

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
Department of Industrial Relations  
2 State of California  
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6

7

BEFORE THE STATE LABOR COMMISSIONER

8

OF THE STATE OF CALIFORNIA

9

10	DINA PADILLA, on behalf of	)	No. TAC 60-94
	LEAH PADILLA, a minor,	)	
11		)	
	Petitioner,	)	
12		)	DETERMINATION ON
	vs.	)	PETITION TO DETERMINE
13		)	CONTROVERSY
	PENNY CLYMER, Individually dba	)	
14	PENNY CLYMER'S MODELING & TALENT	)	
	AGENCY,	)	
15		)	
	Respondent.	)	
16		)	

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18 This proceeding arose under the provisions of the Talent  
19 Agencies Act (the "Act"), California Labor Code Sections 1700  
20 through 1700.47.

21 On August 18, 1994, Petitioners DINA PADILLA, mother of LEAH  
22 PADILLA, a minor, ("Padilla") filed a petition with the Labor  
23 Commissioner pursuant to Section 1700.44 seeking determination of  
24 an alleged controversy with Respondent, PENNY CLYMER'S MODEL &  
25 TALENT AGENCY which is a sole proprietorship owned by PENNY CLYMER  
26 ("Clymer").

27 On June 23, 1995, a full evidentiary hearing was held before  
28 Robert N. Villalovos, Attorney for the Labor Commissioner,

1 assigned as a hearing officer. Present at the hearing were  
2 Petitioners Leah Deanne Padilla, the minor artist, and her mother  
3 Dina Padilla. Respondents did not file any written response to the  
4 Petition within 20 days after the service of the Petition but  
5 present at the hearing was Respondent Penny Clymer, sole  
6 proprietor of Penny Clymer's Modeling & Talent Agency.

7 Due consideration having been given to the testimony,  
8 documentary evidence, and arguments submitted by the parties, the  
9 Labor Commissioner now renders the following decision.

10 **PROCEDURAL AND FACTUAL BACKGROUND**

11 On October 21, 1993, Petitioner Dina Padilla, as parent  
12 (mother) of Leah Padilla, then a minor, entered into a written  
13 agreement with Respondent under which Respondent agreed to serve  
14 as the talent agent for Leah Padilla and for which Petitioner  
15 agreed to pay a percentage of the artist's earnings from any  
16 employment procured by Respondent. There was testimony from  
17 Respondent that there had previously existed two corporations,  
18 Clymer's Modeling and Talent Agency, Inc. and Clymer's Studios,  
19 Inc., for which Penny Clymer was a corporate officer in both  
20 companies. Respondent further testified that the two corporations  
21 had since dissolved and filings of dissolution with the Secretary  
22 of State were made in 1994. The talent agency company was  
23 suspended by the Secretary of State for unpaid taxes owed to the  
24 Franchise Tax Board and has was not licensed with the State Labor  
25 Commissioner since 1988 due to failure to post the required bond  
26 for licensure. The testimony of all parties and the documentary  
27 evidence supports that the contract and relationship was entered  
28 into by Penny Clymer, individually and doing business as a sole

1 proprietorship under Penny Clymer's Modeling and Talent Agency.  
2 Since there were no representations of a corporation in the  
3 subject relationship nor evidence that the (suspended)  
4 corporations were parties to the subject contractual relationship,  
5 the caption of this proceeding is amended to state the more  
6 specifically named respondent pursuant to the proof presented at  
7 the hearing.

8       The written agreement was part of a package of material which  
9 included "Clymer's Modeling & Talent Agency Contract which  
10 consisted of three pages. Also included in the package (at pages  
11 8-10) is material describing a "Model Workshop Program" available  
12 only to models under contract with Clymer. The stated price for  
13 the workshop was \$2,550.00.

14       At the time the written agreement was entered into,  
15 Petitioner made payment of \$600.00 towards the model workshop  
16 program with the balance to be made in monthly payments until paid  
17 in full. The remaining balance of \$1,950.00 was to be made in monthly  
18 installments. Petitioner Dina Padilla testified that she paid a  
19 total of \$1,800.00 to Respondent and, at the hearing, stated she  
20 is seeking recovery of said amount along with wages for time taken  
21 from school by the artist which under testimony by Leah Padilla  
22 amounted to approximately 7 hours.

23       During the period covered by the written agreement, the  
24 artist testified that she participated in activities involving  
25 employment opportunities procured or promised to be procured by  
26 Clymer which included, but were not limited to, window modeling of  
27 prom dresses for Gantos, a Sony print ad, and a John L. Sullivan  
28 video taping.

