

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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10 BEFORE THE LABOR COMMISSIONER
11 OF THE STATE OF CALIFORNIA
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14 CREATIVE ARTISTS ENTERTAINMENT)	Case No. TAC 26-99
15 GROUP, LLC,)	
)	
16 Petitioner,)	
17 vs..)	DETERMINATION OF
)	CONTROVERSY
)	
18 JENNIFER O'DELL,)	
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19 Respondent.)	
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INTRODUCTION

The above-captioned petition was filed on July 1, 1999, by CREATIVE ARTISTS ENTERTAINMENT GROUP, LLC, (hereinafter "CMEG" or "Petitioner") seeking commissions allegedly owed by JENNIFER O'DELL, (hereinafter "Respondent" or "O'DELL"), stemming from petitioner's services as respondent's personal manager in the entertainment industry. Petitioner claims respondent repudiated the valid personal services agreement and failed to pay commissions owed under the contract.

Respondent filed her answer and counter-claim with this agency on November 19, 1999. Respondent defends on the ground that

1 petitioner acted as an unlicensed talent agent in violation of
2 Labor Code §1700.5 and requests the contract be deemed illegal and
3 void *ab initio*. Additionally, respondent's counter-claim seeks
4 disgorgement of all commissions previously paid under the contract.
5 Petitioner maintains any talent agent activities conducted by him
6 on O'Dell's behalf were at the request of and in conjunction with
7 O'Dell's licensed talent agent and consequently that activity is
8 exempt from licensure under Labor Code §1700.44(d).

9 A hearing was scheduled before the undersigned attorney,
10 specially designated by the Labor Commissioner to hear this matter.
11 The hearing commenced as scheduled on February 25, 2000, in Los
12 Angeles, California. Petitioner was represented by Joseph M.
13 Gabriel and Greg S. Bernstein of Rosenfeld, Meyer & Susman, LLP;
14 respondent appeared through her attorneys Dennis Mitchell and
15 Lawrence J. Zerner of Kirsch & Mitchell. Due consideration having
16 been given to the testimony; documentary evidence; arguments
17 presented; and briefs submitted, the Labor Commissioner adopts the
18 following determination of controversy.

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20 FINDINGS OF FACT

21 1. Respondent O'Dell, an actor, entered into a personal
22 services contract with CMEG and its principal Shukri Ghalayini in
23 January 1998, whereby petitioner would act as respondent's
24 exclusive personal manager in the entertainment industry.
25 Petitioner was obligated to advise, counsel, and promote respondent
26 in the furtherance of her entertainment career. On February 16,
27 1998, respondent hired licensed California talent agency,

1 Kazarian, Spencer and Associates, Inc.¹, Mara Santino acting as
2 respondent's principal agent.

3 2. O'Dell, Santino and Ghalayini quickly became friends
4 as well as business associates and the testimony and evidence
5 submitted reflected a close relationship between the three
6 developed. The relationship between the manager and the agent
7 warrants particularly close scrutiny. Both parties testified that
8 in order to advance O'Dell's career it would be necessary to
9 maximize her exposure. As a result, it was discussed and agreed
10 that O'Dell could benefit if both the manager and the agent "double
11 submitted" O'Dell for auditions. The double submission method
12 consisted of both the manager and the agent sending in photos and
13 resumes directly to casting directors, hoping to secure auditions
14 for O'Dell. Testimony conflicted as to how often and under what
15 circumstances O'Dell was "double submitted", but testimony
16 established Santino was aware of this arrangement. Ghalayini
17 testified that he would receive the breakdown services² and contact
18 Santino who would then advise petitioner to send in O'Dell's resume
19 and photo. Santino testified that Ghalayini would discover roles
20 that he felt suited O'Dell, discuss whether the role was
21 appropriate and if so, advise her to audition for the part. If
22 O'Dell obtained the role, Santino would negotiate the employment
23 contract.

