

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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9
10 BEFORE THE LABOR COMMISSIONER
11 OF THE STATE OF CALIFORNIA
12

13	KELLETH CHINN and CAROLINE WAMPOLE,)	No. TAC 17-96
14	professionally known as "BIG SOUL",)	
15)	
16	Petitioners,)	DETERMINATION OF
17	vs.)	CONTROVERSY
18)	
19	GEORGE E. TOBIN, an individual)	
20	dba GEORGE TOBIN MUSIC,)	
21)	
22	Respondent.)	
23)	

24 BACKGROUND

25 Petitioners, Kelleth Chinn and Caroline Wampole, are
26 musicians professionally known as the musical group "Big Soul",
27 who entered into two written agreements with Respondent, George
28 Tobin, on June 22, 1993 - - an "Artist Agreement" and a "Personal
Management Agreement." Respondent is the owner of a business that
is engaged in the recording and publishing of music. At all
relevant times herein, both parties resided in and did business
in the State of California.

Under the "Artist Agreement", petitioners agreed to render
their "exclusive recording services" to Respondent, that
Respondent would be the sole owner of all master recordings
recorded during the term of the agreement, that Respondent and

1 anyone else authorized by Respondent (e.g., a major record label)
2 would have exclusive rights to manufacture records from these
3 master recordings, and to permit the public performance of these
4 recordings; that Respondent would hold the publishing rights to
5 any compositions recorded by petitioners, and that Respondent
6 could subsequently assign all or part of these rights to a
7 publishing company. In return, Respondent agreed to commercially
8 exploit and finance the production of petitioner's recordings, and
9 to pay various recording costs, advances to petitioners, and
10 royalties. The Artist Agreement also provided that Respondent
11 could produce, at his discretion, music videos, and that
12 Respondent would be the sole owner of the rights to any such
13 videos, with petitioners entitled to royalties based on any
14 profits that may result from the commercial exploitation of such
15 videos.

16 Pursuant to the Artist Agreement, Tobin arranged for
17 Petitioners' use of a professional recording studio and sound
18 engineer, and secured and paid for the services of session
19 musicians to record with Petitioners. Tobin also undertook
20 efforts to promote Petitioners' recordings with record industry
21 executives and with radio programmers through meetings and the
22 distribution of promotional CD recordings. Respondent paid over
23 \$43,000 for recording studio time, recording tape, the services of
24 studio musicians and the sound engineer, and costs of other
25 materials.

26 Under the "Personal Management Agreement", petitioners agreed
27 that Respondent would serve as their "exclusive personal manager"
28 and "adviser . . . in connection with all matters relating to

1 Artist's professional career in all branches of the entertainment
2 industry. . . ." The Personal Management Agreement gave
3 Respondent the authority to function as petitioners' attorney-in-
4 fact with respect to various matters. Of primary interest here,
5 under paragraph 3(c) of the Personal Management Agreement,
6 Respondent was authorized, "subject to Artist's approval after
7 consultation with Manager and in accordance with paragraph 7
8 hereof, [to] prepare, negotiate, consummate, sign, execute and
9 deliver for Artist, in Artist's name or in Artist's behalf, any
10 and all agreements, documents and contracts for Artist's
11 services. . . ." Paragraph 7 of the Personal Management Agreement
12 states: "Artist understands that Manager is not an employment
13 agent, theatrical agent, or artist's manager, and that Manager has
14 not offered, attempted or promised to obtain employment or
15 engagements for Artist, and that Manager is not permitted,
16 obligated, authorized or expected to do so. Manager will consult
17 with and advise Artist with respect to the selection, engagement
18 and discharge of theatrical agents, artists' managers, employment
19 agencies and booking agents (herein collectively called "talent
20 agents") but manager is not authorized hereunder to actually
21 select, engage, discharge or direct any such talent agent in the
22 performance to [sic] the duties of such talent agent."

23 As compensation for respondent's services provided under the
24 Personal Management Agreement, petitioners agreed to pay
25 commissions to the respondent in an amount equal to 20% of
26 petitioners' gross earnings in the entertainment industry,
27 including but not limited to earnings derived from activities in
28 motion pictures, television, radio, theatrical engagements, public

1 appearances in places of entertainment, records and recording,
2 except that respondent would not be entitled to commissions on any
3 record royalties or advances paid to petitioners pursuant to the
4 Artist Agreement. In accordance with this provision, Respondent
5 did not deduct any commissions from the advances that were paid to
6 Petitioners pursuant to the Artist Agreement.