1           Petitioner argued that the Respondent was not a licensed  
2 talent agent during all relevant periods stated in the Petition,  
3 acted as a talent agent by promising to procure and procuring  
4 employment opportunities, and that in reliance upon such represen-  
5 tations and conduct, Petitioner incurred costs for which  
6 reimbursement is now sought. Petitioner stated that verbal and  
7 written representations of the model workshop program as part of  
8 the Clymer's Modeling and Talent Agency package which included the  
9 talent agent contract, workshop program information improperly  
10 represented Clymer as a talent agent and that the workshop program  
11 and fee were part of the services rendered by Penny Clymer.  
12 Although demanded, Respondent failed to reimburse Petitioners for  
13 the amounts paid. Petitioner thus seek reimbursement of the  
14 \$1,800.00 as amounts paid to Clymer.

15           Respondent Penny Clymer testified that the model training  
16 workshop and fee charged thereunder was a service completely inde-  
17 pendent of the talent agency and was a separate transaction pro-  
18 viding services to train, develop, and manage Padilla who had no  
19 prior modeling experience. Respondent further argued that such  
20 services did not constitute activities subject to coverage under  
21 the Talent Agency Act (Labor Code Sections 1700, et seq.)  
22 Respondent further maintained that there were no promises of wages  
23 for time taken from school nor for the Sony print ad shoot which  
24 was only an audition. Regarding the latter, Respondent maintained  
25 that statements made by an independent photographer (not employed  
26 by nor an agent of Respondent) regarding wage payment for the  
27 shoot cannot render her liable for the requested wages.

28

1    DECISION

2            1.    **THE CONTRACT IS ILLEGAL UNDER THE ACT AND PADILLA IS NOT**  
3    **OBLIGATED TO PAY COMPENSATION OR OTHERWISE PERFORM**  
   **FURTHER UNDER THE CONTRACT .**

4            Section 1700.5 of the Act provides, in pertinent part, as  
5 follows:

6    "No person shall engage in or carry on the  
7    occupation of a talent agency without first  
   procuring a license therefor from the Labor  
   Commissioner."

8            Section 1700.4 of the Act defines the terms "talent agency"  
9 and "artist" in pertinent part as follows:

10     " (a) 'Talent agency' means a person or corp-  
11     oration who engages in the occupation of pro-  
12     curing, offering, promising, or attempting to  
   procure employment or engagements for an  
13     artist or artists, .... Talent agencies may,  
   in addition, counsel or direct artists in he  
   development of heir professional careers.

14     (b) 'Artists' means ... actors and actresses  
15     ..., radio artists, ..., models, and other  
16     artists and persons rendering professional  
   services in motion picture, theatrical, radio,  
17     television and other entertainment  
   enterprises.

18            "Since the clear object of the Act is to prevent improper  
19 persons from becoming [talent agents] and to regulate such act-  
20 ivity for the protection of the public, a contract between an  
21 unlicensed [talent agent] and an artist is void." Buchwald v.  
22 Superior Court (1967) 254 Cal.App.2d 347, 351; Waisbren v.  
23 Peppercorn Productions, Inc. (1995) 41 Cal.App.4th 246, 261. Under  
24 Civil Code Section 1667, contracts that are contrary to express  
25 statutes or public policy as set forth in statutes are illegal  
26 contracts; the illegality voids the entire contract. Absent a  
27 savings clause, the entire contract must fall if it purports to  
28 bind the parties to an arrangement expressly forbidden by statute.

1 Dina Padilla's status as an artist is undisputed. Therefore,  
2 the sole question presented is whether Respondent contracted to  
3 engage in the occupation of a talent agent for Dina Padilla. The  
4 answer is that the named Respondents did so.

5 The true contractual and business relationship between  
6 Padilla and Clymer was defined at the outset by the provisions of  
7 the executed written contract. The "Talent Agency Contract" (at  
8 pages 5-7 in the package) expressly engage Respondent to act as  
9 the "exclusive agent, advisor, and representative with respect to  
10 [the artists] services, activity, and participation in all  
11 branches of the entertainment, publications photography, modeling,  
12 and related fields throughout the world, ...." (Contract, page 5,  
13 paragraph 1). The Contract also provided that the talent agency  
14 agreed "to use all reasonable efforts to procure employment for  
15 [the artist]." (Contract, page 5, paragraph 3). The conduct of  
16 Clymer supports a finding that the workshop program was provided  
17 as a service arising from the talent agency since the workshop  
18 program material with quoted price of \$2,550.00 was part of the  
19 same package containing the "Talent Agency Contract" which  
20 described the duties and obligations of the artist and agent.

