

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 By: FRANK C. S. PEDERSEN,
3 Special Hearing Officer
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8 Attorneys for the Labor Commissioner

8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA

10	BARRY NUSSBAUM AND PRO MANAGEMENT, INC.,)	
11)	
12	Petitioners,)	TAC 17-80
13)	SFMP 81
14	vs.)	
15)	
16	THE CHICKEN'S COMPANY, INC. AND TED GIANNOULAS,)	
17)	
18	Cross-Petitioners,)	TAC 20-80
19)	SFMP 84
20	vs.)	
21)	
22	BARRY NUSSBAUM AND PRO MANAGEMENT, INC.,)	
23)	
24	Cross-Respondents.)	<u>DETERMINATION</u>

23 The above-entitled controversy came on regularly for hearing
24 in San Diego, California, on May 4, 1981, before the Labor Com-
25 missioner of the State of California by Frank C. S. Pedersen,
26 Counsel for the Division of Labor Standards Enforcement, serving
27 as Special Hearing Officer under the provisions of Section

1 1700.44 of the Labor Code of the State of California; peti-
2 tioners and cross-respondents Barry Nussbaum and Pro Management,
3 Inc. appearing by the law office of Solomon, Ward, Aquirre &
4 Seidenwurm by William W. Ravin, and respondents and cross-peti-
5 tioners The Chicken's Company, Inc. and Ted Giannoulas appearing
6 by the law office of Sullivan, Jones & Archer by William J.
7 Tucker.

8 Evidence, both oral and documentary having been introduced,
9 and the matter having been briefed and submitted for decision,
10 the following determination is made:

11 It is the determination of the Labor Commissioner:

12 1. That the contract entered into between the parties here-
13 to on July 30, 1979 is illegal and petitioners and cross-respond-
14 ents are not entitled to any further commissions.

15 2. That petitioners and cross-respondents return to cross-
16 petitioners the sum of \$7,324.49, representing commissions paid
17 to cross-respondents for services rendered after November, 1979.

18 I

19 INTRODUCTION

20 On June 27, 1980 Barry Nussbaum and Pro Management, Inc.
21 filed a Petition to Determine Controversy pursuant to Labor Code
22 Section 1700.44.

23 The petition alleged and admitted that petitioners had acted
24 in the capacity of a talent agency, although not licensed as
25 such. They nevertheless sought to recover the reasonable value
26 of their services during the length of the contract entered into
27 between the parties on July 30, 1979, the initial term of which

1 was for a period of two years. Respondents filed an answer and
2 cross-petition admitting the fact that the contract had been
3 entered into and that services thereunder had been rendered by
4 petitioners, but asserted that the contract was null and void
5 because petitioners were not licensed as a talent agency and
6 therefore were not entitled to recover any further amounts. The
7 cross-petition also asked for the return of all commissions paid
8 to Barry Nussbaum and Pro Management, Inc., under the contract,
9 amounting to the sum of \$35,476.24.

10 II

11 ISSUES

12 Inasmuch as the petitioners were admittedly not licensed
13 as a talent agency, the only issues are:

- 14 1. Are petitioners nevertheless entitled to the reasonable
15 value of their services?
16 2. Are respondents entitled to recover back all commissions
17 actually paid to petitioners?

18 III

19 DISCUSSION

20 Ted Giannoulas, otherwise known as "The Chicken" is and
21 was an artist as that term is defined in Labor Code Section
22 1700.4.

23 During the early part of 1979 Giannoulas met Nussbaum fre-
24 quently at the office of the San Diego Clippers where Nussbaum
25 was director of sales.

26 They spent some time together and eventually Nussbaum start-
27 ed representing The Chicken as a talent agent without a written

1 contract and eventually, pursuant to the written contract of
2 July 30, 1981.

3 Nussbaum was never licensed by the Labor Commissioner, nor
4 was the contract of July 30, 1979 ever approved by the Labor
5 Commissioner.

6 Nevertheless, Nussbaum rendered services to Giannoulas and
7 was compensated by various checks totalling \$35,476.24, as is
8 set forth in Exhibits M and N, for services through February
9 1, 1980.

10 In November of 1979 (the evidence does not disclose the
11 exact date) Nussbaum was advised by respondent's counsel that he
12 would require license and that the contract would have to be
13 approved by the Labor Commissioner. There is no evidence that
14 either party knew of these requirements prior to November of
15 1979.

