

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
By: Laurence T. Emert, Hearing Officer
2 107 South Broadway, Room 5015
Los Angeles, CA 90012
3 213/620-2500
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7 BEFORE THE LABOR COMMISSIONER
8 OF THE STATE OF CALIFORNIA
9

10 BANK OF AMERICA NATIONAL TRUST AND) No. 1098 ASC
11 SAVINGS ASSOCIATION, As Executor of) MP-432
the Will of JULIUS H. MARX, also)
12 known as GROUCHO MARX, deceased,) DETERMINATION
13)
Petitioner,)
14 vs.)
15 ERIN FLEMING, also known as MARILYN)
FLEMING, aka ERIN MARILYN FLEMING,)
16 aka MARILYN SUZANNE FLEMING, aka)
MARILYN SUZANNE ERIN FLEMING, aka)
17 MARILYN ERIN FLEMING,)
18 Respondent.)
19

20 The above-entitled controversy came on regularly for hearing
21 before the Labor Commissioner, Division of Labor Standards
22 Enforcement, Department of Industrial Relations, State of
23 California, by Laurence T. Emert, Senior Counsel for the Division of
24 Labor Standards Enforcement, serving as Hearing Officer under the
25 provisions of Section 1700.44 of the Labor Code of the State of
26 California; petitioner, Bank of America National Trust and Savings
27 Association, As Executor of the Will of JULIUS H. MARX, also known
28 as GROUCHO MARX, deceased, appearing by the Law Offices of J. Brin

1 Schulman, by J. Brin Schulman, and respondent, ERIN FLEMING, also
2 known as MARILYN FLEMING, aka ERIN MARILYN FLEMING, aka MARILYN
3 SUZANNE FLEMING, aka MARILYN SUZANNE ERIN FLEMING, aka MARILYN ERIN
4 FLEMING, appearing by the Law Office of Ellison & Ellison, A
5 Professional Corporation, by Christopher Darrow and Sherman M.
6 Ellison. Evidence, both oral and documentary having been
7 introduced, and the matter being briefed and submitted for decision,
8 the following determination is made:

9 It is the determination of the Labor Commissioner:

10 1. That during the time in question, respondent acted as
11 an artist manager as that term is defined in Labor Code §1700.4
12 without a license;

13 2. That respondent be ordered to return to petitioner
14 that part of her compensation, including salaries, commissions,
15 expenses, loans and other miscellaneous income which she
16 received for services performed as an unlicensed artists'
17 manager, totaling \$80,000.00.

18 I

19 INTRODUCTION

20 On October 27, 1977, petitioner Bank of America National
21 trust and Savings Association, as Executor of the Will of
22 Julius H. Marx, also known as Groucho Marx, deceased,
23 (hereinafter petitioner) filed a petition to determine
24 controversy pursuant to Labor Code §1700.44 with the Labor
25 Commissioner of the State of California, against respondent
26 Erin Fleming (hereinafter respondent or Fleming). The petition
27 set forth seven claims for relief, including the following:

1 1. A claim that respondent acted as an unlicensed
2 Artists' Manager during her six-year association with MARX
3 (first and second claims);

4 2. A claim that respondent had a fiduciary duty toward
5 Marx, which duty she breached (third claim);

6 3. A claim that respondent unlawfully caused the
7 transfer to be made of certain of MARX's assets to a
8 corporation with which she obtained a 1/2 ownership interest
9 (fourth claim);

10 4. A claim that respondent engaged in fraudulent and
11 deceitful actions with regard to MARX (fifth claim);

12 5. A claim that respondent exerted undue influence over
13 MARX, thus causing him to transfer significant assets to her,
14 and a request that a constructive trust be imposed to preserve
15 the transferred assets (sixth and seventh claim).