21 Clymer's most recent license expired in 1988 and that license  
22 was for the former corporation for which Respondent was a  
23 corporate officer. Penny Clymer was not licensed as a talent agent  
24 at the time the Talent Agent Contract was entered into on October  
25 21, 1993. Since the contract was entered into by an unlicensed  
26 agent, the contract is void in its entirety and Petitioner is  
27 entitled to amounts paid thereunder which is \$1,800.00.

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1           2.     **UNDER MORE RECENT AUTHORITY, CLYMER WAS NOT OTHERWISE**  
2                   **EXEMPT FROM THE LICENSING REQUIREMENT FOR THE SUBJECT**  
3                   **ACTIVITIES PERFORMED BY CLYMER UNDER WACHS V. CURRY**

3           Respondent nonetheless argues that she was not required to  
4 have a license since she was neither engaged in the occupation of  
5 a talent agent in connection with the subject fees. It is elemen-  
6 tal that ambiguities in contracts are construed against the person  
7 who drafted them. Here again, the contractual and business rela-  
8 tionship between the parties, as outlined in the agreement drafted  
9 by Clymer and executed on October 21, 1993, establishes that  
10 Clymer expressly promised to undertake the duties of a talent  
11 agent for the subject artist.

12           Nonetheless, Clymer maintains that the fees sought to be  
13 recovered in the instant petition were not incurred as a result of  
14 the talent agency relationship but constituted separate and  
15 independent services to train, develop, counsel, and manage the  
16 artist's career, citing the case of Wachs v. Curry (1993) 13  
17 Cal.App.4th 616.<sup>1</sup>

18           The Wachs court was faced with a constitutional challenge of  
19 the Act, on its face, as violative of equal protection and due  
20 process, the latter based upon the contention that the word  
21 "procure" was unconstitutionally vague. Significantly, in reject-  
22 ing the contentions of vagueness, the court stated that "the only  
23 question before us is whether the word 'procure' in the context of  
24 the Act is so lacking in objective content that it provides no

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25  
26           <sup>1</sup>     However, it is significant that the subject model workshop program was  
27           advertised and presented as a part of the talent agency contract and  
28           accompanying materials. The program material expressly provides that it  
          is not open to the public and is available only to models under contract  
          with Clymer's. (Model Workshop Program, Package page 8).

1 standard at all by which to measure the agents conduct." Wachs,  
2 supra, 13 Cal.App.4th at 628. In its analysis, the court noted  
3 that the Act applies to persons engaged in the "occupation" of  
4 procuring employment for artists and, in defining "occupation" as  
5 one's principal line of work, stated that the licensing scheme  
6 does not apply unless a persons's procurement activities consti-  
7 tuted a 'significant part' of his business. Id., at 626-628. The  
8 court expressly declined to state what would constitute "signifi-  
9 cant" since such was necessary under the facial challenge analysis  
10 of the Act.

11 More recently however, the courts have held that given the  
12 plain meaning of the Act, its remedial purpose, as well as previ-  
13 ous interpretation by the Labor Commissioner and recent legisla-  
14 tive action under the California Entertainment Commission, the  
15 "licensing scheme contemplates that the 'occasional talent agent,'  
16 like the full-time agent is subject to regulatory control [under  
17 the Act]." Waisbren v. Peppercorn Productions, Inc. (1995) 41  
18 Cal.App.4th 246, 255. Accordingly, "the Act requires a license to  
19 engage in any procurement activities." Id. at 259. In Waisbren,  
20 the court stated:

21 "The statutory goal of protecting artists would be  
22 defeated if the Act applied only where a personal mana-  
23 ger spends a significant part of his workday pursuing  
24 employment for artists. The fact that an unlicensed  
25 manager may devote an 'incidental' portion of his time  
26 to procurement activities would be of little consolation  
27 to the client who falls victim to a violation of the  
28 Act....

26 We refuse to believe that the Legislature intended to  
27 exempt a personal manager from the Act--thereby allowing  
28 violations to go unremedied--unless his procurement  
efforts cross some nebulous threshold from 'incidental'  
to 'principal.' Such a standard is so vague as to be



1 unworkable and would undermine the purpose of the Act.  
2 [Footnote omitted]" Id., at 254.

