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

OF THE STATE OF CALIFORNIA

PAMELA DENISE ANDERSON, Petitioner, vs. ROBERT D'AVOLA, Respondent.	No. TAC 63-93 DETERMINATION OF CONTROVERSY

INTRODUCTION

On August 21, 1993, Petitioner PAMELA DENISE ANDERSON filed a petition to determine controversy pursuant to Labor Code §1700.44, alleging that Respondent ROBERT D'AVOLA violated the Talent Agencies Act (Labor Code §1700, et seq.) by procuring or attempting to procure employment for Petitioner without having been licensed as a talent agent. By this petition, ANDERSON seeks a determination that all purported agreements between the parties, including any provision to arbitrate disputes arising under any such agreement, are void from their inception, and reimbursement of all commissions that were paid to Respondent pursuant to such agreements. D'AVOLA filed an answer to the petition, admitting that he was not licensed as a talent agent

but denying that he had violated the Talent Agencies Act, and asserting various affirmative defenses, including estoppel, waiver, laches, unclean hands, and a claim that the petition is barred by the one-year statute of limitations set forth at Labor Code §1700.44(c), in that no commissions were paid to Respondent after ANDERSON terminated his services on August 4, 1992. Along with this answer, D'AVOLA filed a motion for summary judgment on the ground that Petitioner's claims were time barred pursuant to section 1700.44(c). Thereafter, the Labor Commissioner issued an order denying Respondent's motion to dismiss, finding that although the statute of limitations would preclude an action or proceeding to recover commissions that were paid to Respondent prior to August 22, 1992, the petition also alleged a dispute as to commissions that purportedly did not or will not become due until August 22, 1992 or later; and thus, the petition was not untimely filed.

A hearing was held as scheduled on September 28, 1994 in Los Angeles, California, before the undersigned attorney for the Labor Commissioner. Petitioner appeared through attorney Michael Blaha; Respondent appeared through attorney Gregory Feinberg. Based on the evidence and testimony received, and after having reviewed the parties' post-hearing briefs, the Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. In October 1989, ANDERSON, a Playboy model and aspiring actress, moved from Canada to Los Angeles in order to advance her career in the entertainment industry. She then had no talent agent or personal manager representing her. In 1990,

she met D'AVOLA, who was then managing the acting careers of ANDERSON's two roommates, Mary Sheldon and Deborah Driggs. D'AVOLA had previously worked as a licensed talent agent and as a casting director in New York. After moving to California in 1988, D'AVOLA started a business as a personal manager. Respondent has never been licensed as a talent agent by the California Labor Commissioner.

2. In September 1990, ANDERSON and D'AVOLA entered into an oral agreement, whereby he agreed to serve as her "personal manager", for which she agreed to pay him a percentage of her entertainment industry earnings. To help ANDERSON get started in an acting career and move away from print modeling, D'AVOLA had one or two discussions with her about the different way in which she needed to present herself. He also helped her prepare a resume and select a photo to be sent to producers along with this resume. The photo was chosen out of numerous photographs that had previously been taken, in an effort to find a photograph that would "soften her image" and convey the look of a "serious actress". D'AVOLA encouraged Petitioner to hire a talent agent and offered to arrange for some agents to meet with ANDERSON but, according to Respondent, ANDERSON was "not reliable enough to organize", and the proposed meetings never took place. One or two months later, D'AVOLA secured the services of Barabara Pollins, a talent agent employed by ICM, an agency that is licensed by the Labor Commissioner, to function as a "hip pocket agent" to help procure employment for Petitioner. D'AVOLA believed that by creating this self-described "hip pocket" arrangement, it would be possible to procure work for ANDERSON

without running afoul of the licensing requirements of the Talent Agencies Act. D'AVOLA testified that he used a similar "hip pocket" arrangement on behalf of Deborah Driggs and other clients who did not have their own talent agents.

3. Petitioner never met or spoke to Barbara Pollins and was never told anything about this "hip pocket" arrangement. She never authorized Barbara Pollins or any agent employed by ICM to perform any services for her, or to work with D'AVOLA on her behalf. Nonetheless, Pollins attempted to procure employment for ANDERSON, pursuant to Respondent's instructions, by sending Petitioner's photo and resume (which had been provided to her by D'AVOLA) to various potential employers who were identified through Respondent's efforts. In order to identify these potential employers, D'AVOLA maintained a subscription to a "breakdown service" (a synopsis of character roles planned for upcoming television series and films), which he reviewed in order to keep abreast of possible roles for which ANDERSON would be suitable. Whenever D'AVOLA learned a planned character role which he thought would be appropriate for Petitioner, he would convey this information to Pollins; and she would then initiate contact with the potential employer. As a result of these efforts, two or three producers advised Pollins that they wanted ANDERSON to appear for auditions. These producers provided Pollins with the "sides" (the scripts that would be read during the audition). Pollins would then give D'AVOLA the "sides" and information as to each audition, and he would then contact ANDERSON with instructions to pick up the "sides" from him and directions concerning when and where to appear for the auditions.

