

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

10	A.C. WATSON and CLARANG, INC.,	)	Case No. TAC 24-99
		)	
11	Petitioners,	)	
12	vs.	)	DETERMINATION OF
		)	CONTROVERSY
		)	
		)	
13	RICHARD GLASSER and ROSALIE GLASSER	)	
14	aka ROE GLASSER, both individually	)	
	and dba DOUBLE R MANAGEMENT,	)	
		)	
15	Respondents.	)	
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INTRODUCTION

The above-captioned petition was filed on June 18, 1999, by A.C. WATSON and CLARANG INC., Ms. Watson's loan out corporation, (hereinafter "WATSON" or "Petitioner"), alleging that RICHARD GLASSER and ROSALIE GLASSER dba DOUBLE R MANAGEMENT, (hereinafter "GLASSERS" or "Respondents"), violated the Talent Agencies Act (Labor Code §§1700.<sup>1</sup> et seq.) by procuring employment for the petitioner without possessing a talent agency license as required by Labor

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<sup>1</sup> All statutory citations will refer to the California Labor Code unless otherwise specified.

1 Code §1700.5. Petitioner seeks a determination that all agreements  
2 between the parties are void *ab initio*, and that the respondent be  
3 ordered to disgorge all of the commissions received stemming from  
4 such agreements.

5 Respondents filed their answer on August 12, 1999,  
6 admitting they were never licensed as a talent agent but denying  
7 they acted in that capacity. Respondents maintain that any  
8 incidental procurement of employment was to secure a recording  
9 contract and that activity should be exempt from licensing  
10 requirements, pursuant to the recording contract exemption found at  
11 §1700.4(a). Finally, respondents argued petitioner's claim should  
12 be time barred by the one-year statute of limitations set forth at  
13 §1700.44(c), in that all alleged violations took place more than  
14 one year prior to the filing of the petition.

15 The hearing was held on November 23, 1999 in Los Angeles  
16 California. Petitioner was represented by Steven H. Gardner of  
17 Cohon and Gardner; respondent appeared through their attorney  
18 Robert S. Besser of Besser & Chapin. Due consideration having been  
19 given to the testimony, documentary evidence and arguments  
20 presented, the Labor Commissioner adopts the following  
21 determination of controversy.

22  
23 FINDINGS OF FACT

24 1. In 1990, petitioner, a 15-year-old actress, model and  
25 aspiring singer, hired Mr. Glasser as her vocal coach. The two  
26 continued this relationship for the next three years. In March of  
27 1991, petitioner secured a regular role on the weekly series "Step-

1 By-Step", procured by her agent Iris Burton. Soon thereafter,  
2 petitioner's manager passed away and in May of 1993, petitioner,  
3 still a minor, signed a one-year exclusive management agreement  
4 (hereinafter 1993 agreement) with respondents. The agreement  
5 provided, *inter alia*, that respondents would advise, counsel and  
6 direct petitioner's career in the entertainment industry. In  
7 return, respondents would receive 15% commissions on all monies  
8 earned by petitioner in the entertainment industry, with the  
9 exception of the "Step-By-Step" series commissioned at 10%.

10 2. In 1993, petitioner performed services as a model on  
11 a photo shoot for the Acne Statin product. Petitioner testified  
12 that respondents said, "I got you this engagement and it's going to  
13 be great", followed by documentary evidence establishing that  
14 respondents collected a 15% commission on the photo shoot.  
15 Petitioner provided no additional evidence that respondents  
16 conducted themselves as a talent agent for this engagement.

17 3. In February of 1994, petitioner secured a job as a  
18 spokesperson for Noxzema Skin Cream. Petitioner's responsibilities  
19 included voice over work on Premiere Radio Networks, followed by a  
20 personal appearance and photo shoot with a Noxzema Skin Cream  
21 contest winner. Petitioner supplied uncontroverted evidence that  
22 respondents discussed and negotiated the terms and conditions of  
23 the contest, salary and subsequent personal appearances.  
24 Petitioner's salary included \$10,000.00 in cash and \$40,000.00  
25 worth of commercial air time to be used ostensibly to promote  
26 WATSON'S singing career. The evidence clearly displayed  
27 respondents' efforts to secure employment on petitioner's behalf.

1           4.     On March 7, 1994, petitioner, now the age of  
2 majority, entered into a 2<sup>nd</sup> management agreement (hereinafter 1994  
3 agreement) with respondents for personal management services. The  
4 1994 agreement included two material changes from the 1993  
5 agreement, in that respondents were now entitled to 20% commissions  
6 on petitioner's earnings in the music industry and the length of  
7 the agreement was extended to three years with a one-year option.  
8 The new contract was reviewed by petitioner's attorney and  
9 executed.