16 In petitioner prayer for relief, petitioner requested
17 that:

18 1. It be determined that the Labor Commissioner has
19 jurisdiction over all claims set forth in the petition;

20 2. It be determined that respondent acted as an Artists'
21 Manager during her association with MARX without a license;

22 3. All contracts between respondent and MARX be declared
23 null and void ab initio;

24 4. Respondent be ordered to make an accounting of all
25 remuneration received from MARX during her association;

26 5. Respondent be ordered to return \$400,000 or such
27 other amount as may be proved at the hearing to petitioner;

28

1 6. The Labor Commissioner impress a constructive trust
2 upon all property in respondent's possession obtained from
3 MARX;

4 7. Punitive damages be imposed in the sum of \$500,000;
5 and

6 8. Reasonable attorneys fees be awarded.

7 Respondent filed an answer to the allegations in the
8 petition denying the substance of each allegation. Hearings
9 before the Labor Commissioner commenced in March of 1978, and
10 continued over the next two years. Prior to submission of the
11 controversy to the Labor Commissioner for a determination,
12 respondent made a motion to: (1) dismiss for lack of
13 jurisdiction, (2) limit issues before the Labor Commissioner,
14 and (3) for judgment. The motions to dismiss for lack of
15 jurisdiction and for judgment, were denied. However, the
16 motion to limit issues was granted. Claims three through seven
17 of the petition were ordered stricken, as was the payer for
18 punitive damages, attorneys fees and the imposition of a
19 constructive trust. With this ruling on respondent's motion,
20 the matter submitted to the hearing officer for a
21 determination.¹

22 1 It was the hearing officer's view that claims three
23 through seven were merely alternative theories for the relief sought
24 by petitioner in claims one and two. Thus, under the facts of this
25 case, a resolution of claims three through seven was not necessary to
26 resolve the underlying controversy. In dismissing claims three
27 through seven, the hearing officer did not intend to suggest that in
an appropriate case the Labor Commissioner could not consider the
theories presented. *Buchwald v. Superior Court*, 254 C.A. 2d 347
(1967) makes it very clear that the authority of the Labor
Commissioner, under the Artists' Manager Act, is broad and
comprehensive.

28 Although the authority of the Labor Commissioner is broad in
determining controversies under the Artists' Manager Act, there is
nothing contained therein which authorizes the award of attorneys

1 II

2 ISSUES

3 The issues presented are twofold:

4 1. Did respondent function as an artists' manager as that
5 term is defined in the Labor Code without a license?

6 2. If so, what relief, if any, is petitioner entitled to?

7 III

8 APPLICABLE LAW

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

12 "An artists' manager is hereby defined to be a person who
13 engages in the occupation of advising, counseling, or
14 directing artists in the development or advancement of
15 their professional careers and who procures, offers,
16 promises or attempts to procure employment or engagements
17 for an artist only in connection with and as a part of the
18 duties and obligations of such person under a contract
19 with such artist by which such person contracts to render
20 services of the nature above mentioned to such artist.

21 The word 'artists' as used herein refers to actors and
22 actresses rendering services on the legitimate stage and
23 in the production of motion pictures; radio artists;
24 musical artists; musical organizations; directors of
25 legitimate stage, motion picture and radio productions;

26 fees. In accordance with the well established rule that attorneys
27 fees may not be awarded absent express statutory authority, the
28 hearing officer did not believe he had authority to issue such an
award. See *LeFare v. Dimond*, 46 Cal. 2d 868 (1956); Code of Civil
Procedure §1021.

As to the request for punitive damages, the hearing officer did
not believe that in a contractual dispute (which is the heart of most
controversies under the Artists' Manager Act), punitive damages were
authorized. See Civil Code §3294.

Finally, as to the imposition of a constructive trust, the
hearing officer did not believe such relief was warranted. However,
in an appropriate case, in formulating a remedy, imposition of a
constructive trust would not be outside the Labor Commissioner's
jurisdiction.

1 musical directors; writers; cinematographers; composers;
2 lyricists; arrangers, and other artists and persons
3 rendering professional services in motion picture,
4 theatrical, radio, television and other entertainment
5 enterprises."²

6 Chapter 6, Group 3, Article 6 of Title 8 of the California
7 Administrations Code contains Rules and Regulations for
8 Artists' Managers.

