

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 By: Carl G. Joseph, Special Hearing Officer
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8 BEFORE THE LABOR COMMISSIONER
9 OF THE STATE OF CALIFORNIA
10

11 BRIAN CUMMINS and SCOTSMANAGEMENT) CASE NO. TAC 5-83
12 CORPORATION,)
13) DETERMINATION
14)
15) Petitioners,)
16)
17) vs.)
18)
19) THE FILM CONSORTIUM, a California)
20 Corporation,)
21) Respondent.)
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18 The above-entitled controversy came on regularly for hearing
19 before the Labor Commissioner, Division of Labor Standards
20 Enforcement, Department of Industrial Relations, State of Cali-
21 fornia, by Carl G. Joseph, attorney for the Division of Labor
22 Standards Enforcement, serving as hearing officer under the pro-
23 visions of § 1700.44 of the Labor Code of the State of Cali-
24 fornia. Petitioners Brian Cummins and Scotsmanagement Corpora-
25 tion appeared by the law firm of Wyman, Bautzer, Rothman, Kuchel
26 & Silbert, by Patricia L. Glaser and Michael F. Wright. Respon-
27 dent The Film Consortium, a Nevada corporation, appeared by the

1 law firm of Levin, Ballin, Plotkin & Zimring, by Jay J. Plotkin.
2 Oral and documentary evidence having been introduced, and the
3 matter having been briefed and submitted for decision, the
4 following determination is made:

5 1. That throughout its relationship with petitioners,
6 respondent agreed to act and acted as a talent agency as defined
7 in Labor Code § 1700.4 on behalf of petitioners without obtaining
8 the license required by Labor Code § 1700.5.

9 2. That the agreements entered into between petitioners
10 and respondent, dated February 1, 1980 and June 10, 1981, are
11 void and unenforceable and that petitioners have no liability
12 thereunder to respondent and respondent has no rights or privi-
13 leges thereunder.

14 I.

15 INTRODUCTION.

16 On April 4, 1983, petitioners Brian Cummins and Scots-
17 management Corporation (hereinafter referred to collectively as
18 "petitioners") filed a petition to determine controversy pursuant
19 to Labor Code § 1700.44 with the Labor Commissioner of the State
20 of California, against respondent The Film Consortium (herein-
21 after referred to as "respondent" or "TFC"). The petition
22 alleged that petitioner Cummins was a director of television com-
23 mercials and that TFC had procured employment for him and thereby
24 acted as a talent agency in the State of California as defined in
25 § 1700.4 of the Labor Code. Respondent was not licensed to act
26 as such. This case appears to be the first time the Labor

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1 Commissioner has considered the role of so-called television com-
2 mercial "production" companies vis-a-vis directors of such com-
3 mercials in the instant context or in any other context.

4 Petitioners prayed for the following relief:

5 1. A determination that the agreements of February 1,
6 1980 and June 10, 1981 between petitioners and TFC are void and
7 unenforceable as a matter of law and public policy;

8 2. An accounting and remittance by respondent to
9 petitioners of all money owed to petitioners as a result of a
10 finding that the above-specified agreements are void.

11 On April 19, 1983, respondent filed a response to petition
12 denying that it had acted as an unlicensed talent agency. On May
13 17, 1983, petitioners filed an action in the Superior Court
14 seeking declaratory relief and damages for breach of the agree-
15 ments and other alleged tortious conduct. On August 1, 1983,
16 TFC filed an action in Superior Court for an injunction to
17 restrain alleged breach of the agreements by petitioners.

18 The hearing on the petition began on May 25 and 26, 1983,
19 with the presentation of petitioners' case in chief. Both sides
20 filed hearing briefs on May 24, 1983. The hearing was then con-
21 tinued to July 19 and again to August 4, 1983. Upon resumption
22 of the hearing on August 4, 1983, petitioners made an oral motion
23 for summary judgment, which was denied. On August 4, 5 and 7,
24 1983, petitioners completed presentation of their case and
25 respondent's case was presented. On August 4, 1983, petitioners
26 filed a reply to respondent's hearing brief. On August 15, 1983,
27 pursuant to stipulation, both parties filed closing briefs.

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II.

ISSUES.

1. Did respondent, as a so-called "production company" purportedly engaged in the production of television commercials, function as a talent agency as defined in Labor Code § 1700.4 without a license?

2. If so, to what relief are petitioners entitled?

3. If respondent is a talent agency as defined by Labor Code § 1700.4, did it breach any fiduciary duty owing from it to petitioners?