7 The term of the Personal Management Agreement is defined as
8 "equal to and co-terminus to the term of the Artist Agreement",
9 while Artist Agreement states that it "shall terminate
10 concurrently with the [Personal] Management Agreement should the
11 [Personal] Management Agreement terminate for any reasons
12 whatsoever"

13 On or about May 17, 1996, respondent filed an action in the
14 Los Angeles Superior Court against Kelleth Chinn, Caroline
15 Wampole, and various other defendants seeking damages for breach
16 of contract with respect to obligations purportedly arising from
17 this Artist Agreement and Personal Management Agreement. Shortly
18 thereafter, petitioners filed this petition to determine
19 controversy, alleging that respondent acted in the capacity of a
20 talent agency without having been licensed by the State of
21 California, and that these two agreements are void from their
22 inception and unenforceable by virtue of respondent's violation of
23 Labor Code §1700.5.

24 Pursuant to both parties' claims that this controversy could
25 be decided without an evidentiary hearing, a pre-hearing
26 conference was held on October 7, 1996 in San Francisco,
27 California, before the undersigned attorney for the Labor
28 Commissioner, specially designated to hear this matter.

1 Petitioners were represented by David D. Stein; respondent was
2 represented by David C. Phillips, David M. Given and Steven F.
3 Rohde. Based on the evidence and argument presented at this
4 hearing, and after considering the post-hearing briefs and
5 declarations that were filed, the Labor Commissioner adopts the
6 following determination.

7 LEGAL ANALYSIS

8 At all times relevant herein, Respondent was not licensed as
9 a talent agency. Labor Code §1700.5 provides that "no person
10 shall engage in or carry on the occupation of a talent agency
11 without first procuring a license therefor from the Labor
12 Commissioner." The term "talent agency" is defined at Labor Code
13 §1700.4(a) as "a person or corporation who engages in the
14 occupation of procuring, offering, promising or attempting to
15 procure employment or engagements for an artist or artists, except
16 that the activities of procuring, offering or promising to procure
17 recording contracts for an artist or artists shall not of itself
18 subject a person or corporation to regulation and licensing." It
19 is undisputed that petitioners are artists under Labor Code
20 section 1700.4(b), as "musical artists," "composers," and
21 "lyricists" are expressly defined as "artists.". The question
22 that is presented here is whether respondent acted as a "talent
23 agency" within the meaning of section 1700.4(a).

24 In essence, petitioners' case boils down to the allegation
25 that respondent "procured employment" for Big Soul, within the
26 meaning of Labor Code section 1700.4(a), by obtaining their
27 songwriting services for his own music publishing business, and
28 thereby violated the Act by not being licensed as a talent agent

1 in accordance with Labor Code section 1700.5. This claim is
2 succinctly presented in the Petition to Determine Controversy as
3 follows: "Petitioners allege that Respondent wrongfully seeks to
4 secure for himself valuable publishing rights in the original
5 compositions authored by Petitioners."¹ No evidence of any sort
6 was presented to indicate that Respondent procured, offered,
7 attempted or promised to procure employment for Petitioners, with
8 respect to Petitioner's song writing services, for any person or
9 entity other than the Respondent himself and Respondent's music
10 publishing business. We do not believe that this alone would
11 establish a violation of the Talent Agencies Act, in that a person

12
13 ¹ Although Labor Code section 1700.4(a) exempts "procuring,
14 offering, or promising to procure recording contracts for an
15 artist" from the scope of activities or which a talent agency
16 license is required, this exemption does not expressly extend to
17 the procurement of music publishing contracts. The Talent
18 Agencies Act has long been construed by the courts as a remedial
19 statute intended for the protection of artists. "[T]he clear
20 object of the Act is to prevent improper persons from being
21 [talent agents] and to regulate such activity for the protection
22 of the public. . . ." Buchwald v. Superior Court (1967) 254
23 Cal.App.2d 347, 351. See also Waisbren v. Peppercorn Productions
24 (1995) 41 Cal.App.4th 246. As with all remedial legislation,
25 exemptions must be strictly construed and cannot be extended
26 beyond their express provisions. To do otherwise would defeat the
27 remedial purpose of the legislation.