9 The case law construing the provisions of the Labor Code
10 dealing with artists' manager controversies are Raden v.
11 Laurie, 120 C.A. 2d 778, 262 P. 2d 61 (1953); Buchwald v.
12 Superior Court, 254 C.A. 2d 347; 62 Cal.Rptr. 364 (1964), and
13 Buchwald v. Katz, 8 Cal. 3d 493, 105 Cal.Rptr. 368 (1972).

14 IV

15 DISCUSSION

16 Groucho Marx (hereinafter Marx or the artist) was, up
17 until his death in 1977, a world re[]nown "artist" as that term
18 is defined in Labor Code §1700.4. Respondent first met Marx at

19 _____
20 ² Effective January 1, 1979, Labor Code §1700.4 was Amended
21 to read as follows:

22 "A talent agency is hereby defined to be a person or
23 corporation who engages in the occupation of
24 procuring, offering, promising, or attempting to
25 procure employment or engagement for an artist or
26 artists. Talent agencies may, in addition, counsel
27 or direct artists in the development of their
28 professional careers. The word 'artists' as used
29 herein refers to actors and actresses rendering
30 services on the legitimate stage and in the
31 production of motion pictures; radio artists, musical
32 artists; musical organizations; directors of
33 legitimate stage, motion composers; lyricists;
34 arrangers; and other artists and persons rendering
35 professional services in motion picture, theatrical,
36 radio, television and other entertainment
37 enterprises."

38 Since the petition in this case was filed before the
statute was amended in 1979, the amended version of the statute
was not considered in reaching this determination.

1 a party in August of 1970. A year later, respondent was
2 employed by Marx under an oral agreement to do secretarial
3 work. Compensation was nominal at approximately \$100 per week.

4 Respondent's influence in Marx's life began to increase
5 significantly in 1972, beginning in the later part of that
6 year.

7 On October 12, 1972, Marx agreed to employ respondent:

8 ". . . in such capacities as I may require. The services
9 to be rendered by you may, without limiting the generality
10 of the foregoing, include executive producer, associate
producer, coordinator, and secretary."

11 Compensation for respondent's services included a salary of
12 \$100 per week, 10% of the artist's gross income from his
13 personal appearances, payment of \$5,000 for [a] product
14 endorsement deal by the artist, and a percentage of all net
15 income received by the artist on a record album deal. The
16 contract was terminable at the will of either party.

17 In November of 1972, the artist retained respondent as his
18 personal manager for a term of seven years. The Personal
19 Manager's contract was a form contract prepared by the
20 Conference of Personal Managers. Under the terms of the
21 contract, respondent was to:

22 "advise and counsel in the selection of literary, artistic
23 and musical material; advise and counsel in any and all
24 matters pertaining to publicity, public relations and
25 advertising; advise and counsel with relation to the
26 adoption of proper format for presentation of my artistic
27 talents and in the determination of proper style, mood,
28 setting, business and characterization of keeping with my
talents; advise, counsel and direct in the selection of
artistic talent to assist, accompany or embellish my
artistic presentation, advise and counsel with regard to
general practices in the entertainment and amusement
industries and with respect to such matters of which you

1 may have knowledge concerning compensation and privileges
2 extended for similar artistic values; advise and counsel
3 concerning the selection of theatrical agencies, artists'
4 managers, and persons, firms and corporations who will
5 counsel, advise, seek and procure employment and
6 engagements for me."

7 Compensation for services was a commission not to exceed 10% of
8 any monies received by the artist resulting from the use of his
9 artistic talents. In bold block print, the following
10 disclaimer was included:

11 "IT IS CLEARLY UNDERSTOOD THAT YOU ARE NOT AN
12 EMPLOYMENT AGENT OR THEATRICAL AGENT OR ARTISTS'
13 MANAGER, THAT YOU HAVE NOT OFFERED OR ATTEMPTED OR
14 PROMISED TO OBTAIN, SEEK OR PROCURE EMPLOYMENT OR
15 ENGAGEMENTS FOR ME, AND THAT YOU ARE NOT OBLIGATED,
16 AUTHORIZED, LICENSED OR EXPECTED TO DO SO."