None of these auditions, that were set up through the efforts of both Pollins and D'AVOLA, led to employment offers.

4. In a discussion with David Lewis, an agent employed by ICM in New York, D'AVOLA learned of upcoming auditions for a Woody Allen film. D'AVOLA wanted to have ANDERSON meet with Juliette Taylor, Woody Allen's casting director, for the purpose of auditioning for a role in the film. At Respondent's request, Lewis set up an appointment for Petitioner to meet with Taylor. D'AVOLA then informed ANDERSON of the scheduled appointment with Taylor. ANDERSON failed to show up for this appointment, and no attempt was made to reschedule.

5. In early 1991, an agent employed by 'Coast to Coast', a talent agency that served as a "hip pocket" agency for one of Respondent's former clients, telephone D'AVOLA to advise him that Walt Disney Television was interested in casting a "Playboy type actress" for a role in a planned network situation comedy series. D'AVOLA undoubtedly conveyed his belief that ANDERSON would be appropriate for this role. D'AVOLA informed the agent that he was now representing Petitioner, and that she had appeared as Playboy's cover model on two or three occasions. Later that day, D'AVOLA received a telephone call from the Walt Disney Television casting director, asking to set up an audition with ANDERSON. Respondent then called ANDERSON, leaving her a message as to the date, time and location of this audition. Following this first audition, ANDERSON was called back for several follow-up auditions. At the conclusion of her final audition, ANDERSON was presented with a written contract to

perform the role of 'Lisa' in the pilot episode of the Walt Disney produced situation comedy "Home Improvement". ANDERSON then called Respondent to discuss his recommendation as to whether she should sign the contract. D'AVOLA had obtained a faxed copy of the contract from Disney, and after reviewing its terms, he advised ANDERSON to sign the agreement. On April 10, 1991, ANDERSON signed the Disney contract and began her television acting career. "Home Improvement" became a successful weekly program, and ANDERSON stayed with the show through April 1993.

6. Within a few weeks of signing the Disney contract, ANDERSON terminated the agreement under which Respondent had served as her "personal manager", and retained the services of a new "personal manager". In August 1991, ANDERSON discharged her new manager, and on September 24, 1991, she executed a written contract with D'AVOLA under which he once again began serving as her "personal manager", for which he was to receive compensation based upon a percentage of her entertainment industry earnings. The written agreement contained a clause stating that D'AVOLA "may not be licensed to seek or obtain employment or engagements . . . and [does] . . . not agree to do so." In contrast to the first period of Respondent's representation of Petitioner, ANDERSON was now also represented by a licensed talent agent. In July 1991, ANDERSON retained Billy Miller of the Michael Slessinger Agency ("MSA") as her talent agent.

7. D'AVOLA continued to serve as ANDERSON's "personal manager" under the terms of this written agreement until August 3, 1992, when she terminated Respondent, after retaining

Ray Manzella as her new "personal manager". MSA represented ANDERSON as her talent agency throughout the entire period of her written contract with Respondent. During this period, she obtained employment with the Baywatch Production Company in the role of 'C.J. Parker', a leading character in "Baywatch", a weekly network television program. ANDERSON signed a written contract with the Baywatch Production Company in May 1992. She is currently completing her third year of employment with "Baywatch". This was the only employment obtained by Petitioner during the period from September 1991 to August 1992. D'AVOLA's role in procuring this employment was rather limited. Billy Miller told D'AVOLA that Baywatch was interested in hiring ANDERSON. D'AVOLA never had any discussions with the Baywatch Production Company about ANDERSON. D'AVOLA may have telephoned ANDERSON with information that he received from Miller concerning an audition for Baywatch. Once the Baywatch Production Company decided to make an employment offer to ANDERSON, they faxed a copy of the proposed contract to D'AVOLA so he could review it and ensure that it was in her best interests. D'AVOLA did not negotiate this contract with Baywatch. After reviewing it, he advised ANDERSON to accept the offer, which she did.

8. As ANDERSON was represented by her own talent agent after July 1991, D'AVOLA no longer used the services of any "hip pocket agents" to assist in procuring employment on her behalf. Nor did he undertake any independent efforts to obtain employment for ANDERSON during the period in which he represented her pursuant to their written agreement.

9. ANDERSON stopped paying commissions to D'AVOLA

when she terminated his services on August 4, 1992. On May 13, 1993, D'AVOLA filed a demand for arbitration pursuant to an arbitration clause in the written personal management contract, alleging that under this contract, he is owed commissions based upon ANDERSON's earnings in connection with her employment in "Home Improvement" and "Baywatch". An arbitration hearing was held in March 1994, resulting in an award in favor of D'AVOLA for commissions based upon ANDERSON's gross earnings received from both "Home Improvement" and "Baywatch". A petition to confirm the arbitration award has been filed, but the court has stayed proceedings on the petition pending the outcome of these proceedings before the Labor Commissioner.

CONCLUSIONS OF LAW

1. Petitioner 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. Labor Code §1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." The term "talent agency" is defined at Labor Code §1700.4(a) as "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 artists in the development of their professional careers".