28 Respondent argues, however, that the rights granted to him
under the music publishing provision of the Artist Agreement are
expressly defined to include only those musical compositions that
are "recorded by [Petitioners] under this [Artist] Agreement",
that these music publishing rights were therefore dependent upon
and "merely incidental to" the recording contract, and thus, that
these music publishing rights fall within the statutory exemption
for recording contracts. This argument ignores the fact that
music publishing and recording are two separate endeavors, that
musicians who compose and record their own songs may have separate
music publishing and recording contracts, that there are recording
artists who are not songwriters, and that there are songwriters
who are not recording artists. We therefore conclude that music
publishing and songwriting does not fall within the recording
contract exemption, regardless of whether the right to publish an
artist's music is limited only to compositions that are contained
on that artist's record.

1 or entity who employs an artist does not "procure employment" for
2 that artist, within the meaning of Labor Code section 1700.04(a),
3 by directly engaging the services of that artist. Instead, we
4 hold that the "activity of procuring employment," under the Talent
5 Agencies Act, refers to the role an agent plays when acting as an
6 intermediary between the artist whom the agent represents and the
7 third-party employer who seeks to engage the artist's services.

8 Petitioners' novel argument would mean that every television
9 or film production company that directly hires an actor, and that
10 every concert producer that directly engages the services of a
11 musical group, without undertaking any communications or
12 negotiations with the actor's or musical group's talent agent,
13 would itself need to be licensed as a talent agency under the Act.
14 To suggest that any person who engages the services of an artist
15 for himself is engaged in the occupation of procuring employment
16 for that artist, and that such person must therefore be licensed
17 as a talent agent is to radically expand the reach of the Talent
18 Agencies Act beyond recognition. The Act "must be given a
19 reasonable and common sense construction in accordance with the
20 apparent purpose and intention of the lawmakers - - one . . . that
21 will lead to wise policy rather than mischief or absurdity."
22 Buchwald v. Superior Court (1967) 254 Cal.App.2d 347, 354-355.
23 The purpose of the Act was to require licensing of agents, that
24 is, individuals who represent artists by attempting to obtain
25 employment for such artists with third party employers. We can
26 find nothing in the legislative history of the Talent Agencies Act
27 that would even remotely indicate any legislative intent to
28 require the licensing of employers who directly offer employment

1 to artists, and to construe the Act in such a manner would lead to
2 absurd results. Nor are we aware of any prior Labor Commissioner
3 determinations or court decisions that have held that an employer
4 violates the Talent Agencies Act by engaging the services of an
5 artist for himself without being licensed as a talent agent. The
6 cases cited by Petitioners - - Church v. Brown (1994) TAC 52-92
7 and Humes v. MarGil Ventures, Inc. (1985) 174 Cal.App.3d 486 - -
8 do not lend support to that contention.

9 The respondent in Church v. Brown was not licensed as a
10 talent agent and was employed as the casting director for the film
11 production company which produced the film "Stolen Moments" and
12 which employed Thomas Haden Church as an actor in the production
13 of this film. But those were not the facts that the Labor
14 Commissioner relied on in holding that Ross Brown had violated the
15 Talent Agencies Act. Indeed, there is no requirement that a
16 casting director employed by a production company and who works
17 exclusively for that production company be licensed as a talent
18 agent in order to hire actors to work for the production company.
19 Rather, the Labor Commissioner determined that Brown initially
20 violated the Act by engaging in fraudulent activities outside the
21 scope of his employment as a casting director that violated his
22 primary duty to the producers and that created a conflict of
23 interest between himself and the producers. Specifically, Brown
24 created a false resume for Church, containing several false
25 credits regarding Church's prior work, as a means of ensuring that
26 Church would get hired by the "Stolen Moments" production company.
27 Thereafter, Brown told Church that he expected to be paid
28 commissions equal to 15% of Church's gross earnings on "Stolen

1 Moments". Following the completion of "Stolen Moments", Brown
2 undertook continuous efforts to procure employment for Church - -
3 with third party employers - - and repeatedly promised Church that
4 he would procure such employment. These activities included
5 arranging employment interviews, sending out resumes and
6 photographs, and calling casting directors. Thus, despite the
7 fact that Brown's business relationship with Church began while
8 Brown was the casting director for the production company that
9 employed Church, the true nature of Brown's role - - based on the
10 specific evidence presented - - was that he went far beyond his
11 job as the production company's casting agent to become Church's
12 talent agent.