17 At the time the Personal Manager's contract was signed, Marx
18 had in his employ International Famous Agency (hereinafter IFA)
19 as his licensed artists' manager, as well as a retinue of other
20 professionals, including public relations men, a business
21 manager and a lawyer.

22 Over the course of the next five years, Marx became
23 increasingly dependent upon respondent for his personal well
24 being, as well as the promotion of his career.³ Respondent
25 began to wear many hats, as secretary, housekeeper, decorator,
26 nurse, consultant, confidant, personal manager and close friend
27 to the artist. Had respondent's activities been limited to

28 ³ In April of 1974, an agreement was entered into between
respondent and Marx wherein Marx agreed to compensate
respondent for her work in promoting both the licensing of
Marx's name and caricature in connection with merchandise, and
for the resyndication of the television program, "You Bet Your
Life." Payment was to be 1/2 of the net cash proceeds received
from both projects. In that agreement, Marx referred to
respondent as his secretary and business manager.

1 these, and nothing more, the Labor Commissioner would have no
2 jurisdiction to adjudicate this controversy. However, the
3 evidence was that respondent did more - including the attempt
4 to procure employment or engagements for the artist in
5 connection with and as a part of her duties under her personal
6 management contract. In performing the latter activities
7 without a license, respondent was in violation of the Labor
8 Code.⁴

9 Strangely enough, "employment" is not defined in the
10 Artists' Managers Act or in the Rules and Regulations for
11 Artists' Managers contained in the Administrative Code.⁵

12 "Engagement" is, however, defined in Labor Code §1700.1(a), (b)
13 and (c) as follows:

14 "(a) Theatrical engagement means any engagement or
15 employment of a person as an actor, performer, or
16 entertainer in a circus, vaudeville, theatrical, or other
17 entertainment, exhibition, or performance.

18 ⁴ As noted in the case of Raden v. Laurie, 120 C.A. 2d 778,
19 262 P. 2d 61 (1953) construing Labor Code §1650 (which
20 contained identical language as that contained in Labor Code
21 §1700.4 before its amendment in 1979):

22 "One is not an artists' manager unless he both
23 advises, counsels and directs artists in the
24 development or advancement of their professional
25 careers, and also procures, offers, promises or
26 attempts to procure employment or engagements for an
27 artist 'only in connection with and as a part of the
28 duties and obligations of such person under a
contract with such artist by which such person
contracts to render services of the nature above
mentioned to such artist.' Such is the clear working
of the statute." (at 781)

⁵ Contrast this with Labor Code §6303(b) which defines
"employment" for purposes of the California Occupational Safety
and Health Act, and Unemployment Insurance Code §601 et. seq.
which defines "employment" for purposes of administering the
Unemployment Insurance Code.

1 (b) Motion picture engagement means any engagement or
2 employment of a person as an actor, actress, director,
3 scenario, or continuity writer, camera man, or in any
4 capacity concerned with the making of motion pictures.

5 (c) Emergency engagement means an engagement which has to
6 be performed within 24 hours from the time when the
7 contract for such engagement is made."

8 To find a definition of employment, we must look outside
9 the Artists' Managers Act. "Employment" is defined in Black's
10 Law Dictionary (5th Ed. 1979) as follows:

11 "Act of employing or state of being employed; that which
12 engages or occupies; that which consumes time or
13 attention; also an occupation, profession, trade, post or
14 business."

15 The California Supreme Court as early as 1894, in the case of
16 Malloy v. Board of Education, 102 Cal. 642, 36 P. 948 defined
17 employment to mean:

18 "Employment implies a contract on the part of the employer
19 to hire, and on the part of the employee to perform
20 services . . ." (at 646).

