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

THE DAVID CRANE AGENCY, INC., ) No. TAC 64-92
) Petitioner,
) DETERMINATION
vs.
BARBARA BECK,
) Respondent.

INTRODUCTION

On August 5, 1992, THE DAVID CRANE AGENCY (hereinafter
"CRANE" or "Petitioner") filed a petition to determine controversy
pursuant to Labor Code §1700.44, alleging that BARBARA BECK
(hereinafter "BECK" or "Respondent") failed to pay CRANE for his
services in negotiating and procuring an employment contract with
television station KTLA. By its petition, CRANE seeks payment of
commissions in the amount of 7.5% of Respondent's earnings at KTLA
pursuant to her employment contract, interest on the unpaid
commissions, and attorney's fees. BECK filed an answer to the
petition, alleging that Petitioner's services were performed
gratuitously, and denying that CRANE was entitled to any
compensation.
A hearing was held on March 4, 1993 in San Francisco, California, before Miles E. Locker, attorney for the Labor Commissioner. Petitioner appeared by counsel John McGuinn, and Respondent appeared by counsel Donna Anderson. Based upon the testimony and evidence received, the Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. On September 30, 1988, Petitioner, a licensed talent agency with its office in San Francisco, California, entered into a written agreement with BECK, then employed as a television newscaster with WLOX, a station in Biloxi, Mississippi, under which CRANE was to represent BECK as her exclusive talent agency for a period of three years, for which BECK agreed to pay CRANE commissions in an amount equal to 7.5% of her earnings under any broadcasting industry employment contract entered into or negotiated during the term of the talent agency agreement. The agreement also provided that if four consecutive months transpired without BECK obtaining a bona fide offer of employment, either party could then terminate the contract upon ninety days written notice to the other party. The agreement further provided that CRANE would be entitled to commissions, at 7.5% of Respondent's earnings for any employment obtained by BECK within six months of the termination of the agreement, if such employment resulted from Petitioner's efforts while representing BECK under the agreement.

2. By certified letter dated February 2, 1990, BECK terminated Petitioner's services as her talent agent. Respondent was still employed at WLOX, earning $80,000 per year. She had not obtained any employment offers since entering into the
representation agreement with CRANE.

3. About two weeks later, CRANE informed BECK that prior to his receipt of the termination notice, he had sent tapes of her broadcasts to the ABC network. Both agreed that if ABC decided to offer employment to BECK, Petitioner would represent her in any employment negotiations under the terms of the September 30, 1988 representation agreement. However, despite Petitioner's efforts, ABC did not make any employment offer.

4. Following this unsuccessful attempt to procure employment for Respondent, CRANE continued to send copies of BECK's broadcast tapes to television news executives. On March 28, 1990, CRANE contacted the news director at WSVN, a television station in Miami, sending him BECK's broadcast tapes along with those of four other television news anchors or reporters. Shortly thereafter, WSVN advised CRANE of their interest in BECK, and he provided WSVN with her telephone number. In early May 1990, WSVN contacted BECK and on June 7, 1990 she entered into a written agreement with WSVN to begin her employment as a television newscaster on August 6, 1990 for a two-year period, at $65,000 per year for the first year and $70,000 a year for the second.

5. In July 1990, prior to her commencement of employment with WSVN, BECK agreed to pay CRANE commissions in the amount of 3.75% of her earnings, half his usual rate of 7.5%, resulting in monthly payments of $203 throughout her employment with WSVN. CRANE suggested this lower than usual rate because BECK was taking a pay cut to go from WLOX to WSVN, which he nonetheless viewed as a good career move for her future, as this placed Respondent in a much larger market.
6. BECK started working for WSVN in August 1990. While employed at WSVN, she continued to send sample broadcast tapes to CRANE. BECK was somewhat unhappy with the station management at WSVN and wanted to explore other career options. With BECK's knowledge, CRANE sent one of her broadcast tapes to KTLA, a television station in Los Angeles, in the hope of attracting the station's interest in Respondent. Shortly thereafter, during December 1990 and January 1991, CRANE sent additional copies of BECK's sample broadcast tapes to stations in San Diego and Chicago, to the recruitment directors for ABC and NBC television news, and to Don Fitzpatrick, a recruiting consultant who works for various television stations.

7. In March 1991, CRANE had a lengthy discussion with KTLA's news director concerning the station's plans for a new morning news show and the possibility of securing Respondent's services as a newscaster for that show. CRANE then contacted BECK encouraging her to pursue an offer from KTLA. BECK advised CRANE that she would consider an offer if it was in writing, but that she was primarily interested in pursuing employment with KPNX, a Phoenix station which was then carrying on discussions with BECK. CRANE then spoke with KTLA's executive producer, attempting to shape a multi-year offer that would be acceptable to Respondent, with an annual salary in excess of $100,000.