3 The court in Waisbren specifically rejected the language  
4 utilized in Wachs interpreting the term "occupation" (i.e., that a  
5 person's procurement activities under the Act must constitute a  
6 'significant' part of a person's business) by stating that even  
7 the Wachs court recognized the limited nature of the issue before  
8 it, and thus regarded the latter court's interpretation of the  
9 term "occupation" as dicta and declined to follow it. Waisbren,  
10 supra, 41 Cal.App.4th at 260-261.

11 Accordingly, the language in Wachs does not provide the  
12 correct standard for determining when a license is required under  
13 the Act; and further, under Waisbren, a person will be subject to  
14 regulation and licensure under the Act and liability for viola-  
15 tions thereof even where his activities are incidental to his  
16 business.

17 In applying the above standard pursuant to Waisbren, the  
18 significance of the agent's employment procurement function com-  
19 pared to the agent's counseling function is neither dispositive  
20 nor relevant. Here, the written agreement between the parties  
21 expressly provided that Clymer was to engage in procurement of  
22 employment and, in fact, she procured employment opportunities  
23 which were, at least incidental, but at most, constituted the very  
24 activity the artist expected Clymer to perform, i.e., procuring  
25 employment. Although there was little, if any, actual compensation  
26 received, the agreement expressly referred to coverage by, and  
27 contained provisions from, the Act and the activities of the  
28 Respondent were covered under the Act.

1           Testimony of Clymer indicated she did not receive any  
2 compensation from the opportunities procured for Padilla but  
3 stated that discounts on products/services are often made by the  
4 customers of Clymer to the artists. For the Gantos job on April 5,  
5 1994, Padilla received a 15% store discount for 3 hours of work  
6 modeling prom dresses in a store window. On another occasion where  
7 the artist was scheduled to attend a runway show at "Career Days"  
8 at Casa Robles School in Orangevale, \$50.00 was to be paid to the  
9 artists attending. Clymer presented documents regarding another  
10 job on April 29, 1994 which indicated that Leah Padilla was a "no  
11 show." Clymer stated that the \$50.00 amount given to the models  
12 was a "gratuity" from her company.

13           Significantly, the documents presented for both jobs are  
14 titled "Job Billing Information Form" on Respondent's letterhead  
15 and lists an "employer" (Gantos & Casa Robles, respectively), job  
16 name (Gantos Cocktail Mannequin & Casa Robles Career Days) and  
17 lists the models used including name, rate (15% discount & \$50.00,  
18 respectively), and had a space for "hours" for each entry. The  
19 Respondent's form was, by its terms, created for and obviously  
20 used for billing jobs procured by her agency and such document is  
21 patently inconsistent with Clymer's testimony that her business is  
22 not utilized to procure employment opportunities.

23           Clymer's argument would have one disregard the express  
24 undertaking between the parties as indicated in the agreement and  
25 reflected in the workshop program provided under the putative  
26 talent agent's name. Clymer's position requires one to myopically  
27 view the specific activity for which the alleged losses were  
28 incurred (registration fees and other fees) to arrive at a

1 portrayal of her procurement activities smaller relative to the  
2 training, counseling, and directing of Padilla's career. Such  
3 analysis is contrary to Waisbren wherein the Court stated:

4 "By creating the [California Entertainment] Commission,  
5 accepting the Report, and codifying the Commission's recom-  
6 mendations in the Act, the Legislature approved the Commis-  
7 sion's view that '[e]xceptions in the nature of incidental,  
8 occasional or infrequent activities relating in any way to  
9 procuring employment for an artist cannot be permitted: one  
10 either is, or is not, licensed as a talent agent ...' (Report  
11 at p.11) This legislative approval extends to the Commis-  
12 sion's finding that the Act imposes a *total* prohibition on  
13 the procurement efforts of unlicensed persons. (*Ibid.*) Given  
14 the Legislature's wholesale endorsement of the Report, we  
15 conclude, as did the Commission, that the Act requires a  
16 license to engage in *any* procurement activities. [Cf. cita-  
17 tion omitted]" Waisbren, supra, 41 Cal.App.4th at 258-259  
18 (bracketed material added).

12 In the context of the foregoing, a petitioner who asserts a  
13 licensing violation under the Act satisfies his burden if he  
14 establishes that the Petitioner was involved in a contractual  
15 relationship with Respondent procuring employment or that a rela-  
16 tionship included any employment procurement activities undertaken  
17 or promised to be undertaken by Respondent. The testimony of both  
18 Leah and Dina Padilla establish from the outset that employment  
19 opportunities were going to occur (e.g., that "Leah would be work-  
20 ing within 10 days") as a result of the relationship with Clymer.  
21 Such a showing supports an inference that these activities were  
22 some part of the Respondents' business as well as the specific  
23 undertaking by Respondent, and thus, suffices to establish a *prima*  
24 *facie* case of violation of the Act. At that point, the burden  
25 shifts to the Respondent to come forward with sufficient evidence  
26 to sustain a finding that procurement functions were not any part  
27 of the Respondent's activities.