16 Nussbaum procured an application for a license but never
17 filed it with the Labor Commissioner.

18 Finally Nussbaum was terminated by The Chicken on February
19 29, 1980.

20 The case of Buchwald v. Superior Court, 254 Cal. App. 2d
21 347, affirmed the broad powers of the Labor Commissioner and
22 states that since the clear object of the Talent Agency Act "is
23 to prevent improper persons from becoming artists' managers
24 (talent agencies) and to regulate such activity for the protec-
25 tion of the public, a contract between an unlicensed artists'
26 manager and an artist is void."

27 The subsequent case of Buchwald v. Katz, 8 Cal. 3d 493,

1 set forth the decision of the Labor Commissioner including repay-
2 ment of all commissions.

3 Nowhere in either of those two cases does the Court state
4 that it is mandatory for the Labor Commissioner to order the
5 return of all commissions.

6 The authorities cited by petitioner stand for the proposi-
7 tion that relief may be granted even under an illegal contract
8 depending upon "the kind of illegality and the particular facts
9 involved". This proposition is well expressed in Southfield
10 v. Barrett, 13 C.A. 3d 290, 91 Cal. Rptr. 514, which states:

11 "...The rule requiring courts to withhold relief under the
12 terms of an illegal contract is based on the rationale that
13 the public importance of discouraging such prohibited trans-
14 actions outweighs equitable consideration of possible injus-
15 tice as between the parties. However, the rule is not an
16 inflexible one to be applied in its fullest rigor under
17 any and all circumstances. A wide range of exceptions has
18 been recognized. Where the public cannot be protected be-
19 cause the transaction has already been completed, no serious
moral turpitude is involved, defendant is the only one
guilty of the 'greatest moral fault,' and defendant would
be unjustly enriched at the expense of plaintiff if the
rule were applied, the general rule should not be applied.
In such circumstances, equitable solutions have been
fashioned to avoid unjust enrichment to a defendant and
a disproportionately harsh penalty upon the plaintiff."
(Cases cited)

20 From evidence in this case it must be concluded that at
21 the time the parties signed the contract in July of 1979 they
22 both believed they were entering into a valid contract.

23 It is obvious from his testimony and demeanor at the hearing
24 that Giannoulas is an able and an astute businessman and not
25 the type to be taken advantage of.

26 On the other hand, Nussbaum is not such an undesirable indi-
27 vidual that he would have been refused a talent agency license

1 had he applied for one, as in fact he should have after being
2 advised in November of 1979 that he required a license.

3 The Hearing Officer now makes the following Findings of
4 Fact and Conclusions of Law:

5 FINDINGS OF FACT

6 1. Giannoulas is a performer of antics and "The Chicken"
7 costume falls within the definition of an "artist" in Labor Code
8 Section 1700.4.

9 2. Nussbaum was a "talent agency" within the meaning of
10 Labor Code Section 1700.4.

11 3. Nussbaum was never licensed as a talent agency, nor
12 was any contract ever approved by the Labor Commissioner.

13 4. Neither party had any reason to believe that they were
14 entering into an illegal contract on July 30, 1981.

15 5. In November of 1979 Nussbaum was advised that he re-
16 quired a talent agency license and thereafter knowingly failed
17 to secure a license from the Labor Commissioner pursuant to Labor
18 Code Section 1700.5.

19 6. Giannoulas paid Nussbaum various amounts of commissions
20 totalling the sum of \$35,476.24. Checks numbers 199, 201 and
21 219 totalling \$7,324.49 were for services rendered by Nussbaum
22 after November of 1979.

23 7. The illegal contract did not involve moral turpitude
24 nor was it entered into with intent to evade the requirements
25 of the Talent Agency Act.

26 8. The repayment of all commissions by Nussbaum would be
27 disproportionately harsh in proportion to the extent of illegality.

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CONCLUSIONS OF LAW

1. The contract entered into on July 30, 1979 by the parties hereto is an illegal contract.

2. Petitioners are not entitled to any further commissions under the contract of July 30, 1979.

3. Petitioners and cross-respondents are ordered to return to respondents and cross-petitioners all sums for services rendered after November of 1979, amounting to the sum of \$7,324.49.

DATED: December 16, 1981.


Frank C. S. Pedersen
Special Hearing Officer

ADOPTED:

JANUARY 6, 1982


Patrick W. Henning
Labor Commissioner
State of California