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25 _____
26 ¹ A search of the Labor Commissioner's database confirmed Kazarian, Spencer
& Associates are licensed talent agents under license No. TA 736.

27 ² A current list of upcoming roles in the entertainment industry,
distributed to artists and their representatives.

1 3. This arrangement continued throughout the
2 relationship and the manager and the agent worked closely together
3 in an effort to further O'Dell's career by combining their efforts
4 to seek employment on O'Dell's behalf.

5 4. It was established that in 1998, this method lead
6 to securing O'Dell a starring role in the weekly series entitled
7 "The Lost World." Petitioner's credible testimony revealed that he
8 submitted O'Dell for the part by sending her resume and photograph
9 directly to the production's casting agent, after discussions with
10 Santino regarding her suitability for the role.

11 5. Throughout 1998 petitioner continued this practice
12 of submitting O'Dell for roles, albeit according to petitioner's
13 testimony, all done with knowledge and acquiescence of Santino.
14 Respondent called various witnesses, including two casting
15 directors for production companies that hired O'Dell, in an attempt
16 to establish that petitioner had secured these roles without the
17 knowledge of respondent's agent, but that evidence was not
18 conclusive. Equally unavailing was the testimony of O'Dell, who
19 did not establish that petitioner sought employment engagements on
20 her behalf without the assistance of Santino.

21 6. It was the testimony of petitioner himself, who
22 maintained and did not deviate from the fact, that he regularly
23 sent Petitioner's photo and resume directly to casting directors in
24 an effort to secure auditions, ostensibly to procure employment.
25 When a manager submits his client for roles and attempts to use the
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1 narrow licensing exemption found at Labor Code §1700.44(d)³, he/she
2 is walking a very thin line. A manager who attempts to secure his
3 client employment must be prepared to establish that his activity
4 falls within the guidelines established by legislative intent and
5 the Division's previous talent agency determinations.

6 7. It is not a stretch to imagine a manager who obtains
7 the talent agent's permission to submit that artist for employment,
8 may occasionally exceed that permission by submitting the artist
9 without the agent's knowledge. Not surprisingly, that is precisely
10 the situation that occurred here.

11 8. Lacey Pemberton, petitioner's employee, testified
12 that her responsibility with CMEG included the scheduling and
13 coordinating of auditions for CMEG's artists under contract.
14 Pemberton's credible account established that she would sometimes
15 submit O'Dell's photo directly to casting agents without Santino's
16 knowledge. On cross examination Pemberton stated, "occasionally
17 Mara would not know about submissions." This testimony reflects
18 the natural progression of this type of relationship. It also
19 demonstrates the ease in which a manager runs afoul of the Talent
20 Agencies Act.

21 9. In November of 1998, respondent, dissatisfied with
22 petitioner's efforts on her behalf, terminated the agreement and
23 purportedly refused to pay certain commissions allegedly owed on
24 projects secured during the term of the contractual relationship.

25
26 ³ Labor Code §1700.44(d) states, "it is not unlawful for a person or
27 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 contract."

1 Petitioner then filed this petition to determine controversy,
2 seeking the Labor Commissioner validate petitioner's behavior by
3 making a determination that petitioner's efforts fall within the
4 licensing exemption at 1700.44(d). This we cannot do.

5
6 CONCLUSIONS OF LAW

7 1. Labor Code §1700.4(b) includes "actors" in the
8 definition of "artist" and respondent is therefore an "artist"
9 within the meaning of §1700.4(b).

10 2. Labor Code §1700.40(a) defines "talent agency" as,
11 "a person or corporation who engages in the occupation of
12 procuring, offering, promising, or **attempting to procure employment**
13 or engagements for an artist or artists."

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

18 4. Labor Code §1700.44(a) provides the Labor
19 Commissioner with the power and jurisdiction to hear and determine
20 matters falling under the Talent Agencies Act (§§1700.00 et seq.),
21 therefore the Labor Commissioner has jurisdiction to hear and
22 determine this matter.