8. CRANE and BECK never entered into a written agreement concerning his efforts to procure employment for her at KTLA. BECK testified that soon after negotiations first started with KTLA, CRANE told her that he "would not charge any more than what I paid him at WSVN" and that a few weeks later, CRANE said it would cost
"about $1,500 to negotiate the contract". CRANE denied ever offering to negotiate the contract for $1,500. Taking all of the circumstances into account, it is impossible to credit Respondent's version that CRANE offered his services to BECK for only $1,500.

To begin with, at all times until then CRANE charged commissions based on a percentage of BECK's earnings rather than a flat fee. Secondly, it simply does not make sense that while negotiating a contract that would pay BECK far more than what she was presently making at WSVN, CRANE would agree to have her pay him a flat fee that amounted to less than he had already received from BECK in the eight months that she had been working at WSVN. On the other hand, BECK's testimony that CRANE agreed not to charge any more than he had been charging during the time BECK was working at WSVN is believable in that it is difficult to imagine that an experienced talent agent would begin negotiating on a client's behalf without having made any provision for his own payment. Thus, it is impossible to credit CRANE's testimony that he just "assumed" that if he got any employment for BECK that did not involve a cut in pay, she would pay commissions at the rate of 7.5%. Considering the substantial amounts of money involved, we would expect at least some discussion if CRANE intended to double his commission rate from the 3.75% he had been charging since August 1990. CRANE could not possibly have "assumed" such a dramatic increase in the rate of his compensation. Instead, we find that the subject of compensation was discussed and that CRANE agreed to limit his compensation to the amount he had been charging BECK during her employment at WSVN.

9. CRANE convinced BECK to try out for the job with
KTLA, and in early April 1991, BECK interviewed at KTLA. Following
this interview, negotiations for an employment contract
intensified. Meanwhile, KPNX offered BECK a news anchor position
starting at $110,000 a year, but BECK decided to hold off on
accepting the job with KPNX, in order to allow CRANE to continue
the negotiations with KTLA.

10. On April 19, 1991, KTLA sent CRANE a copy of a
"letter of agreement" reflecting the understanding reached between
KTLA and CRANE concerning BECK's services as anchor of the KTLA-
morning news, under which BECK was to be paid $120,000 for the
first year, with KTLA to have an option to renew for a second year
at $135,000 and a third year at $175,000. The next day, CRANE
faxed a letter to KTLA asking for certain changes in the agreement,
along with a rewrite of the "letter of agreement".

11. From April 22 to April 27, CRANE was in
Czechoslovakia pursuant to a previously scheduled commitment which
he had made known to all of the parties in the course of
negotiations. There is no indication that his five-day absence
from the United States caused any prejudice to Respondent, or in
any way slowed down her contract negotiations with KTLA. CRANE
spoke to KTLA en route to Czechoslovakia at a lay-over in New York
and later from Prague. The parties were very close to an agreement
and only a few minor issues remained to be ironed out.
Nonetheless, BECK was extremely angry at CRANE for what she
perceived as his unavailability during a critical phase of the
negotiations, and through a telephone conversation and confirming
letter on April 29, 1991, she advised him that she was terminating
his services, but that she would continue to pay him $203 a month
in connection with her present contract with WSVN as long as she remained employed with WSVN under that contract.

12. Following her termination of Petitioner's services, BECK concluded her negotiations with KTLA on her own, executing a written agreement with KTLA on May 1, 1991. Under the terms of this agreement, her employment with KTLA was to begin on June 10, 1991 at a salary of $120,000 per year, with annual salary increases to $135,000 and $175,000 if KTLA exercised its right to extend the agreement to a second and third year. The agreement differed in no significant respects from that negotiated by CRANE prior to his departure to Czechoslovakia.

13. After BECK began working for KTLA in June 1991, CRANE sent her a bill seeking $750 in commissions for the month of June 1991, based on 7.5% of Respondent's salary of $120,000 per year ($10,000 per month). BECK refused to pay this bill. Subsequent efforts to reach a settlement proved fruitless resulting in the filing of this petition.

14. In June 1992 KTLA exercised its option to renew the contract with BECK, and beginning in June 1992 her salary increased to $135,000 a year ($11,250 per month), with a possible increase to $175,000 a year in June 1993 ($14,583.33 per month) if KTLA were to exercise its final year option, with the contract then expiring on June 9, 1994.

CONCLUSIONS OF LAW

1. Petitioner is a "talent agency" within the meaning of Labor Code §1700.4(a). Respondent is an "artist" within the meaning of Labor Code §1700.4(b). The Labor Commissioner has jurisdiction to determine this controversy pursuant to Labor Code
§1700.44(a).

2. Title 8, California Code of Regulations, section 12002 provides: "A talent agency shall be entitled to recover a fee, commission or compensation under an oral contract between a talent agency and an artist so long as the particular employment for which such fee, commission or compensation is sought to be charged shall have been procured directly through the efforts or services of such agency and should have been confirmed in writing within 72 hours thereafter .... However, the fact that no written confirmation was ever sent shall not be, in and of itself, sufficient to invalidate the oral contract."