13 In Humes v. MarGil Ventures, Inc., supra, 174 Cal.App.3d 486,
14 the court reversed the lower court's confirmation of the Labor
15 Commissioner's determination against a respondent, holding that
16 the respondent's right to due process was violated when the Labor
17 Commissioner proceeded with a hearing that respondent was unable
18 to attend because of his incarceration. The appellate court
19 decision did not address the substantive merits of the controversy
20 between the artist and the putative agent, and did not review the
21 Labor Commissioner's determination of the merits. In its
22 recitation of facts, however, the court noted that in 1978
23 respondent Gilbert Cabot entered into an agreement whereby he was
24 to act as Mary Humes "personal manager", that two years later
25 Humes and Cabot formed a "theatrical production company" called
26 MarGil Ventures "for the purpose of developing and advancing
27 Humes' professional acting career", that Humes then entered into
28 an "exclusive employment agreement" with MarGil, and that one year

1 later Humes filed a petition to determine controversy with the
2 Labor Commissioner under Labor Code section 1700.44, seeking a
3 determination that Cabot and MarGil violated the Talent Agencies
4 Act by procuring employment for her and negotiating contracts with
5 third party employers without having been licensed under Labor
6 Code section 1700.5. The essence of the Labor Commissioner's
7 determination, and the reason that respondents' procurement
8 activities were found by the Labor Commissioner to have violated
9 the Act, was that MarGil was a "theatrical production company" in
10 name only; that it was not engaged in the production of any
11 entertainment or theatrical enterprises, but rather, merely
12 functioned as a loan-out company for providing Humes' artistic
13 services to third party producers. Humes' "employment agreement"
14 with MarGil notwithstanding, these third party producers were the
15 persons or entities with whom she was seeking employment. And it
16 was Cabot's activities as a talent agent - -his efforts in
17 procuring and attempting to procure employment for Humes with
18 these third party producers - - that violated the Talent Agencies
19 Act.

20 The Labor Commissioner reached the determination that it did
21 in MarGil by examining the substantive reality behind the
22 contractual language. "The court, or as here, the Labor
23 Commissioner is free to search out illegality lying behind the
24 form in which the transaction has been cast for the purpose of
25 concealing such illegality." Buchwald v. Superior Court (1967)
26 254 Cal.App.2d 347, 355. At the pre-hearing conference in this
27 matter, the parties were ordered to submit declarations or some
28 offer of proof as to whether respondent promised or attempted to

1 procure or did procure employment for petitioners with any third
2 parties in violation of the Talent Agencies Act. The undersigned
3 hearing officer invited the submission of this sort of evidence
4 precisely in order to look beyond the written agreements, to
5 determine whether these agreements were merely a subterfuge
6 intended to conceal the actual nature of the parties' business
7 relationship. Petitioners' papers filed in response to this order
8 failed to present any evidence, or offer of proof, that respondent
9 ever procured or promised or offered or attempted to procure
10 employment for petitioners with any third party.² That lack of
11 evidence as to promises or offers to obtain employment with third
12 parties or actual procurement activities is what distinguishes
13 this case from Buchwald and its progeny. Here, search as we
14 might, we are unable to discern any "illegality lying behind the
15 form in which the transaction has been cast."

16
17 ² Petitioners did present evidence that Tobin "made several
18 attempts to obtain major [record] label distribution for Big Soul"
19 and had contacts with at least one European "subpublisher". These
20 activities were consistent with Tobin's rights under the Artist
21 Agreement, with respect to his ownership of Big Soul's recordings
22 and compositions. Tobin was not negotiating with these record
23 companies and subpublishers to employ Big Soul, but rather, to
24 distribute Big Soul's records and compositions (both of which were
25 owned by Tobin, the employer of Big Soul's artistic services). In
26 this respect, Tobin's role was analogous to an independent
27 television production company that hires actors and other
28 necessary employees for the production, that bears the expenses
incurred in completing the production, that owns the movie or
television series that it produced, and that has the right to
enter into distribution agreements with networks for this movie or
series. The Talent Agencies Act does not require that an
independent television producer be licensed to engage in such
activities. There is no reason to treat an independent music
producer any differently. And the evidence presented here leaves
no doubt that Tobin is a bona fide music producer, in contrast to
the fictitious "theatrical production" company that was created in
MarGil for the purpose "loaning out" the artist's services to
third party producers as a means of evading the Act's licensing
requirement.

