

1 pending resolution of this petition.

2 On June 12, 1992, Respondent filed an answer to the
3 petition and a "cross demand to determine controversy", denying
4 that he acted as a talent agent and asserting that the Labor
5 Commissioner should enforce his rights under the "employment
6 agreement" by awarding him the amounts allegedly due him as
7 wages under the agreement, plus interest, penalties and
8 attorney's fees. On September 21, 1992, Petitioners filed an
9 opposition to Respondent's "cross demand to determine
10 controversy", denying that any amounts are owed to Petitioners,
11 and asserting numerous affirmative defenses.

12 A hearing was held before the undersigned attorney for the
13 Labor Commissioner on October 29, 1992 at San Francisco,
14 California. Petitioners were present and represented by
15 attorney Eric Sweet; Respondent was present and represented by
16 attorney Patrick Macias. Based upon the evidence received, the
17 Labor Commissioner adopts the following determination.

18 FINDINGS OF FACT

19 1. At all relevant times, Petitioners PHILIP A. SULLIVAN,
20 WILLIAM C. HARVEY, STEPHEN A. SMITH and DENNIS BOSTOK were
21 musicians in a group known named "FLAME", also known as "FLAME
22 MUSIC, INC.", a corporation.

23 2. The so-called "employment agreement" between the
24 parties was in effect from January 12, 1987 until January 11,
25 1989. However, the evidence indicates that SMITH did not
26 perform any substantial services after the early part of 1988.

27 3. The "employment agreement" defined, in general terms,
28 the services SMITH was to provide to Petitioners, including the

1 handling of FLAME's business affairs and advising and counseling
2 Petitioners with respect to the development and presentation of
3 their artistic talents. Pursuant to this agreement, SMITH was
4 appointed to serve as the chief executive officer, chief
5 financial officer, and secretary of FLAME MUSIC, INC. However,
6 the agreement further provided that SMITH's "services hereunder
7 are not exclusive to . . . FLAME and [SMITH] may at all time
8 render the same or similar services to others". The agreement
9 noted that SMITH "is not a licensed talent agent and shall not
10 be required to and shall not provide services or act as such."
11 Finally, the agreement provided that SMITH was to receive, as
12 compensation for his services, the greater of 3.5% of all gross
13 income earned by Petitioners as a group in connection with their
14 music entertainment projects or \$2,500 a month; however, in the
15 event that sufficient funds were not available for payment,
16 SMITH's compensation could be deferred until the expiration of
17 the agreement or his termination from employment.

18 4. This "employment agreement" was drafted by FLAME's then
19 attorney, Barbara Greene, following negotiations between SMITH
20 and Ms. Greene. The agreement was signed by SMITH and by each
21 of the Petitioners, following a meeting in which all of the
22 parties were present and the agreement was discussed "paragraph
23 by paragraph". However, Ms. Greene was not present at this
24 meeting, and the evidence indicates that she never had a
25 discussion with the band members about the legal significance of
26 this agreement. At the time of entering into this agreement,
27 Petitioners, who were then making no more than \$6,000 per year
28 on their music engagements, hoped to substantially increase

1 their income through a recording contract. Petitioners contend
2 that SMITH assured them that if things did not work out, they
3 would not have to pay him anything, and that they never would
4 have agreed to pay SMITH a guaranteed minimum of \$2,500 a month
5 if they had known that he would insist on payment regardless of
6 the band's lack of success at procuring a record contract.

7 5. During the period from January to July 1987, SMITH
8 devoted a great deal of time to FLAME. Among other things,
9 SMITH handled the band's cash management and bank account, kept
10 their books, negotiated and drafted a loan agreement and
11 investment agreement to obtain needed capital, provided advice
12 to FLAME on music industry practices, obtained insurance
13 policies for the band, attended recording studio sessions and
14 arranged for payments to producers, engineers and studios,
15 assisted the band in purchasing musical equipment, obtained
16 sound engineers for the band's live performances, and helped the
17 band set up at these live performances. During this period,
18 SMITH also devoted a small percentage of his time in attempting
19 to procure bookings for live performances. For example, in a
20 press release that SMITH authorized and distributed, his name
21 and telephone number was listed as a contact person for
22 bookings. Nonetheless, during this period of time the vast
23 majority of SMITH's services for FLAME consisted of providing
24 services that are typically characterized as "personal
25 management", with some time spent attempting to obtain a
26 recording contract for FLAME and a very small portion of his
27 time spent attempting to procure live engagements for the band.

28 6. Petitioners moved from the San Francisco area to Los

1 Angeles in July 1987, and they remained in Los Angeles for the
2 next year. Upon their arrival in Los Angeles, they engaged the
3 services of Susan Frank pursuant to a written "personal
4 management agreement". With the band's move to Los Angeles and
5 the hiring of Susan Frank, SMITH's role underwent a significant
6 change. From that point on, SMITH played almost no role in
7 attempting to procure recording contracts, as Ms. Frank was now
8 handling this task. Also, SMITH's involvement in the band's
9 business management decreased substantially, and far greater
10 percentage of his time was spent attempting to procure live
11 engagements. Petitioners were willing to travel from Los
12 Angeles to perform live engagements in the Bay Area. FLAME
13 continued to perform at clubs in which they had performed in the
14 past, including Niles Station in Fremont and the Stone in San
15 Francisco, and these bookings were procured directly through
16 Petitioners' efforts. However, in an effort to obtain new
17 bookings in the Bay Area, SMITH contacted various clubs on
18 behalf of the band. As a result of SMITH's efforts, the band
19 obtained bookings in several new venues. For example, in March
20 1988 FLAME performed in Oakland at the Hill and the Omni. Both
21 of these live engagements were procured by SMITH. Both clubs
22 paid SMITH for FLAME's performances, out of which SMITH kept 10%
23 for himself before disbursing the remainder to the band.