3. In Wachs v. Curry (1993) 13 Cal.App.4th 616, 628, the court held that the question of whether or not an alleged talent agent is engaged "the 'occupation' of procuring

employment", within the meaning of Labor Code §1700.4(b), must "be determined according to a standard that measures the significance of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole, then he or she is subject to the licensing requirement of the Act."

4. In Thomas Haden Church v. Ross Brown (Case No. TAC 52-92), the Labor Commissioner applied Wachs to find that the "procurement of employment constitutes a 'significant' portion of the activities of an agent if the procurement is not due to inadvertence or mistake and the activities of procurement have some importance and are not simply a de minimis aspect of the overall relationship between the parties when compared with the agent's counseling functions on behalf of the artist." The Labor Commissioner then ruled that an artist who asserts a licensing violation under the Talent Agencies Act satisfies his burden if he establishes that the parties were "involved in a contractual relationship . . . that was permeated and pervaded by employment procurement activities . . . . Such a showing supports an inference that these activities were a significant part of the respondent's business as a whole, and suffices to establish a prima facie case of violation of the Act. At that point, the burden shifts to the respondent to come forward with sufficient evidence to sustain a finding that the procurement functions were not a significant part of the respondent's business as a whole."

5. Labor Code §1700.44(d) provides that "it is not unlawful for a person or corporation which is not licensed

pursuant to this chapter to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contact." This statute does not permit such an unlicensed person to engage in any procurement activities other than the "negotiation of an employment contract". Discussions with producers or casting directors in an attempt to obtain auditions for an artist exceed the scope of this statute. Even with respect to the limited activities that are permitted by this statute, it would defeat the obvious legislative purpose of the Talent Agencies Act to permit an unlicensed person to act in conjunction with any licensed talent agent other than an agent previously selected and approved by the artist. The type of "hip pocket" agency arrangement described by Respondent is a transparent subterfuge designed solely as a means of attempting to evade the licensing requirements of the Act. To allow an unlicensed person to enter into an arrangement with a licensed talent agent for the purpose of procuring employment for an artist, when the artist is unaware of this arrangement and never gave any sort of approval to this arrangement, would create a gaping hole in the Act's licensing requirement - - a requirement that is designed to protect artists. Consequently, we conclude that Labor Code §1700.44(d) does not apply to any period prior to ANDERSON's retention of a licensed talent agent.

6. Applying the standard set forth in Wachs v. Curry and Church v. Brown, we find that as to the first period of Respondent's representation of Petitioner, from September 1990 through April 1991, the parties' relationship was "permeated and pervaded by employment procurement activities undertaken by the

respondent". These procurement activities were neither inadvertent nor de minimis. Indeed, the non-procurement professional counseling activities that occurred constituted only a minor portion of D'AVOLA's overall relationship with ANDERSON. The evidence presented thus established a prima facie violation of the Act. Respondent failed to provide sufficient evidence to rebut this prima facie violation. The evidence that Respondent utilized the services of a "hip pocket" agent to help him procure employment for other clients compels the conclusion that procurement activities constituted a significant part of his overall business.

7. With respect to the second period of Respondent's representation of Petition, from September 1991 to August 1992, the evidence indicates that procurement activities were no longer the significant part of Respondent's relationship with ANDERSON.

8. A contract between an artist and a person acting as an unlicensed talent agent is unlawful and void ab initio. The unlicensed talent agency has no right to collect commissions purportedly earned pursuant to such an unlawful agreement. Buchwald v. Superior Court (1967) 254 Cal.App.2d 347.

9. Petitioner obtained her employment on "Home Improvement" as a direct result of Respondent's unlawful procurement activities. As a result, Respondent had no right to commissions based upon ANDERSON's earnings from "Home Improvement". The fact that the written contract between the parties, upon which D'AVOLA bases his claim for compensation, was not executed until Respondent ceased engaging in procurement activities, is of no consequence. D'AVOLA forfeited his right to

commissions on Petitioner's "Home Improvement" earnings by procuring this employment for her at a time when he was in violation of the Act's licensing requirements. Consequently, the parties' written contract is invalid to the extent (and only to the extent) that it purports to give D'AVOLA a right to commissions for any employment that he had unlawfully procured for ANDERSON.

10. The Talent Agencies Act does not prohibit Respondent from collecting commissions in connection with Petitioner's employment on "Baywatch", in that this employment was not procured in violation of the Act's licensing provisions.

DETERMINATION

For all of the above reasons, IT IS HEREBY ORDERED that the parties' written personal management contract is invalid to the extent that it purports to authorize Respondent to collect commissions in connection with Petitioner's employment on "Home Improvement". In all other respects, the written contract does not conflict with the provisions of the Talent Agencies Act.

DATED: 2/24/95

Miles E. Locker

MILES E. LOCKER, Attorney for the Labor Commissioner

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

DATED: 2/24/95

Victoria L. Bradshaw

VICTORIA L. BRADSHAW
STATE LABOR COMMISISONER