23 5. In Waisbren v. Peppercorn Production, Inc (1995) 41
24 Cal.App.4th 246, the court held that any single act of procuring
25 employment subjects the agent to the Talent Agencies Act's
26 licensing requirements, thereby upholding the Labor Commissioner's
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1 long standing interpretation that a license is required for any
2 procurement activities, no matter how incidental such activities
3 are to the agent's business as a whole. Applying Waisbren, it is
4 clear that petitioner's efforts in sending resumes and photos
5 directly to casting directors establish that respondent acted as a
6 talent agency within the meaning of §1700.4(a).

7 6. The primary issue in this case is whether
8 petitioner's actions on behalf of the respondent fall within the
9 activities described at Labor Code §1700.44(d), exempting persons
10 conducting certain traditional talent agency functions from the
11 licensing requirement.

12 7. Labor Code §1700.44(d) states, "it is not unlawful
13 for a person or corporation which is not licensed pursuant to this
14 chapter to act in conjunction with and at the request of a licensed
15 talent agency in the negotiation of an employment contract."

16 8. This exemption requires a two-part analysis and both
17 parts must be satisfied for petitioner to prevail. First, we must
18 determine whether petitioner's acts of submitting respondent's
19 photos and resumes directly to casting agents were done "in
20 conjunction with and at the request a licensed talent agency"; and
21 two, whether petitioner's activities on behalf of O'Dell are
22 considered "the negotiation of an employment contract". We begin
23 with the former by examining legislative intent. In determining
24 legislative intent, one looks at both legislative history and the
25 statutory scheme within which the statute is to be interpreted.

26 9. In 1982, AB 997 established the California
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1 Entertainment Commission. Labor Code §1702 directed the Commission
2 to report to the Governor and the Legislature as follows:
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4 "The Commission shall study the laws and
5 practices of this state, the State of New
6 York, and other entertainment capitals of the
7 United States relating to the licensing of
8 agents, and representatives of artists in the
entertainment industry in general, . . . , so as
to enable the commission to recommend to the
Legislature a model bill regarding this
licensing."

9 10. Pursuant to statutory mandate the Commission
10 studied and analyzed the Talent Agencies Act in minute detail. The
11 Commission concluded that the Talent Agencies Act of California is
12 a sound and workable statute and that the recommendation contained
13 in this report will, if enacted by the California Legislature,
14 transform that statute into a model statute of its kind in the
15 United States. All recommendations were reported to the Governor,
16 accepted and subsequently signed into law.

17 11. The major, and philosophically the most difficult,
18 issue before the Commission, the discussion of which consumed a
19 substantial portion of the time was this first issue: When, if
20 ever, may a personal manager or, for that matter, anyone other than
21 a licensed Talent Agent, procure employment for an artist without
22 obtaining a talent agent's license from the Labor Commissioner?
(Commission Report p. 15)

23 12. The Commission considered and rejected alternatives
24 which would have allowed the personal manager to engage in "casual
25 conversations" concerning the suitability of an artist for a role
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1 or part; and rejected the idea of allowing the personal manager to
2 act in conjunction with the talent agent in the negotiation of
3 employment contracts **whether or not requested to do so by the**
4 **talent agent.** (Commission Report p. 18-19)

5 13. As noted, all of these alternatives were rejected by
6 the Commission. The Commission concluded:

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8 "[I]n searching for the permissible limits to activities
9 in which an unlicensed personal manager or anyone could
10 engage in procuring employment for an artist without
11 being license as a talent agent,... there is no such
12 activity, there are no such permissible limits, and that
13 the prohibitions of the Act over the activities of anyone
14 procuring employment for an artist without being licensed
15 as a talent agent must remain, as they are today, total.
16 Exceptions in the nature of incidental, occasional or
infrequent activities relating in any way to procuring
employment for an artist cannot be permitted: one either
is, or is not, licensed as a talent agent, and, if not so
licensed, one cannot expect to engage, with impunity, in
any activity relating to the service which a talent agent
is licensed to render. There can be no 'sometimes'
talent agent, just as there can be no 'sometimes' doctor
or lawyer or any other licensed professional."
(Commission Report p. 19-20)