4. If so, to what relief, if any, are petitioners entitled?

III.

APPLICABLE LAW.

The law applicable to the claims asserted by petitioners is contained in Labor Code §§ 1700-1700.47, known as the Talent Agencies Act (hereinafter sometimes "the Act"). Section 1700.5 of the Act prohibits any person from engaging in the occupation of a talent agency without first procuring a license from the Labor Commissioner. Respondent has admitted that it has never sought or obtained such a license.

Section 1700.4 of the Act provides:

"A talent agency is hereby defined to be 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

1 artists in the development of their pro-
2 fessional careers."

3 The Act provides a comprehensive regulatory scheme governing
4 the conduct of talent agents, including licensing requirements,
5 provisions for investigation of character, conduct of business,
6 bonding requirements, posting of fees, verification of employer
7 experience, requirements regarding maintenance of books and
8 records and other provisions. Among the principal decisions
9 interpreting the statutory predecessor of the Act is Buchwald v.
10 Superior Court, 254 Cal.App.2d 347, 62 Cal.Rptr. 364 (1967).

11 IV.

12 DISCUSSION AND FINDINGS.

13 The Talent Agencies Act, enacted in 1978, is the most recent
14 in a series of California statutes regulating the procurement of
15 employment for artists. The history of such regulation in Cali-
16 fornia dates from 1913 and represents a continuing public and
17 legislative concern with protecting artists from exploitation by
18 those who procure employment for them. See Buchwald, supra, 254
19 Cal.App.2d at 351; Johnson & Lang, "The Personal Manager in the
20 California Entertainment Industry," 52 S.Cal.L.Rev. 375, 383-86
21 (1979).

22 In the instant case, the Labor Commissioner finds that
23 respondent engaged in multiple acts of procuring employment and
24 that TFC's "primary activity" with respect to petitioners was to
25 procure employment for Brian Cummins. TFC's procurement activity
26 was therefore far greater than the minimum necessary to trigger
27 application of the Act. The language and purpose of the Act

1 require its application even to single acts of procuring employ-
2 ment, regardless of the procuring entity's overall activity.

3 This interpretation of the Act is supported by Buchwald,
4 supra, 254 Cal.App.2d at 351, where the court applied the
5 Artists' Managers Act (the statutory predecessor to the Act) to a
6 contract pursuant to which defendant "undertook, among other
7 things, to act as 'exclusive personal representative, advisor and
8 manager in the entertainment field.'" (emphasis added) The
9 Artists' Managers Act applied to persons who functioned as per-
10 sonal managers and employment procurers. A determination that
11 defendant acted as a personal manager was thus necessary to its
12 application. In deciding the applicability of the Artists'
13 Managers Act, the court did not determine whether the regulated
14 activity was defendant's "primary" activity or merely "inciden-
15 tal." If application of the statutory scheme had been limited to
16 those entities whose "primary activity" is procuring employment,
17 the Buchwald court necessarily would first have had to determine
18 defendant's "primary activity," because he performed other func-
19 tions besides those regulated by the statute. The absence of any
20 such determination therefore shows that the Buchwald court
21 applied the Artists' managers to any person engaged in acts of
22 the type regulated by the statute, regardless of such person's
23 "primary activity." Obviously, the careful consideration and
24 interpretation given by a California appellate court to the prede-
25 cessor of the Act is a persuasive guide to interpreting the Act
26 itself.

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1 Since 1953, the Labor Commissioner has consistently con-
2 strued the Act and its predecessors to encompass any unlicensed
3 procurement activity, regardless of the procuring entity's over-
4 all activity. In its amicus brief filed in Raden v. Laurie, 120
5 Cal.App.2d 778, 262 P. 2d 61 (1953), the Commissioner interpreted
6 the predecessor statute of § 1700.4 to include "any and all
7 activities whereby, one for a fee procures or attempts to procure
8 employment for another . . ." (emphasis added). This interpre-
9 tation is further expressed in 8 California Administrative Code
10 § 12000(b) (1970), which defines an "artists' manager" (now a
11 "talent agent" under the current Act) as one "who, in fact,
12 either procures, offers, promises, or attempts to procure employ-
13 ment . . . for an artist . . ." Johnson & Lang, supra, 52 S.
14 Cal.L.Rev. at 389-93.