10           5.     In 1994, petitioner appeared as a guest on the  
11 Suzanne Somers Show. Petitioner testified that respondent secured  
12 this engagement, but that evidence was controverted by respondents'  
13 undisputed testimony that he was out of the country at this time.

14           6.     In October of 1994, petitioner's likeness was used  
15 on "Dick Clark's Bloopers", showing amusing outtakes of scenes from  
16 "Step-by-Step". Dick Clark Productions contacted Warner Bros, the  
17 producer of "Step-By-Step", and requested the scenes be used for the  
18 "bloopers" special. A clip release signed by WATSON was required  
19 prior to airing. The release was sent to respondents, signed by  
20 WATSON, and returned to the production company. In return,  
21 petitioner received a small fee which was commissioned by the  
22 GLASSERS.

23           7.     In May 1996, petitioner made a personal appearance  
24 and sang for the show "Truth or Consequences" by Ralph Edwards  
25 Production. Again, the testimony conflicted. Petitioner testified  
26 respondents got her the engagement but provided no other evidence  
27 of procurement activities. Respondent offered into evidence a

1 declaration<sup>2</sup> by Jeanne Brown, the shows talent coordinator, stating  
2 she contacted respondent directly and offered a small appearance  
3 fee of \$1,500.00. The testimony reflected the offer was discussed  
4 and accepted by WATSON whose singing career would ultimately  
5 benefit through the exposure.

6 8. In August 14, 1997, petitioner severed the  
7 relationship with respondent. On December 31, 1998, petitioner  
8 filed a lawsuit in the County of Los Angeles Superior Court against  
9 her parents, talent agents, accountants, and respondents; alleging,  
10 *inter alia*, breach of fiduciary duty, fraud, conversion,  
11 negligence, and breach of contract, seeking rescission and  
12 restitution. On March 15, 1999, respondents filed their answer  
13 accompanied by a cross-complaint seeking commissions allegedly owed  
14 by petitioner stemming from her earnings on "Step-By-Step" during  
15 the 1994 management agreement.

16  
17 CONCLUSIONS OF LAW

18 1. Labor Code §1700.4(b) includes "actors" in the  
19 definition of "artist" and petitioner is therefore an "artist"  
20 within the meaning of §1700.4(b). The Labor Commissioner has  
21 jurisdiction to determine this controversy pursuant to §1700.44(a).

22 2. The primary issues are as follows:

23 a) Based on the evidence presented at this hearing,  
24 did the respondent operate as a "talent agency" within the meaning  
25 of §1700.40(a) for either or both of the management agreements in

26  
27 <sup>2</sup> California Code of Regulations §12027(a) provides a subpoena mechanism  
for in-state witnesses, consequently declarations are admissible but upon proper  
objection carry minimal weight.

1 issue?

2                   b) May the respondent assert the one-year statute of  
3 limitations affirmative defense set forth at §1700.44(c), or do any  
4 other affirmative defenses apply?

5                   c) What are petitioner's remedies, if any?

6                   3. Labor Code §1700.4(a) defines "talent agency" as:

7  
8                   "a person or corporation who engages in the occupation of  
9 procuring, offering, promising, or attempting to procure  
10 employment or engagements for an artist or artists,  
11 except that the activities of procuring, offering, or  
12 promising to procure recording contracts for an artist or  
13 artists shall not of itself subject a person or  
14 corporation to regulation and licensing under this  
15 chapter."

16                   4. Labor Code section 1700.5 provides that "no person  
17 shall engage in or carry on the occupation of a talent agency  
18 without first procuring a license therefor from the Labor  
19 Commissioner."

20                   5. In Waisbren v. Peppercorn Production, Inc (1995) 41  
21 Cal.App.4th 246, the court held that any single act of procuring  
22 employment subjects the agent to the Talent Agencies Act's  
23 licensing requirements, thereby upholding the Labor Commissioner's  
24 long standing interpretation that a license is required for any  
25 procurement activities, no matter how incidental such activities  
26 are to the agent's business as a whole. Applying Waisbren, it is  
27 clear that respondent acted in the capacity of a talent agency  
within the meaning of §1700.4(a) during the May 15, 1993 management  
agreement. The undisputed evidence offered through detailed  
correspondence established that respondents negotiated the material

1 terms, including petitioner's salary, for the Premiere Radio  
2 Networks Noxzema campaign. Respondents contend they did not  
3 solicit the engagement and merely fielded the offer. Respondents  
4 also contend that procurement must include an active role in  
5 seeking out employment and that without solicitation, procurement  
6 cannot occur. Further, respondents argued that should the Labor  
7 Commissioner find procurement, any acts of procurement were  
8 conducted for the purpose of securing a recording contract, and  
9 those acts are exempt under the Act.