1 Petitioners argue that the agreements that are the subject of
2 this dispute are illegal on their face in that they contain the
3 promise to procure employment that triggers the need for a talent
4 agency license. This argument is unavailing. As discussed above,
5 there are no provisions in the Artist Agreement which, on their
6 face, are violative of the Talent Agencies Act. The Personal
7 Management Agreement is worded in a manner that carefully avoids
8 violating the Act. The paragraph of the Personal Management
9 Agreement that purports to give Tobin the authority to negotiate
10 and consummate employment agreements on behalf of Big Soul grants
11 this authority to Respondent "in accordance with" another
12 paragraph of the Agreement that states that Tobin "is not
13 permitted, obligated, authorized, or expected" to obtain
14 employment or engagements for Big Soul, and that Tobin shall
15 consult with Big Soul in the selection or engagement of any talent
16 agent. It would be an understatement to say that these seemingly
17 contradictory provisions, taken together, are less than a model of
18 clarity. But absent any evidence to the contrary, we are forced
19 to conclude that it was the parties' intent that these contract
20 provisions be construed in a manner that complies with the Talent
21 Agencies Act.

22 It is a basic principle of contract law that a contract must
23 be given such an interpretation as will make it lawful, if it can
24 be done without violating the intentions of the parties. (Civil
25 Code section 1643.) Pursuant to Labor Code section 1700.44(d), a
26 person not licensed as a talent agent may "act in conjunction
27 with, and at the request of, a licensed talent agency in the
28 negotiation of a contract." See, Barr v. Rothenberg (1992)

1 TAC 14-90 [dismissing petition on ground that unlicensed "manager"
2 who engaged in negotiations for artist's employment did so in
3 conjunction with and at the request of petitioner's licensed
4 talent agency]. We therefore construe paragraphs 3(c) and 7 of
5 the Personal Management Agreement as allowing Tobin to engage in
6 only those procurement activities, and only under those
7 circumstances that are permitted by Labor Code section 1700.44(d).
8 Here, had Petitioners presented any evidence that Tobin, without
9 acting in conjunction with and at the request of a licensed talent
10 agency selected by Big Soul, made any promises or undertook any
11 attempts to obtain or negotiate the terms of employment for Big
12 Soul with third party employers, there would be a basis to
13 conclude that the prohibitory language contained in paragraph 7 of
14 Personal Management Agreement, and its adoption by reference into
15 paragraph 3(c) of that Agreement, was nothing more than a pretext
16 designed to misrepresent or conceal the true nature of Tobin's
17 activities. But without such evidence in this regard, we must
18 conclude that the prohibitory language of the Personal Management
19 Agreement means what it says, and was not a subterfuge. See,
20 Raden v. Laurie (1953) 120 Cal.App.2d 778.


21 ORDER

22 For the reasons set forth above, the petition to determine
23 controversy is hereby DISMISSED on the ground that Petitioners
24 failed to present evidence that Respondent engaged in the
25 occupation of a talent agency, within the meaning of Labor Code
26 section 1700.4(a), so as to require licensure under Labor Code
27 section 1700.5. The Talent Agencies Act does not therefore
28 operate to make either the Artist Agreement or the Personal

1 Management Agreement unlawful or void ab initio.

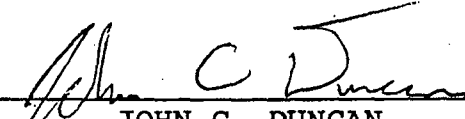
2 We express no opinion on the question of whether an agreement
3 requiring artists to provide their artistic services exclusively
4 to the same person who is representing those artists under the
5 terms of a personal management agreement results in an inherent
6 conflict of interest and the inevitable violation of the personal
7 manager's fiduciary duties towards those artists, or whether such
8 a conflict of interest or violation of fiduciary duties existed
9 here. We leave that issue for the court to decide in the context
10 of the ongoing litigation between these parties, as the Labor
11 Commissioner is without jurisdiction to proceed further, having
12 found that based on the evidence here, no talent agency license
13 was required.

14
15 Dated: 3/24/97


MILES E. LOCKER
Attorney for the Labor Commissioner

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17
18 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

19
20 Dated: 3/26/97


JOHN C. DUNCAN
Chief Deputy Director
DEPARTMENT OF INDUSTRIAL RELATIONS