21 In English v. City of Long Beach, 77 C.A. 894, 176 P. 2d 940
22 (1947) the court adopted the following definitions from the
23 Cyclopedic Law Dictionary and Corpus Juris:

24 "A business or vocation, . . . calling; office; service;
25 commission, trade; profession . . . The service of
26 another . . . the act of employing, in another sense, the
27 state of being employed. In 20 Corpus Juris, page 1245,
28 the following appears, 'The word is not of the technical
language of the law, or of any science or pursuit, and
must be construed according to the context and approved
usage of the language.' It has been variously defined as
the act of attending to the duties . . . and services of
another . . ." (at 899).

It is this hearing officer's view that "employment" for
purposes of the Artists' Managers Act, refers to the rendition
of personal services by the artist, i.e., when the artistic or

1 creative talents of the artist are on display. The very nature
2 of employment suggests that the artist will receive some
3 compensation for his services.

4 There was a great conflict in the evidence before the
5 hearing officer as to the extent of respondent's involvement in
6 attempting to procure or in fact procuring employment or
7 engagements for Marx. In resolving this conflict, the hearing
8 officer has determined after a review of the testimony and
9 documentary evidence, that respondent spent part of her time
10 attempting to procure employment or engagements for Marx
11 without a license to do so. By her own admission, respondent
12 came into Marx's life when other considered him "washed up" as
13 a performer. Respondent dedicated part of her time to
14 attempting to find work for Marx and return him to the public
15 eye.

16 Respondent's efforts included helping to arrange for
17 Marx's concert tour which included appearances at Iowa State
18 University, the Masonic Temple in San Francisco, the Music
19 Center in Los Angeles, and Carnegie Hall in New York.⁶ Her
20 efforts also included helping to arrange for Marx's television
21 appearances on Merv Griffin, Bill Cosby and Bob Hope.
22 Respondent was also involved with attempting to promote Marx's
23 appearance on the Tomorrow Show and television specials to be
24 produced by people such as Richard Adams, Denny Bond, Pierre
25 Cosette, Bernie Kukoff, Peter Schlessinger, Dick Clark, George
26 Berrie, George Schlatter, and Danny Selznick. Her involvement

27 _____
28 ⁶ An appearance at a Ralph Nader Public Citizen Program
"Washington Greet Groucho" was cancelled shortly before it was
scheduled to occur.

1 included conversations with various producers to discuss the
2 viability of proposed television specials, and attendance at
3 meetings where the concept for the specials and finances were
4 discussed. The fact that none of these specials were ever made
5 is not significant. The Artists' Managers Act is designed to
6 control both the actual obtaining or procurement of employment
7 or engagements and the promise or attempt to procure employment
8 or engagements.

9 When all the evidence is reviewed in its totality, the
10 conclusion seems inescapable that respondent was dedicating at
11 least part of her time while in Marx's employ to attempting to
12 procure engagements or employment for that artist without being
13 licensed to do so.

14 Respondent argues that the disclaimer in her Personal
15 Management contract makes it impossible to reach the conclusion
16 that she was in violation of the Artists' Managers Act. This
17 argument is not persuasive. As Buchwald v. Superior Court,
18 supra instructs:

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

21 The court, or as here, the Labor Commissioner, is
22 free to search out illegality lying behind the form
23 in which a transaction has been cast for the purpose
of concealing such illegality. (Cite omitted) The
24 court will look through provisions, valid on their
face, and with the aid of parol[e] evidence,
25 determine that the contract is actually illegal or is
part of an illegal transaction." (Cite omitted)

1 Similarly, in the case at bar, the hearing officer may too look
2 to the essence of the true relationship between the parties and
3 not be bound by boilerplate language in the contract.

4 Respondent further points to the existence of licensed
5 Artists' Managers which the artist had under contract during
6 his relationship with her, and to booking memos from the
7 Artists' Managers in support of her argument that she could not
8 perform activities of an unlicensed Artists' Manager. Again,
9 the hearing officer is not persuaded. That the artist may have
10 had a licensed Artists' Manager in his employ does not
11 necessarily mean that respondent was not also performing
12 services of an Artists' Manager without a license.

