BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

JOSHUA BLOOMBERG pka Joshua Path, Petitioner, v. SUSAN BUTLER, dba KRYSTONE MANAGEMENT, Respondent.	Case No. TAC 31-94 DECISION

This matter came on regularly for hearing on July 18, 1994, in Los Angeles, California. Craig R. Gates appeared on behalf of the Petitioner Joshua Bloomberg; Respondent, Susan Butler appeared in propria persona.

FACTS

The following facts were stipulated to by the parties.

1. Respondent was not a licensed talent agent.
2. Petitioner and Respondent entered into the Personal Management Agreement dated April 30, 1992.
3. Respondent signed the contract dated February 2, 1993, which purports to be a contract for services between Joshua Path and LONE WOLF PRESENTS which covered an engagement at the Roxy.

The Petitioner contended in his testimony that he had booked an estimated fifteen of his own shows over the past three years. In addition, he has made a number of tapes.

According to Petitioner, Respondent violated the provisions of Labor Code § 1700.4 by procuring employment for Petitioner to perform at the Roxy, located at 9009 Sunset Blvd., Los Angeles, on March 27, 1993, and Tio Alberto's, located at 1121 Broad St., San Luis Obispo, on either April 1st or 2nd, 1993.

According to Petitioner, the Respondent told him that she had procured the employment at the two locations listed above.

According to the testimony of Respondent, she acted in the capacity of a personal agent attempting to guide the career of Mr. Bloomberg. The Respondent's unrefuted testimony shows that she spent an estimated 1000 hours over a one year period in guiding Petitioner's career and received a total of less than $300.00[1].

Again, the unrefuted testimony of the Respondent evidences the fact that she contacted at least nine licensed artist managers in an attempt to solicit the services of a talent agent for the Petitioner.

In February of 1993 she asked the Petitioner what he would like to do for his upcoming birthday. Petitioner responded that he would enjoy playing the Roxy. Respondent reminded the Petitioner that the Roxy was a pay-to-play venue that was designed to showcase talent. As a general rule, those who played the Roxy were required to sell tickets for the performance. The pay-for-play player was required to pay the difference in the costs of the theater and the costs recovered by the sale of tickets.

Respondent, pursuant to Petitioner's birthday wish, contacted

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[1]Respondent also testified that she waived over $3000.00 in commissions pursuant to the provisions of the "Personal Management Agreement". This waiver was designed to help the Petitioner in his young career.

the management of the Roxy and discussed the possibility of Petitioner appearing. She was told that Bloomberg (pka Path) was known and that he would be allowed to perform and he would be paid if a certain number of customers paid to attend the performance. The minimum was met and exceeded and Petitioner was paid for the performance. Respondent states that she received her 20% commission on the amount received by Petitioner based upon the terms of the Personal Management Agreement. She testified that the commission on that performance was between $15.00 and $20.00.

The contract she received from the Roxy management (Lone Wolf Presents) was signed by her after she discussed the contract with Petitioner. The power to sign the contract is contained in the Personal Management Agreement between Petitioner and Respondent.

Respondent testified, and was undisputed, that she did not make the changes on the contract or negotiate the terms of the contract. The terms were offered by the Roxy management and it was the Roxy management who made the interlineation on the face of the contract according to the unrefuted testimony of Respondent.

In regard to the Tio Alberto performance, Respondent testified that she was contacted by Petitioner regarding a performance which he had arranged with a fraternity. She was told by Petitioner that the fraternity had taken the entire Tio Alberto facility for the show. She cautioned Petitioner that the price offered by the fraternity might not cover his expenses in going to San Luis Obispo. Respondent called the management at Tio Alberto inquiring about the type of public address system available. In her discussion with the management person from Tio Alberto, she was told that, in view of the fact that Petitioner was known, if the

fraternity did not come up with enough money to cover the expenses which Petitioner would incur, Tio Alberto would allow him to work the cocktail hour in order to earn enough to cover the expenses. Respondent called Petitioner and explained this turn of events to him and he told her that he would work the cocktail hour. Respondent did not receive any commissions on any fees which Petitioner may have received from Tio Alberto.

DISCUSSION

The Act prohibits the occupation of "procuring, offering, promising, or attempting to procure employment or engagements for an artist" unless the person performing such activities is licensed pursuant to the Talent Agencies Act. "Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [talent agent] and an artist is void. Buchwald v. Superior Court (1967) 254 Cal.App.2d 347, 351.

There was no dispute that Petitioner is an artist as that word is defined in the Talent Agency Act. Both of the performances which Petitioner contends are connected with a violation of the Act are within the one-year statute of limitations set out in the provisions of Labor Code § 1700.44.

The testimony and evidence received at this hearing can lead to no other conclusion than that the activities performed by the Respondent in respect to the Tio Alberto performance can not be classified as procurement of employment under any circumstances. Respondent simply called the management after finding out that Petitioner had made arrangements to perform. Her call was related

to equipment which might be needed. The unsolicited offer by Tio Alberto's management to allow Petitioner to work the cocktail hour to defray expenses can hardly be construed as solicitation of employment.

In connection with the Roxy engagement: The call made by Respondent to a pay-to-play venue is not the solicitation of employment. Such activity is nothing more than an attempt to advance the artist's career. The term "employment", if it is to have any logical meaning within the context used in the Act, implies payment for the service rendered. Procuring employment certainly does not imply soliciting a position which entails paying for the right to perform the service.

The fact that while performing an activity that was obviously within the realm of the personal manager, there was an unexpected turn of events which resulted in the Petitioner being paid for the performance was simply fortuitous. It would have been illogical to expect a personal manager under the circumstances to refuse to pass on the information to her client.

But even if we had found that the activities engaged in by the Respondent involved the procurement of employment, it would be necessary to show that those procurement activities are significant. Wachs v. Curry (1993) 13 Cal.App.4th 616, 628. The Labor Commissioner has determined that:

> "[p]rocurement of employment constitutes a 'significant' portion of the activities of an agent if the procurement is not due to inadvertence or mistake and if 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. This meaning would seem to be in line with the tenor of the court's decision in Wachs v. Curry." (Precedent Decision Thomas

Church v. Ross Brown, TAC 52-92, Adopted June 2, 1994)

The testimony of Respondent, unassailed by Petitioner, was to the effect that she had invested over 1000 hours to the advancement of the Petitioner's career. This activity was legal and, in fact, required by the terms of the Personal Management Agreement.

In light of this activity, it could hardly be said that the few minutes it took to garner the information regarding either the Roxy or the Tio Alberto performances constituted a significant part of the activities of the personal manager.

CONCLUSION

There is insufficient evidence to establish, given the facts in this particular case, that the Respondent was engaged in procuring employment in violation of the Talent Agency Act.

The Petition is denied and the matter is dismissed.

Dated: 7-22-94

H. Thomas Cadell Jr.
H. THOMAS CADELL, JR.
Special Hearing Officer

Adopted:

Dated: 7-21-94

Victoria Bradshaw
VICTORIA BRADSHAW
State Labor Commissioner