15 The fundamental purpose and intent of the Talent Agencies
16 Act require that it apply even to isolated acts of procuring
17 employment. The statutory policy of protecting artists from
18 exploitation requires application of the Act to any transaction
19 where such exploitation might arise. Obviously, an artist could
20 be seriously exploited by means of a single contract or single
21 instance of procuring employment. Yet, in such cases, the act of
22 procuring employment could easily constitute only a minute frac-
23 tion of an entity's overall activity. Unless the Act were
24 applied in such situations, its purpose would be frustrated and
25 an entity seeking to evade the Act could do so merely by engaging
26 in activities other than procuring employment. To avoid such
27 results and to effectuate statutory policy, the Act must be

1 interpreted to apply even to discrete acts of procuring or pro-
2 mising to procure employment for an artist.

3 The evidence shows that TFC's primary activities are tying
4 directors such as Mr. Cummins to long-term contracts and selling
5 their services to advertising agencies. The advertising agencies
6 bear the financial burden of producing the commercial, including
7 the payment of the director. The actual production work is per-
8 formed by the director and by free-lance production personnel
9 chosen by the director, who are not part of TFC and who are also
10 paid out of funds advanced by the advertising agency. In prac-
11 tice, TFC neither produces the commercial nor, for the most part,
12 finances the commercial. Its essential function is to promote
13 and sell the services of directors to the advertising agencies,
14 which then actually employ the directors.

15 By way of background, certain aspects of the way in which
16 TFC's business operates deserve further discussion. The parties
17 do not dispute that, as a director of television commercials,
18 petitioner Cummins is an artist as defined in Labor Code
19 § 1700.4. The director is the key creative element in the pro-
20 duction of a commercial. Mr. Cummins testified to the director's
21 decisive role in production as follows: "Everything that is in
22 front of the camera by way of wardrobe, talent or design is . . .
23 designed specifically by me for that commercial." Mr. Cummins
24 chooses all the production crew that work on the commercial and
25 fully controls their actions in the production process. Evidence
26 presented by TFC confirmed that the commercial is primarily the
27 product of the director.

1 Advertising agencies are principal actors in the development
2 and financing of commercials. The advertising agencies create
3 the overall advertising campaigns for their sponsor-clients and
4 develop broad guidelines for the commercials envisioned for such
5 campaigns. Advertising agencies are the source of business for
6 directors and the companies that represent them.

7 The process that ultimately leads to production of a commer-
8 cial begins with a sales effort by a company like TFC, by which
9 it promotes to the agencies the talent of the directors it has
10 under contract. The evidence showed that TFC's entire sales
11 effort is focused on promotion and selling of the talent of
12 directors such as Mr. Cummins.

13 The evidence also showed that the advertising agency looks
14 primarily to the director to execute the commercial. Because the
15 commercial is primarily the product of the director, the adver-
16 tising agencies solicit bids from companies such as TFC which
17 represent directors. Such companies represent the only source
18 from which the agencies may obtain the services of those direc-
19 tors they prefer. Witnesses for both sides testified that the
20 advertising agency's primary concern in selecting companies to
21 bid on a commercial is to obtain the services of the specific
22 director such a company represents.

23 The director is also the principal figure in developing the
24 bid a company like TFC submits to the advertising agency. Testi-
25 mony confirmed that the essential information required to develop
26 the bid (i.e., the number of shooting days, the kind of equip-
27 ment, the number and type of actors and the set needed) is

1 determined by the director. TFC's participation in the bidding
2 process is limited to the assembly of cost figures developed by
3 the director and the free-lance producer the director selects to
4 assist him. After the bid is complete, it is submitted to the
5 advertising agency. Although the agency considers the amount of
6 the bid, the primary factor in awarding the commercial is the
7 identity of the director. Testimony showed that the agency often
8 chooses a higher or the highest bid just to obtain the services
9 of a preferred director.

10 The evidence further established that after the advertising
11 agency selects the preferred director -- and thus the successful
12 bid -- it pays the entire cost of producing the commercial. Sub-
13 stantial evidence was presented that the advertising agency nor-
14 mally pays between one-third and one-half of the bid price before
15 the commencement of actual production work and that advance pay-
16 ments by the agency cover the entire cost of production.

17 The actual production work on commercials produced through
18 TFC is performed by the director and the free-lance production
19 personnel the director selects to work with him. (Such production
20 personnel are not part of TFC and are hired on a job-by-job
21 basis. The evidence established that TFC's permanent staff per-
22 form very little or no actual production work.