13 Finally, respondent argues that any contracts in question
14 where the artist was engaged or employed were prepared by
15 attorneys or other professionals. True, the final terms of
16 contracts where Marx actually performed as an artist were
17 reduced to writing by others. But, the evidence was by a
18 preponderance that respondent was involved with negotiating
19 terms of proposed television appearances by Marx with some
20 interested producers.

21 The final issue, and most crucial issue, is what relief
22 should be afforded petitioner? Is petitioner entitled to have
23 respondent return all consideration paid to her during the
24 entire six year period of the relationship? The hearing
25 officer believes such relief would be unduly harsh, and
26 contrary to the spirit of the Artists' Managers Act.

27 If the Personal Management contract was a ruse to
28 circumvent the Artists' Managers Act, then it would certainly

1 be within the authority of the Labor Commissioner to declare
2 the contract void ab initio, and order the return of all
3 consideration received. However, in the case at bar, the
4 hearing officer does not believe any such fraud or subterfuge
5 was intended by respondent. That she did require a license for
6 some of her activities for the artist is without question.
7 But, it is apparent that had she applied for a license, and
8 paid the nominal fee, the license would have been issued.

9 The Artists' Managers Act is a remedial statute designed
10 to accomplish two goals:

- 11 1. To protect those artists looking for employment or
12 engagements, and
- 13 2. To protect the public by preventing improper persons
14 from becoming licensed.

15 At the time he met respondent, Marx was 80 years old, and
16 had been in show business for well over 60 years. As such, he
17 could hardly have been described as a neophyte in that
18 business. While the Act clearly is intended to protect all
19 artists, the inexperienced and veteran, there is more concern
20 to protect the new artist, who because of his lack of
21 experience can be more easily exploited.

22 Respondent hardly fit the bill of the unsavory individual
23 that the act seeks to prevent from ever receiving a license.
24 There was no evidence introduced to show any criminal history
25 or anything else that would have denied her a license had she
26 taken the time to submit an application and pay the required
27 fee.
28

1 Nevertheless, respondent did violate the Artists' Managers
2 Act as then enacted.⁷ To encourage compliance with the
3 Artists' Managers Act and deter others from failing to obtain
4 the requisite license, restitution is required. The question
5 is how much and to what extent.

6 It is the hearing officer's view that consistent with what
7 he believes to be his broad discretion in formulating a remedy
8 that is appropriate under the facts of this case,⁸ respondent
9 is ordered to return all sums received between the time she
10 signed her Personal Management Contract and the death of Marx
11 which reflect payment for services performed as an unlicensed
12 artists' manager.

13 The evidence before the hearing officer was that
14 respondent received in salaries, commissions, expenses, loans
15 and other miscellaneous income, the sum of \$401,462.53 during
16 the period in question. Unfortunately, Marx did not clearly
17 delineate what sums were paid to respondent for her services as
18 an artists' manager. It is the hearing officer's determination

19 ⁷ The hearing officer expresses no view as to whether the
20 1979 amendment to the Artists' Managers Act reflects any
significant change from its predecessor statute.

21 ⁸ In Garson v. Division of Labor Law Enforcement, 33 Cal.
22 2d 861, 206 P. 2d 363 (1949) at 864, the California Supreme
23 Court recognized the comprehensive powers of determination
granted to the Labor Commissioner to settle disputes arising
out of the Artists' Managers Act:

24 "It is a reasonable implication from this section
25 that the general policy is to give comprehensive
26 powers of determination in disputes between the
27 agency and applicant in regard to commissions or fees
28 and their contracts. They may provide in their
contract for a broad and inclusive arbitration and it
should follow that similar broad powers are granted
to the commissioner to settle disputes where the
parties do not provide for arbitration as
contemplated by section 1647.5" (at 864).

1 that respondent spent no more than 20% of her time performing
2 the services of an artists' manager. Accordingly, it is my
3 determination that respondent be ordered to return the sum of
4 \$80,000.00 to petitioner.

5 DATED: 1/6/82

_____/s_____
Laurence T. Emert
Hearing Officer

7 ADOPTED:

8 DATED: January 14, 1982

_____/s_____
Patrick Henning
State of California Labor
Commissioner

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