24 7. After the band moved back to San Francisco in the
25 summer of 1988, SMITH's involvement with FLAME decreased to
26 virtually nothing. FLAME terminated Respondent's employment
27 agreement effective January 11, 1989.

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1 CONCLUSIONS OF LAW

2 1. Labor Code §1700.5 provides that "no person shall
3 engage in or carry on the occupation of a talent agency without
4 first procuring a license therefor from the Labor Commissioner."
5 The term "talent agency" is defined by Labor Code §1700.4(a) to
6 include any "person or corporation who engages in the occupation
7 of procuring, offering, promising, or attempting to procure
8 employment or engagements for an artist, except that the
9 activities of procuring, offering or promising to procure
10 recording contracts for an artist or artists shall not of itself
11 subject a person or corporation to regulation and licensing
12 under this chapter." Under this statute, a talent agency is
13 also authorized to "counsel or direct artists in the development
14 of their professional careers."

15 2. A contract between an unlicensed talent agency and an
16 artist is void and unenforceable, even if the artist proposed
17 the terms of the contract and knowingly entered into it. Thus,
18 a person acting as an unlicensed talent agent is not entitled to
19 compensation for services performed pursuant to a contract with
20 an artist. Buchwald v. Superior Court (1967) 254 Cal.App.2d
21 347.

22 3. The fact that a contract states that a person
23 performing services for an artist is not a talent agent and is
24 not authorized to act as a talent agent is not dispositive.
25 Such a contract may prove to be a subterfuge. The key
26 determinant is whether the person performing services for the
27 artist is actually engaged in the occupation of procuring or
28 attempting to procure employment for the artist. (Buchwald v.

1 Superior Court.)

2 4. In the recently decided case of Wachs v. Curry (1993)
3 13 Cal.App.4th 616, the court reasoned that whether or not a
4 person is engaged in the "occupation" of procuring employment is
5 "to be determined according to a standard that measures the
6 significance of the agent's employment procurement function
7 compared to the agent's counseling function taken as a whole.
8 If the agent's employment procurement function constitutes a
9 significant part of the agent's business as a whole, then he or
10 she is subject to the licening requirement of the Act even if,
11 with respect to a particular client, procurement of employment
12 was only an incidental part of the agent's overall duties. On
13 the other hand, if counseling and directing the client's careers
14 constitutes the significant part of the agent's business, then
15 he or she is not subject to the licensing requirement of the
16 Act."

17 5. Based upon the evidence presented, we conclude that
18 prior to July 1987, the counseling and directing of Petitioners'
19 careers, rather than the procurement of employment, constituted
20 the "significant part" of Respondent's business dealings with
21 FLAME. However, from July 1987 on, the procurement of live
22 engagements for FLAME became the "significant part" of SMITH's
23 business, so as to trigger the need for a license. Because
24 SMITH was never licensed as a talent agent, we conclude that he
25 is not entitled to any compensation for the services he provided
26 to FLAME beginning in July 1987. It is apparent that the so
27 called "employment agreement", and SMITH's purported role as a
28 corporate officer, was essentially a subterfuge to mask the

1 actual nature of his services, which beginning in July 1987
2 primarily consisted of acting as a talent agent within the
3 meaning of Labor Code §1700.4. This conclusion is strongly
4 influenced by the fact that under the "employment agreement",
5 SMITH was free to provide these very same services to other
6 bands. This provision is inconsistent with his purported
7 position as a corporate officer and instead, mirrors the
8 provision one would expect to find in a contract between a
9 talent agent and an artist.

10 6. Although we conclude that SMITH did not violate the
11 licensing requirement of the Talent Agencies Act by his actions
12 prior to July 1987, the Labor Commissioner is without
13 jurisdiction to award any compensation to SMITH for the services
14 he performed for FLAME from January 12, 1987 until July 1987.
15 The reason the Labor Commissioner is without jurisdiction is
16 because during that time SMITH was not a "talent agent" within
17 the meaning of Labor Code §1700.4. Under Labor Code §1700.44,
18 the Labor Commissioner has jurisdiction to determine
19 controversies between talent agents and artists, and to make an
20 award if money is owed to a talent agent or an artist. Any
21 money owed to SMITH for the work he performed prior to July 1987
22 is recoverable through SMITH's pending superior court action for
23 breach of contract.

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DETERMINATION

For all of the above reasons, we conclude that SMITH is not entitled to any sums purportedly owed under his "employment agreement" with Petitioners for services performed on or after July 1987.

DATED: _____

MILES E. LOCKER, Attorney for
the Labor Commissioner

The above Determination is approved by the Labor Commissioner in its entirety.

DATED: _____

VICTORIA L. BRADSHAW
STATE LABOR COMMISSIONER