23 The contracts here at issue purport to provide for the
24 employment of petitioner Cummins (through his personal services
25 entity Scotsmanagement Corporation) by TFC. The evidence, how-
26 ever, showed that Mr. Cummins is in reality not an employee of
27 TFC. Mr. Cummins was consistently able to select the projects on

1 which he preferred to work, or to refuse to work altogether, at
2 his discretion. The evidence further showed that Mr. Cummins had
3 complete control over the commercials on which he worked. Mr.
4 Cummins selected the crew and directed their actions in the pro-
5 duction process. While TFC may have had nominal supervisory
6 control over the projects on which Mr. Cummins worked, the evi-
7 dence showed that it neither exercised nor possessed control over
8 Mr. Cummins, did it nor in any way enhance his artistic endea-
9 vors.

10 The evidence established that the real source of employment *
11 for directors such as Mr. Cummins is the advertising agency.
12 TFC's essential function, by contrast, is to bring the advertising
13 agency and the director together.

14 In form, the exchange of consideration between petitioners
15 and TFC differs from that normally found between a talent agency
16 and the talent it represents. A talent agency usually receives a
17 percentage of the money paid by the employer to the talent. TFC,
18 by procuring employment for Mr. Cummins, was able to charge a
19 markup of some 35% on the cost of the commercial. This markup,
20 however, could only be obtained by and as the result of TFC's *
21 procurement of employment for Mr. Cummins. The markup is there-
22 fore the equivalent of a commission on Mr. Cummins' earnings.

23 TFC sought to differentiate itself from standard talent
24 agencies on the grounds that it is "primarily" a production com-
25 pany. The evidence indicates that TFC may on occasion have acted
26 as a production company, held itself out as a production company
27 and made money as such. TFC's actions as a production company,

1 however, are irrelevant to application of the Talent Agency Act,
2 which turns on whether TFC engaged in the type of employment pro-
3 curement activity regulated by the Act. The evidence showed that
4 TFC regularly engaged in such activity and thereby became subject
5 to the Act.

6 TFC further argued that its practice with respect to Mr.
7 Cummins merely reflects industry norms. Whether other companies
8 situated similarly to TFC are subject to the Act, of course, is
9 not at issue in this case. That other such companies may also
10 procure employment for directors, however, does not reduce
11 the need for or effect of application of the Act to TFC's pro-
12 curement activity on behalf of Mr. Cummins.

13 Respondent argued that the Act is inapplicable because TFC
14 has suffered losses on commercials directed by Mr. Cummins. This
15 issue is strongly contested, but even if respondent's version is
16 true, it is unpersuasive as an objection to application of the
17 Act. That TFC may have suffered such losses in the course of its
18 activities apart from procuring employment for petitioners does
19 not negate the fact that TFC engaged in the type of procurement
20 activity regulated by the Act.

21 In support of its argument that it employed Mr. Cummins, TFC
22 maintains that no correlation existed between the amount of the
23 director's fee paid to TFC by the advertising agency and the
24 amount of money passed on to Mr. Cummins. TFC presented no evi-
25 dence in support of this point. At most, however, this argument
26 proves that TFC was able, in addition to its markup, to earn a
27 commission directly from Mr. Cummins' earnings. TFC's possible

1 retention of part of the director's fee does not change the fun-
2 damental fact that the entire amount of this fee was paid by the
3 advertising agency. TFC's position seeks to elevate the form of
4 the transaction over its substance. The weight of the evidence
5 clearly supports petitioners' contention that the money paid to
6 Mr. Cummins, in substance, was paid by the advertising agency and
7 passed on to him by TFC.

8 Respondent maintains that it has not engaged in "the occupa-
9 tion of" procuring employment for an artist. In support of this
10 argument, TFC mistakenly has relied on several cases, only two of
11 which merit discussion here. In Pawlowski v. Woodruff, 122 Misc.
12 695, 203 N.Y.Supp. 819 (App. Term 1924), the appellate court
13 refused to apply the New York counterpart of the Act to procure-
14 ment activity that the court found to be incidental to a manage-
15 ment contract between the parties. However, the New York
16 statute, unlike § 1700.4, contained an express exception which
17 exempted from its licensing requirements "the business of
18 managing . . . artists . . . where such business only inciden-
19 tally involves the seeking of employment therefor" (emphasis
20 added). Pawlowski is inapposite here because § 1700.4 contains
21 no such exemption for "incidental" procurement activity. The
22 facts of this case further demonstrate that TFC's procurement
23 activity far exceeded in frequency, purpose and financial gain
24 any possible level of "incidental" procurement which might be
25 excused under the Act.