3. Here, there is no doubt that Respondent's employment with KTLA was "procured directly through the efforts or services" of Petitioner. Although Petitioner failed to provide BECK with a timely written confirmation of the commissions sought to be charged, the absence of such written confirmation by itself is not sufficient to invalidate an oral contract.

4. In order for a binding contract to arise, there must be mutual assent between the parties --- that is, each party must intend to enter into the contract under the terms and conditions of the agreement. Civil Code §§1550, 1565. Consent of the parties may be communicated by word or act. Whether there has been mutual assent is tested by an objective standard, that is, what a reasonable person in the position of each of the parties would be led to believe by the words or conduct of the other party. Zurich General Acc. & Liability Assur. Co. v. Industrial Acc. Com. (1933) 132 Cal.App.101. Mutual assent may be inferred either by the express words of the agreement, oral or written, or by the actions
of the parties. If the agreement of the parties to the terms of
the contract is inferred from their subsequent acts or conduct, the
contract is an "implied in fact contract". Civil Code §1621.

5. To determine if a contract is sufficiently certain to
be enforced, courts will liberally construe the language that was
used by the parties. "If the parties have concluded a transaction
in which it appears that they intend to make a contract, the court
shall not frustrate their intention, if it is possible to reach a
fair and just result, even though this requires a choice among
conflicting meanings". Rivers v. Beadle (1960) 183 Cal.App.2d 691,
695. "The law does not favor but leans against the destruction of
contracts because of uncertainty; and it will, if feasible, so
construe agreements as to carry into effect the reasonable
intentions of the parties, if that can be ascertained". McIllmoil
v. Frawley Motor Co. (1923) 190 Cal. 546, 549.

6. Ordinarily, acceptance must be expressed or
communicated by the offeree to the offeror, in order to manifest
mutual assent. Civil Code §§1565, 1581; Drovin v. Fleetwood
Enterprises (1985) 163 Cal.App.3d 486, 491. However, acceptance
will be inferred by the conduct of the parties in cases where the
offeree, with freedom to do otherwise, make use of the services
provided by the offeror. See Civil Code §§1584, 1589; Durgin v.
Kaplan (1968) 68 Cal.2d 81, 91.

7. Applying the above principles to the facts herein, we
hold that there was an implied in fact agreement between the
parties to compensate CRANE for the work he performed procuring and
negotiating Respondent's employment contract with KTLA. CRANE's
offer to provide his services to BECK for no more than what he had

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been paid during BECK's employment at WSVN can reasonably and fairly be construed as an offer to provide these services on a commission basis at the rate of 3.75% of Respondent's earnings --- the amount he was charging her from the commencement of her employment at WSVN. It would be far less reasonable to construe this as an offer to perform services at the fixed rate of $203 per month, since the contract CRANE was negotiating with KTLA was far more lucrative than the contract BECK was working under at WSVN, and since the $203 monthly amount was computed as a percentage of her employment earnings --- that is, the $203 figure has no independent significance in itself. BECK's acceptance of CRANE's offer can be inferred by her subsequent use of his services in the negotiations with KTLA. Finally, BECK's termination of CRANE's services two days before the KTLA contract was executed does not affect his right to compensation, as an examination of the terms of the executed contract reveals that it was procured and substantially negotiated by CRANE.

8. Petitioner is therefore entitled to payment of commissions in the amount of 3.75% of BECK's earnings pursuant to her employment contract with KTLA. These commissions should amount to $4,500 ($375 per month) for BECK's first year of employment, $5,062.50 ($421.87 per month) for BECK's second year of employment, and if KTLA exercised its final year option to review, $6,562.50 ($546.87 per month) for BECK'S final year of employment under this contract.

9. Petitioner is also entitled to interest pursuant to Civil Code sections 3287 and 3289, in the amount of 10% per annum, on each monthly commission payment as it became due.

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10. The Labor Commissioner has no authority to award attorney's fees in a proceeding under the Talent Agencies Act, unless the parties before the Labor Commissioner are covered by a contract which expressly provides for an award of attorney's fees to the prevailing party. As that is not the case here, attorney's fees cannot be awarded.

DETERMINATION

For the above stated reasons, IT IS HEREBY ORDERED that Respondent BARBARA BECK pay Petitioner THE DAVID CRANE AGENCY, INC., an amount equal to 3.75% of Respondent's earnings pursuant to her employment contract with KTLA, from June 10, 1991 until June 9, 1994 or the date of her termination of employment with KTLA, whichever occurs first, plus interest at the rate of 10% per annum on each monthly commission payment from the date it should have been paid to the present. Respondent is further ordered to provide Petitioner with a full accounting of her earnings pursuant to her employment at KTLA within ten days to enable the parties to calculate the amount due to Petitioner under this determination. If the parties are unable to agree upon the amount due, further proceedings will be conducted upon either party's application to the Labor Commissioner.

DATED: 2/11/94

MILES E. LOCKER, Attorney for the Labor Commissioner
The above Determination is adopted by the Labor Commissioner in its entirety.

DATED: 2-11-94

VICTORIA BRADSHAW
STATE LABOR COMMISSIONER