10 6. The word "procure" is defined in *Webster's Third New*  
11 *International Dictionary, Unabridged Merriam-Webster*, as follows:

12 "Procure...1 a (1): to get possession of; OBTAIN,  
13 ACQUIRE... (2): GAIN, WIN... 2 a (1): to cause to happen or be  
14 done: Bring about: EFFECT <procured temporary agreement>:  
15 ACHIEVE..."

16 *Webster's New Dictionary of Synonyms 1978*, Merriam-  
17 Webster gives the following synonyms for "procure":

18 "procure get, obtain, secure, acquire, gain, win

19 Analogous words: negotiate, arrange, concert: reach, compass,  
20 gain, achieve, attain"

21 7. It is obvious that the word "procure" when used with  
22 the word "employment" means either to secure employment or to bring  
23 about employment or cause employment to occur. That is the common  
24 sense meaning of "procure" in this context. It means to arrange  
25 employment. It means to negotiate for employment. (See Arsenio  
26 Hall v. X Management, TAC 19-90 at p. 31.) Respondents' acts of  
27 arranging the personal appearances and negotiating the salary

1 clearly rise to the level of activity required to establish  
2 procurement activity within the meaning of §1700.4(a). Procurement  
3 is not contingent upon solicitation. Otherwise, representatives of  
4 industry heavyweights would simply field offers of employment,  
5 negotiate terms and never be subject to the licensing requirements  
6 which were created for the protection of California artists. This  
7 narrow interpretation of "procure" would render countless artists  
8 without statutory protection and clearly subvert legislative  
9 intent.

10 8. Respondents argued the one-year-statute of  
11 limitations set forth at §1700.44(c) should bar the petitioner from  
12 bringing this claim before Labor Commissioner. Labor Code  
13 §1700.44(c) states,

14 "No action or proceeding shall be  
15 brought pursuant to this chapter  
16 with respect to any violation which  
17 is alleged to have occurred more  
18 than one year prior to commencement  
19 of the action or proceeding."

20 9. The Petition to Determine Controversy was filed on  
21 June 18, 1999, and the violation occurred more than five (5) years  
22 before the filing of the Petition.

23 10. It is a well established policy recently supported  
24 by the Second District Court of Appeal in Park v. Deftones 71  
25 Cal.App.4th 1465, that the statute of limitations would begin anew  
26 upon any filing in Superior Court seeking commissions from an  
27 illegal contract, as the act of seeking commissions from an illegal

1 contract was itself a violation of the Act. Alternatively, a  
2 statute of limitations is procedural, that is, it only affects the  
3 remedy, not the substantive right or obligation. It runs only  
4 against causes of action and defenses seeking affirmative relief,  
5 and not against any other defenses to an action. The statute of  
6 limitations does not bar the defense of illegality of a contract,  
7 and in any action or proceeding where the plaintiff is seeking to  
8 enforce the terms of an illegal contract, the other party may  
9 allege and prove illegality as a defense without regard to whether  
10 the statute of limitations for bringing an action or proceeding has  
11 already expired. Sevano v. Artistic Production, Inc., (1997) TAC  
12 No. 8-93 pg.11.

13 11. In the case at bar, the petitioner and not the  
14 respondent, has filed the action in the Los Angeles County Superior  
15 Court seeking a return of commissions paid. In response to the  
16 complaint, respondents' answer and accompanying cross complaint  
17 also seek commissions. The petition in the instant action was then  
18 filed in defense of respondents' cross complaint in Superior Court.

19 The cross complaint only seeks commissions allegedly due under the  
20 1994 agreement and therefore the Deftones case would have  
21 application only with respect to the 1994 agreement. Had the cross  
22 complaint included a claim for commissions stemming from the 1993  
23 agreement, that 1993 contract between petitioner and respondent  
24 would be unlawful and void *ab initio*, as the unlicensed talent  
25 agency has no right to collect commissions purportedly earned  
26 pursuant to such an unlawful agreement. Buchwald v. Superior Court  
27 (1967) 254 Cal.App.2d 347. Here, that is not the case. The

1 petitioner did not file the petition in defense of respondents'  
2 affirmative claim for commissions from the 1993 agreement,  
3 consequently there is no basis upon which the statute of  
4 limitations can be extended and the petitioner is barred pursuant  
5 to §1700.44(c) from bringing a claim based on violations occurring  
6 within the 1993 agreement. Respondents' recording contract  
7 exemption defense is therefore moot.

8           12. That leads us to alleged procurement activities  
9 during the 1994 agreement. The 1994 agreement was executed on  
10 March 7, 1994, for a term of three years. The alleged procurement  
11 during this agreement includes: the appearance on the Suzanne  
12 Somers Show; the outtakes from "Step-By-Step" aired on Dick Clark's  
13 Bloopers; and the personal appearance on Ralph Edwards "Truth or  
14 Consequences".