17 14. The Commission was very clear in their conclusion
18 that a personal manager may not negotiate an employment contract
19 unless that negotiation is done "at the request" of a licensed
20 talent agent. It is not enough, as indicated in the Commission's
21 Report, that the talent agent grants overall permission. The agent
22 must advise the manager or request the manager's activity for each
23 and every submission. At the very minimum an agent must be aware
24 of the manger's procurement activity. In our case, the testimony
25 was clear that at times the petitioner submitted the respondent's
26 photos and resume without the knowledge, and therefore, not "at the

1 request of" respondent's licensed talent agent.

2 15. The evidence established that sometimes Santino was
3 aware that petitioner was submitting O'Dell for parts, and other
4 times not aware. This arrangement purporting to allow the
5 petitioner the freedom to act as a part-time *de facto* talent agent,
6 as discussed, was not the legislative intent behind Labor Code
7 §1700.44(d). An artist's manager may not participate in a
8 situation where the manager is free to submit an artist for roles
9 wherever and whenever the manager decides it is appropriate, with
10 or without the talent agent's acquiescence or approval. Notably,
11 the evidence did not establish petitioner created this arrangement
12 for the purpose of evading licensing requirements, however, to
13 allow this situation would create a gaping hole in the Act's
14 licensing requirement by allowing a manager to potentially employ
15 a licensed talent agent for the sole purpose of providing an all-
16 encompassing permission to act as a talent agent, resulting in a
17 subterfuge designed to evade the Act's licensing requirements.
18 This would defeat obvious legislative intent.

19 16. Petitioner argues that a personal manager can seek
20 employment for his client as part of a cooperative effort with a
21 licensed talent. Waisbren v. Peppercorn 41 Cal.App.4th 246, 259.
22 In Waisbren, unlike here, 1700.44(d) was not in issue as Waisbren
23 did not contend that the exception was applicable. Waisbren,
24 *supra*, FN15. The Waisbren court simply makes a general statement
25 without further explanation or elaboration. Consequently, the
26 Labor Commissioner considers the statement dicta.

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17. Further, petitioner asserts that Labor Commissioner Determination, Wesley Snipes v. Dolores Robinson Entertainment, TAC 36-96 expands §1700.44(d), by allowing a manager to submit the artist, "as long as the activities were done as part of a 'team effort' with a licensed agent." This case is distinguishable because the hearing officer in Snipes expressly stated, "it is clear that she [the manager] acted at the requests of and in conjunction with a licensed talent agency within the meaning of Labor Code section 1700.44(d) **at all times.**" Snipes, supra p.7 Further, because the Snipes Determination is expressly limited to that set of facts based on "undisputed evidence presented, which was well documented by the correspondence and other exhibits", and the Determination does not consider the legislative intent behind §1700.44(d), or the remedial purpose behind the Act, we decline to follow it to the extent that it expands Labor Code §1700.44(d) beyond our discussion here.

18. The petitioner has failed the first-prong of the analysis, and therefore the second prong does not require discussion, but will be briefly addressed. The Commission was silent as to what constitutes "the negotiation of an employment contract", but as stated in Anderson v. D'avola (1995)TAC 63-93, "[t]his statute [§1700.44(d)] does not permit such an unlicensed person to engage in any procurement activities other than the 'negotiation of an employment contract.' Discussion with producers or casting directors in an attempt to obtain auditions for an artist exceed the scope of this statute." Anderson illustrates the negotiation of an employment contract must also be narrowly

1 defined. Allowing submissions and direct discussions with
2 production companies and casting agents by a manager in an attempt
3 to obtain employment on behalf of the artist would again frustrate
4 legislative intent by expanding permissible unlicensed activity.
5 Petitioner's activities do not fall within the exemption at Labor
6 Code §1700.44(d).

