiating
8 the sale, lease, license or other disposition of all literary,
9 dramatic, comedic, or musical material and all rights therein"
10 belonging to respondent. Petitioner was not a party to the
11 agreement. There was no evidence that ICM received any
12 commissions for performing services under the agreement.

13 The conclusion that follows from a review of all the
14 testimony and documentary evidence is that respondent was in fact
15 acting as an artists' manager without a license throughout its
16 relationship with petitioner. The jobs that were obtained for
17 petitioner were obtained by respondent and not by any licensed
18 artists' manager. None of the licensed artists' managers hired by
19 Kutash rendered any services for respondent or petitioner. If as
20 respondent alleged, it had licensed artists' managers retained by it
21 to procure employment for petitioner, why was it that none of the
22 artists' managers had any documentation or jobs procured for
23 petitioner, or fees received for finding work? Petitioner looked
24 to, and relied upon, respondent to find him work, and where
25 possible, respondent obtained employment or attempted to obtain
26 employment for petitioner. Since respondent did not have the
27 license required under the Labor Code, it was in violation of the
law.

The remaining question to be answered is: What relief is petitioner entitled to? Since the Personal Management Agreement was a subterfuge to avoid compliance with the Labor Code, it must be deemed void. Buchwald v. Superior Court, 254 C.A. 2d 347, 351(1967). A void agreement has no standing in the law. Ainsworth v. Morrill, 31 C.A. 509(1916) It can be given no effect whatsoever. Progressive Collection Bureau v. Whealton, 62 C.A. 2d 873(1944) It can be neither reformed nor enforced. Ainsworth v. Morrill, supra.

It is the order of the Labor Commissioner that the Personal Management Agreement between the parties is void, and that no further sums are due and owing to respondent under the Agreement. Because there was no evidence introduced by either side concerning any payments made or received under the Agreement, no determination or monetary award will be made as to any such payments.

DATED: 5/29/81

Laurence T. Emert

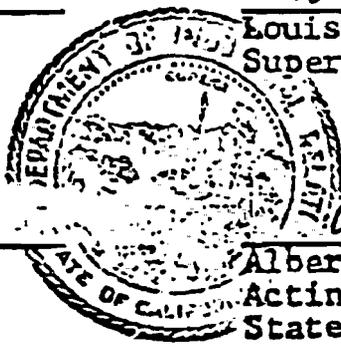
Laurence T. Emert
Special Hearing Officer

APPROVED:
DATED: JUN 15 1981

Louis Giannini

Louis Giannini
Supervising Special Hearing Officer

ADOPTED:
DATED: JUN 15 1981



Albert J. Reyer

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Acting Labor Commissioner
State of California