

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
2 Department of Industrial Relations  
3 State of California  
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BEFORE THE LABOR COMMISSIONER  
OF THE STATE OF CALIFORNIA

10	COURTNEY E. CAMPBELL,	)	TAC No. 11-87
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COURTNEY E. CAMPBELL, ) TAC No. 11-87  
Petitioner, )  
vs. ) DETERMINATION OF  
CLYMER'S MODELING & TALENT AGENCY, ) CONTROVERSY  
Respondent. )

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16 INTRODUCTION

17 On March 30, 1987, Petitioner COURTNEY E. CAMPBELL  
18 filed a Petition to Determine Controversy pursuant to Labor  
19 Code §1700.44, alleging that Respondent CLYMER'S MODELING AND  
20 TALENT AGENCY breached its contractual obligations by failing to  
21 refund certain fees that Petitioner had paid to Respondent. On  
22 April 27, 1987, Respondent filed a Response to the Petition,  
23 denying that there had been any breach of contract or that  
24 Respondent owed any money to Petitioner. A hearing was held on  
25 April 25, 1991 in San Francisco, California, before Miles E.  
26 Locker, the Labor Commissioner's designated hearing officer.  
27 Petitioner was present and was represented by David B. Campbell.

1 Respondent appeared through counsel David R. Driver and its  
2 principal officer, Penny Lynn Clymer. The parties were given an  
3 opportunity to testify and present evidence. Based upon the  
4 testimony and evidence received, the Labor Commissioner adopts  
5 the following determinatin of controversy.

6 FINDINGS OF FACT

7 1. On May 27, 1986, Petitioner entered into an  
8 agreement with Clymer Studios, Inc., for one composite test  
9 shoot consisting of four black and white 8 x 10 photographs.  
10 The purpose of a test shoot is to determine whether an  
11 individual has the photogenic qualities needed for professional  
12 modeling. Petitioner paid \$299 plus sales tax for this test  
13 shoot. About a week after the test shoot, the four photographs  
14 were made available to Petitioner.

15 2. Clymer Studios, Inc., shares the same premises as  
16 Clymer Modeling and Talent Agency, Inc. Clymer Studios, Inc.,  
17 operates as a photography studio and is not a licensed talent  
18 agency. Clymer Modeling and Talent Agency, Inc., is licensed by  
19 the Labor Commissioner as a talent agency.

20 3. On June 13, 1986, Petitioner entered into a written  
21 contract with Respondent Clymer Modeling and Talent Agency,  
22 Inc., under which Respondent was engaged for a period of one  
23 year as Petitioner's exclusive modeling and talent agent, and  
24 Petitioner agreed to pay Respondent a fixed percentage of her  
25 gross compensation for all employment covered by the contract.  
26 There are no written provisions in the contract which purport to  
27 require Petitioner's payment of a registration or retainer fee

1 as a condition for representation by Respondent.

2 4. The written contract contains an "escape clause"  
3 under which the Petitioner was entitled to terminate the  
4 agreement if, for a period of four consecutive months, during  
5 which Petitioner was ready, willing and able to work, Petitioner  
6 did not receive any bona fide employment offers in any fields  
7 covered by the contract.

8 5. The contract also contains a clause based upon  
9 Labor Code §1700.40, providing that if Respondent collects from  
10 Petitioner "a fee or expenses for obtaining employment," and if  
11 Petitioner then fails to obtain the employment for which she  
12 paid such fees or expenses, Respondent must refund the fees and  
13 expenses to Petitioner on demand; and if a refund is not made  
14 within 48 hours of such a demand, Petitioner shall be entitled  
15 to repayment of the fees and expenses plus a penalty equal to  
16 the amount of the fees and expenses.

17 6. On June 13, 1986, the same day she entered into the  
18 written contract with Respondent, Petitioner paid \$750 to  
19 Respondent. Petitioner contends that she had been told that  
20 this amount was required as "retainer" for the one year contract  
21 she had executed. Petitioner states that she was told the \$750  
22 would secure Respondent's services for one year and would  
23 entitle Petitioner to receive 100 business cards and 200 copies  
24 of her "composite", an 8 1/2 x 11 glossy divided into 4 black  
25 and white photographs and listing her name and measurements and  
26 the name, address and phone number of the agency.

27 7. Penny Clymer testified that this \$750 did not

1 constitute a "retainer" for Respondent's services as a talent  
2 agent. Rather, Clymer stated that models who are represented by  
3 Respondent are under no obligation to pay this fee; however, if  
4 the fee is paid, the model will receive business cards and  
5 "composites" and will be entitled to enroll in workshops that  
6 are offered by Respondent as a means of providing training to  
7 those models who desire such training. Petitioner failed to  
8 attend the workshops, but they were available to her as a result  
9 of her payment of the \$750 fee. Petitioner received the  
10 business cards.

11 8. Due to a printing error, Petitioner's name was  
12 misspelled on her "composite". Consequently, the composites were  
13 of virtually no value to her. Penny Clymer testified that she  
14 had the printer correct the error, but that after the new  
15 composites were delivered to Respondent, they were never  
16 provided to Petitioner.