15           13. The petitioner has not met the burden of proof  
16 required and subsequently has not established that respondents have  
17 engaged in procurement activities during the 1994 agreement.

18           14. The testimony reflected that Mr. Glasser was out of  
19 the country when petitioner made her appearance on the Suzanne  
20 Somers Show. Petitioner provided no additional evidence other than  
21 petitioner's unavailing testimony that respondents got her the job.

22           15. Respondent did not procure employment for Dick  
23 Clark's Bloopers. As discussed, respondents were directly  
24 contacted by the production company and simply asked for a  
25 signature from their client. Respondents did not conduct  
26 negotiations nor participate in any fashion, other than handing a  
27 clip release over to the petitioner for signature. We do not

1 believe these facts constitute the procurement of employment. The  
2 petitioner was paid for services that had already been rendered.  
3 The definition of "employ" means to engage, suffer, or permit to  
4 work. *Industrial Welfare Commission Order (IWC) No 12-80 sec. 2(D)*  
5 The petitioner was under no obligation and had no duties to  
6 perform. To interpret these facts as procurement would radically  
7 expand the definition and lead to potentially absurd results.

8 16. Finally, with respect to "Truth or Consequences", the  
9 petitioner did not provide evidence other than petitioner's  
10 testimony that the respondent got her the job. There simply was no  
11 evidence; documentary or otherwise, which established respondents  
12 engaged in procuring this performance. The burden of proof is on  
13 the petitioner to establish a violation and the petitioner did not  
14 sustain this burden.

15 17. The proper burden of proof is found at Evidence Code  
16 §115 which states, "[e]xcept as otherwise provided by law, the  
17 burden of proof requires proof by preponderance of the evidence."  
18 Further, McCoy v. Board of Retirement of the County of Los Angeles  
19 Employees Retirement Association (1986) 183 Cal.App.3d 1044 at 1051  
20 states, "the party asserting the affirmative at an administrative  
21 hearing has the burden of proof, including both the initial burden  
22 of going forward and the burden of persuasion by preponderance of  
23 the evidence(cite omitted). "Preponderance of the evidence"  
24 standard of proof requires the trier of fact to believe that the  
25 existence of a fact is more probable than its nonexistence. In re  
26 Michael G. 74 Cal.Rptr.2d 642, 63 Cal.App.4th 700.

27 18. When establishing a preponderance of the evidence,

1 the moving party must supply more than "he said/she said" when both  
2 parties testify credibly. There must be evidence of an offer, a  
3 promise, or an attempt by respondents to procure employment.  
4 Minimally, an element of negotiation established through  
5 documentary evidence or testimony from a witness with personal  
6 knowledge of respondents procurement activity will suffice. Theses  
7 elements were not present. The only evidence offered was a request  
8 from Ralph Edwards Productions directed to Mr. Glasser to obtain  
9 petitioner's taxpayer identification number (see Exhibit No. 14).  
10 Conversely, respondent's testimony reflected a direct offer came in  
11 with a fixed appearance fee which was relayed and accepted by the  
12 petitioner. The declaration of Jeanne Brown, which was given  
13 minimal weight, supported this testimony. The procurement evidence  
14 found during the 1993 agreement was not present during the 1994  
15 agreement. The Talent Agencies Act is a remedial statute and must  
16 be liberally construed, but the petitioner must meet her initial  
17 burden.

18 19. It follows that in the instant action there was no  
19 violation under of the requirements of the Act, licensure was not  
20 required, and the 1994 management agreement between Watson and the  
21 Glassers was not illegal nor void.

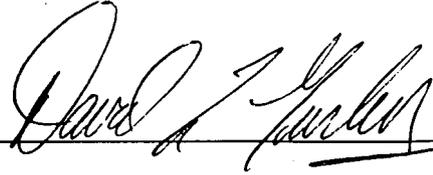
22  
23 ORDER

24 For the above-stated reasons, IT IS HEREBY ORDERED that  
25 petitioner's claim that respondents procured employment during the  
26 1993 management agreement between petitioner A.C. WATSON and  
27 respondents DOUBLE R MANAGEMENT is barred by the statute of

1 limitations set forth at Labor Code §1700.44(c). Accordingly, it  
2 is hereby determined and declared that under the provisions of the  
3 Talent Agencies Act, the 1994 management agreement is neither  
4 illegal, nor invalid, nor unenforceable. Therefore, the petition  
5 of WATSON is denied.

6  
7  
8 Dated:

1/28/00



9 DAVID L. GURLEY  
10 Attorney for the Labor Commissioner

11  
12 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

13  
14  
15 Dated:

1/28/00



16 MARCY SAUNDERS  
17 State Labor Commissioner