7 19. A bright line rule must be established to further
8 legislative intent. Again, one either is an agent or is not. The
9 person who chooses to manage an artist and avoid statutory
10 regulation may not cross that line, unless that activity falls
11 within the narrow exception of §1700.44(d). Critics may argue that
12 this rule works against an artist by discouraging creativity of a
13 manager, that after all is conducted for the artist's benefit.
14 Others may suggest this creates a chilling effect on the artists
15 representatives working together in concert for the artist's
16 benefit. Still others may argue this "bright-line rule" does not
17 consider the realistic operations of the entertainment industry.
18 Until case law or the legislature redirects the Labor Commissioner
19 in carrying out our enforcement responsibilities of the Act, we are
20 obligated to follow this path.

21 20. O'Dell in her counter-claim seeks disgorgement of
22 all commissions paid to the petitioner during the relationship
23 between the parties. O'Dell filed her counter-claim on November
24 19, 1999. Labor Code §1700.44(c) provides that "no action or
25 proceeding shall be brought pursuant to [the Talent Agencies Act]
26 with respect to any violation which is alleged to have occurred
27 more than one year prior to the commencement of this action or

1 proceeding." Having made no clear showing that O'Dell paid
2 commissions to petitioner during the period of November 19, 1998
3 through November 19, 1999, O'Dell's counter-claim is dismissed.

4 21. Finally, petitioner argued the respondent has not
5 met her burden of proof. The proper burden of proof is found at
6 Evidence Code §115 which states, "[e]xcept as otherwise provided by
7 law, the burden of proof requires proof by preponderance of the
8 evidence." Further, McCoy v. Board of Retirement of the County of
9 Los Angeles Employees Retirement Association (1986) 183 Cal.App.3d
10 1044 at 1051 states, "the party asserting the affirmative at an
11 administrative hearing has the burden of proof, including both the
12 initial burden of going forward and the burden of persuasion by
13 preponderance of the evidence(cite omitted). "Preponderance of the
14 evidence" standard of proof requires the trier of fact to believe
15 that the existence of a fact is more probable than its
16 nonexistence. In re Michael G. 74 Cal.Rptr.2d 642, 63 Cal.App.4th
17 700. Here, petitioner has not established by a preponderance of
18 the evidence that he acted within the exception. Conversely, the
19 respondent established that petitioner procured employment by
20 sending respondent's resume and photos directly to casting agents
21 in an attempt to secure employment without the knowledge of, and
22 not "at the request of" respondent's talent agent. The evidence
23 taken as a whole favors the respondent.

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25 ORDER

26 For the above-stated reasons, IT IS HEREBY ORDERED that
27 the 1998 contract between petitioner, CREATIVE ARTISTS

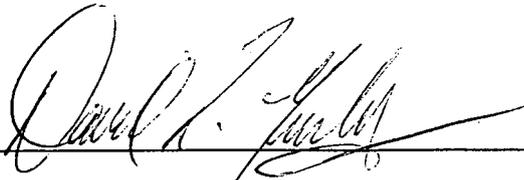
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ENTERTAINMENT GROUP, LLC, and respondent, JENNIFER O'DELL, is unlawful and void *ab initio*. Petitioner has no enforceable rights under that contract.

Having made no clear showing that the petitioner collected commissions within the one-year statute of limitations prescribed by Labor Code §1700.44(c), respondent is not entitled to a monetary recovery.

The parties will bear the expense of their own attorneys' fees.

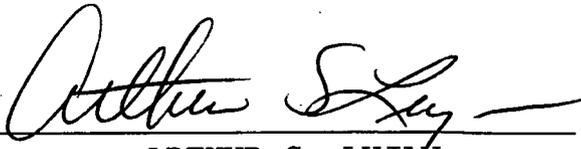
Dated: 6/1/00



DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 5-31-00



ARTHUR S. LUJAN
State Labor Commissioner