17 9. Petitioner never obtained a paid modeling  
18 assignment while she was represented by Respondent. Respondent  
19 offered some paid modeling assignments to Petitioner, but she  
20 chose not to accept those assignments.

21 10. By letter dated January 30, 1987, Petitioner  
22 notified Respondent that pursuant to the contract's "escape  
23 clause", she was terminating Respondent's engagement as her  
24 talent agent. In this letter, Petitioner requested full refund  
25 of the \$750 "retainer fee" and partial refund of the initial  
26 \$299 payment for photographs. Respondent failed to provide any  
27 refund.

1 11. Petitioner asserts that she is entitled to full  
2 refund of the \$750 "retainer fee", refund of half the \$299  
3 payment for the test shoot photographs, and a \$750 penalty  
4 pursuant to Labor Code §1700.40, for a total of \$1,649.50.  
5 Respondent disputes the entire claim. With respect to the  
6 Petitioner's claim for one-half of the \$299 fee for the test  
7 shoot photographs, Respondent contends that Petitioner received  
8 these photographs; and furthermore, the test shoot pre-dated  
9 Petitioner's contract with Respondent and involved a separate  
10 entity over which the Labor Commissioner has no jurisdiction.  
11 With respect to Petitioner's claim for a full refund of the \$750  
12 "retainer", Respondent contends that this was not a "retainer"  
13 for acting as Petitioner's agent but rather a fee for the  
14 business cards, composites and workshops; and thus, the fee was  
15 proper and non-refundable. Finally, Respondent argues that  
16 Petitioner is not entitled to the \$750 penalty because it can  
17 only be imposed if there is a "fee for obtaining employment",  
18 and such was not the case here.

19 CONCLUSIONS

20 1. The evidence establishes that Petitioner's failure  
21 to obtain work was not the fault of Respondent. Petitioner's  
22 unwillingness to accept those modeling assignments that were  
23 communicated to her by Respondent establishes that she was not  
24 "ready, willing and able to work" within the meaning of the  
25 contract's "escape clause".

26 2. In a complaint filed pursuant to Labor Code  
27 §1700.44, the petitioner has the burden of proving his or her

1 case by a preponderance of the evidence. Here, Petitioner  
2 failed to meet this burden of proof with respect to her  
3 contention that the \$750 paid to Respondent on June 13, 1986  
4 constituted a "retainer" for Petitioner's services as an agent.  
5 Rather, we find the \$750 was a fee for one year of workshops,  
6 business cards, and composites.

7 3. Labor Code Sections 1700.2 and 1700.40 were amended  
8 in 1986 to prohibit a talent agency from charging a model for  
9 photographs. But these amendments did not become effective  
10 until January 1, 1987. Prior to that, an agency was not  
11 prohibited from charging such fees. A talent agency was  
12 prohibited, however, from failing to refund "a fee or expenses  
13 for obtaining employment" to a model if the employment was not  
14 actually procured. This does not require the refund of all  
15 fees, but rather, only those fees that were charged for  
16 obtaining employment. The \$750 paid to Respondent on June 13,  
17 1986 did not constitute a "fee for obtaining employment" within  
18 the meaning of Labor Code §1700.40.

19 4. Because Petitioner received the test shoot  
20 photographs for which she paid the initial \$299, she is not  
21 entitled to a refund of any portion of this amount.


22 5. The \$750 paid to Respondent on June 13, 1986 was  
23 intended to pay for three items --- business cards, workshops  
24 and composites. Petitioner received the business cards and was  
25 given the opportunity to attend the workshops. But Respondent's  
26 failure to provide Petitioner with satisfactory composites  
27 deprived Petitioner of one of the items for which she had paid

1 the \$750. Respondent could have delivered these composites to  
2 Petitioner at little or no cost. Respondent violated the terms  
3 of its agreement with Petitioner by failing to do this.  
4 Petitioner is entitled to a refund of a portion of the \$750 to  
5 compensate her for Respondent's failure to provide her with  
6 satisfactory composites. Because no evidence was introduced as  
7 to the exact amount allocated for the composites, we conclude  
8 that because the composites represent one of the three items  
9 included in the \$750 fee, Petitioner is entitled to a refund of  
10 \$250, one third of the entire fee.

11 DETERMINATION

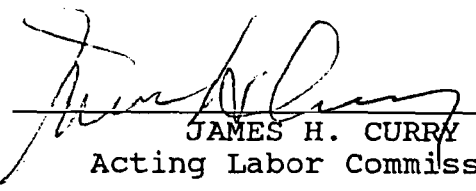
12 For the above-stated reasons, IT IS HEREBY ORDERED that  
13 Respondent pay \$250 to Petitioner as a refund for the  
14 composites.

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16 DATED: May 16, 1991

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18 MILES E. LOCKER, Attorney  
19 for the Labor Commissioner

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21 The above Determination is adopted by the Labor  
22 Commissioner in its entirety.

23  
24 DATED: May 16, 1991

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26 JAMES H. CURRY  
27 Acting Labor Commissioner

