

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  
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14 CREATIVE ARTISTS ENTERTAINMENT	)	Case No. TAC 26-99
15 GROUP, LLC,	)	
	)	
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CREATIVE ARTISTS ENTERTAINMENT ) Case No. TAC 26-99  
GROUP, LLC, )  
Petitioner, )  
vs.. ) DETERMINATION OF  
JENNIFER O'DELL, ) CONTROVERSY  
Respondent. )

28 INTRODUCTION

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

37 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.<sup>1</sup>, 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 services<sup>2</sup> 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           <sup>1</sup> A search of the Labor Commissioner's database confirmed Kazarian, Spencer  
26 & Associates are licensed talent agents under license No. TA 736.

27           <sup>2</sup> 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)<sup>3</sup>, 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.

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26 <sup>3</sup> 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.

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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 manager'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.

1           17. Further, petitioner asserts that Labor Commissioner  
2 Determination, Wesley Snipes v. Dolores Robinson Entertainment, TAC  
3 36-96 expands §1700.44(d), by allowing a manager to submit the  
4 artist, "as long as the activities were done as part of a 'team  
5 effort' with a licensed agent." This case is distinguishable  
6 because the hearing officer in Snipes expressly stated, "it is  
7 clear that she [the manager] acted at the requests of and in  
8 conjunction with a licensed talent agency within the meaning of  
9 Labor Code section 1700.44(d) **at all times.**" Snipes, supra p.7  
10 Further, because the Snipes Determination is expressly limited to  
11 that set of facts based on "undisputed evidence presented, which  
12 was well documented by the correspondence and other exhibits", and  
13 the Determination does not consider the legislative intent behind  
14 §1700.44(d), or the remedial purpose behind the Act, we decline to  
15 follow it to the extent that it expands Labor Code §1700.44(d)  
16 beyond our discussion here.

17           18. The petitioner has failed the first-prong of the  
18 analysis, and therefore the second prong does not require  
19 discussion, but will be briefly addressed. The Commission was  
20 silent as to what constitutes "the negotiation of an employment  
21 contract", but as stated in Anderson v. D'avola (1995)TAC 63-93,  
22 "[t]his statute [§1700.44(d)] does not permit such an unlicensed  
23 person to engage in any procurement activities other than the  
24 'negotiation of an employment contract.' Discussion with producers  
25 or casting directors in an attempt to obtain auditions for an  
26 artist exceed the scope of this statute." Anderson illustrates the  
27 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.

24  
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.

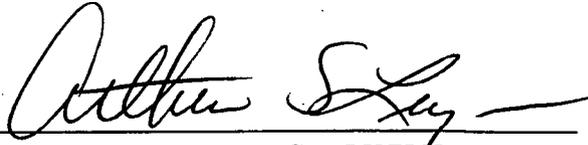
The parties will bear the expense of their own attorneys' fees.

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