28

1 In the present case, the verbal and written representations  
2 in the package presented to Petitioner at the outset, which  
3 includes the talent agent agreement, and the express individual  
4 representations by Clymer lead to the inescapable conclusion that  
5 the activities performed by Respondents were to undertake on a  
6 professional basis the duties of a talent agent with respect to  
7 matters not subject to the recording industry exclusion contained  
8 in the Labor Code.

9 Consequently, Respondent was not exempt from the licensing  
10 requirement for the undertaken activities. Clymer's argument that  
11 the specific activities (giving rise to the claim for reimburse-  
12 ment of fees) were activities not requiring a license and/or that  
13 such activities do not involve procurement of employment (and  
14 thus, excuses Clymer's failure to have a license) fails under the  
15 foregoing analysis.

16 **3. COLLECTION OF THE SUBJECT FEES WERE**  
17 **NONETHELESS PROHIBITED BY THE ACT**

18 Notwithstanding the above analysis rendering the illegal  
19 contract void, the talent agent improperly collected fees which  
20 are prohibited under the Act. Under the Act (which, incidently,  
21 the subject contract expressly referred to and incorporated),  
22 Labor Code Section 1700.40 prohibits talent agents from collecting  
23 any "registration fees" as defined by Section 1700.2(b) which  
24 includes "any charge made or attempted to be made to an artist for  
25 ... (B) photographs, film strips, video tapes, or other reproduc-  
26 tions of the applicant ..." or "(5) any activity of a like  
27 nature." Here, the registration fee for the model workshop pro-  
28 gram was presented in writing and verbally by Clymer as a service

1 of the talent agency requiring payment for services which would  
2 not have been incurred but for the talent agency relationship.<sup>2</sup>

3 Since the amounts paid consist of payments for the model  
4 program workshop prohibited by Section 1700.40, including the  
5 photo portfolio of the artist, and registration for a modeling  
6 workshop which are proscribed by Section 1700.2(b), said fees  
7 charged to Petitioner were prohibited by Section 1700.40 and  
8 Respondent must reimburse Petitioner the \$1,800.00 which consti-  
9 tute amounts paid to Respondent as unlawful fees collected pursu-  
10 ant to the provisions of the Act.

11 **4. PETITIONER IS NOT ENTITLED TO COLLECTION OF**  
12 **CLAIMED WAGES FROM RESPONDENT FOR TIME TAKEN**  
13 **FROM SCHOOL**

14 At the hearing, Petitioner also sought recovery of wages from  
15 time taken from school and provided testimony that approximately  
16 2½ - 3 hours were spent from school doing the Sony print shoot on  
17 March 16, 1994 and 4 hours for the Gantos modeling job. Dina  
18 Padilla maintains that time was taken off from school because it  
19 was thought that Leah would get paid and there was never mention  
20 of volunteer work for the shoots. However, no specific evidence,  
21 by expressions or conduct, was presented by Petitioner to estab-  
22 lish such a promise by Respondent to pay for time taken from  
23 school enforceable as a direct employment by Clymer nor pursuant  
24 to the provisions under the Talent Agency Act.

25 The evidence does not support a specific wage obligation  
26 against Clymer for time taken from school for the two above-

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27 <sup>2</sup> The Model Workshop Program was not open to the public and, by its terms,  
28 was available only to models under contract with Clymer.

1 mentioned jobs and Petitioner is not entitled to recovery thereon  
2 under the provisions of the Talent Agency Act.

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**DISPOSITION**

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Accordingly, it is hereby ordered as follows:

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1. The contract between Petitioner Padilla and Respondent  
Clymer is declared to be illegal, void, and unenforceable, and  
Padilla shall have no further obligation to Clymer under the  
contract for commissions or otherwise.

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2. Respondent Clymer shall pay to Petitioner Padilla a total  
of \$1,800.00 for reimbursement of unlawfully collected fees, and  
\$1,800.00 for penalties pursuant to Labor Code Section 1700.40,  
for a total of \$3,600.00.

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DATED: 1-9-98

Robert N. Villalovos  
ROBERT N. VILLALOVOS  
Attorney and Special Hearing Officer  
for the Labor Commissioner

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

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DATED: 1/15/98

Jose Millan  
JOSE MILLAN  
State Labor Commissioner

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