26 TFC also relies on general language from City of Los Angeles
27 v. Cohen, 124 Cal.App.2d 225, 228, 268 P.2d 183 (1954), as

1 authority that it does not engage "in the occupation of" pro-
2 curing employment. The reasoning and result in Cohen, however,
3 support application of the Act to TFC. Defendant in Cohen, a
4 professional accountant, purchased accounts of a business owned
5 by a friend. Defendant undertook this activity for personal
6 reasons, not for financial gain. His profits over a three-year
7 period totaled only about \$2,000 annually. Defendant did not
8 hold himself out as being in the business of purchasing accounts
9 and spent only a small portion of his time in that activity.

10 The City of Los Angeles sought to tax defendant as a person
11 engaged "in the business of" purchasing monetary obligations
12 at a discount. Defendant resisted imposition of the tax on the
13 grounds that he was not engaged in such a business. In affirming
14 a judgment for the city, the Court of Appeal concluded that the
15 question of whether defendant was sufficiently engaged in the
16 subject business was "not even a close one." Defendant had
17 engaged in some 190 transactions, which showed "a frequency and
18 continuity" in the taxed activity. The court found that defen-
19 dant had derived "substantial profits" from this activity. The
20 court held defendant's argument that he only occasionally pur-
21 chased such accounts to be of no consequence. Id. at 228.

22 As in Cohen, the facts of this case demonstrate that TFC
23 engaged in "the occupation of" procuring employment for peti-
24 tioners. The evidence showed that TFC held itself out as capable
25 of obtaining employment for Mr. Cummins, that it arranged roughly
26 90 commercials for petitioners over a three-year period, and that
27 TFC has derived very large financial gains from this activity.

1 Cohen therefore is consistent with and supports application of
2 the Act to the facts of this case.

3 The evidence also showed that, in addition to its violations
4 of the Act, TFC has violated its fiduciary duties as a talent
5 agency. Since February, 1980, TFC has circulated to advertising
6 agencies "corporate reels," which are video tapes or film reels
7 containing the work of several directors TFC has under contract.
8 The various commercials contained on this reel are specifically
9 identified as the work of a particular directors only by a single
10 piece of paper. As soon as this piece of paper is separated from
11 the reel itself, the advertising agency is unable to identify the
12 director responsible for any individual commercial. This con-
13 fusion is a deliberate result of the use of the corporate reel.
14 The evidence showed that TFC's purpose in using the reel was to
15 obscure the identity of Mr. Cummins -- the director responsible
16 for the superior work shown on the reel -- and thereby to attri-
17 bute or infer such work to other directors or to TFC itself.
18 This practice clearly violates the fiduciary duty TFC owed to
19 petitioners as a talent agency.

20 There appear to be other and additional grounds for determin-
21 ing that the subject agreements are void as against public policy.
22 In view of respondent's clear violation of the Talent Agency Act,
23 however, it is unnecessary to address these issues at this time.
24 Moreover, whether the Labor Commissioner has jurisdiction over
25 such issues is unclear.

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CONCLUSION.

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3 The evidence in this case shows that TFC's principal activi-
4 ties pursuant to the agreements here at issue was to procure
5 employment for Brian Cummins. TFC's continuous and systematic
6 procurement activity surpasses any threshold requirements
7 necessary for application of the Act. That TFC engaged in other
8 activities besides procuring employment is irrèlevant to the
9 application of the Act for the reasons stated above. Pursuant
10 to its agreements with petitioners, TFC acted as an unlicensed
11 talent agency. TFC also breached its fiduciary duties as a
12 talent agency by circulating "corporate reels" that misattributed
13 the work of petitioner Cummins to others.

14 The agreements of February 1, 1980 and June 10, 1981 between
15 petitioners and respondent are determined to be void and unenfor-
16 ceable. The amount of money respondent will be required to dis-
17 gorge as a result of this determination, or to pay petitioners in

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1 damages as a result of its breach of fiduciary duty, shall be
2 determined in a separate hearing to be held on October 24, 1983.

3 DATED: September 14, 1983

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6 CARL G. JOSEPH,
7 Hearing Officer

8 ADOPTED

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10 DATED: _____

11 _____
12 California Labor Commissioner

