

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
2 State of California
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Attorney for the Labor Commissioner

6 BEFORE THE LABOR COMMISSIONER
7 OF THE STATE OF CALIFORNIA

9
10 TOMMY LISTER, an individual a/k/a) Case No. TAC 04-00
TINY LISTER,)
11)
Petitioner,)
12 vs.) DETERMINATION OF
CONTROVERSY
13)
TAMARA HOLZMAN, an individual d/b/a)
14 HOLZMAN MANAGEMENT,)
15 Respondent.)
16)

17 INTRODUCTION

18 The above-captioned petition was filed on February 7,
19 2000, by TOMMY LISTER, a/k/a TINY LISTER, (hereinafter "LISTER" or
20 "Petitioner") alleging that TAMARA HOLZMAN, doing business as
21 HOLZMAN MANAGEMENT, (hereinafter "Respondent" or "HOLZMAN"), acted
22 as an unlicensed talent agent in violation of Labor Code §1700.5.
23 Petitioner seeks a determination voiding any agreement between the
24 parties and seeks disgorgement of any commissions paid to the
25 respondent in connection with that relationship.

26 Respondent filed her response on March 13, 2000, claiming
27 she did not act as a talent agent and requests the Labor

1 Commissioner dismiss the petition for lack of jurisdiction and
2 requests attorney's fees according to proof.

3 A hearing was scheduled and conducted before the
4 undersigned attorney specially designated by the Labor Commissioner
5 to hear this matter. The hearing commenced on December 7, 2000,
6 and was completed on March 30, 2001, in Los Angeles, California.
7 Petitioner was represented by Charles M. Coate of Barab, Kline &
8 Coate, LLP; respondent appeared through her attorney, Marshall A.
9 Caskey. Due consideration having been given to the testimony,
10 documentary evidence and arguments presented, the Labor
11 Commissioner adopts the following determination of controversy.

12
13 FINDINGS OF FACT

14
15 1. Petitioner is a character actor with dozens of
16 motion pictures on his résumé. Petitioner coveting dependable
17 income to financially assist his ailing father began to explore
18 television as a means to achieve that result. In March or April of
19 1999, petitioner asked his talent agent, Raphael Berko, to provide
20 a few names in the television industry that could facilitate a
21 pilot or series for Lister. Berko provided Lister with the name of
22 Tamara Holzman. Berko indicated that Holzman had a background in
23 television and could possibly provide the opportunity Lister was
24 seeking. Lister contacted Holzman and asked whether she could
25 help. Holzman maintained that she could and sought a written
26 contract from him. Lister refused to sign the written contract and
27 instead agreed to "[take] her on as a trial basis." The testimony
28 was unclear as to what the exact terms of the agreement were. But

1 it was understood that Holzman was authorized to seek television
2 opportunities on behalf of Lister and in return, Holzman would
3 receive 10% of Lister's compensation for those engagements
4 attributable to Holzman.

5 2. Soon thereafter, Lister was contacted by R&B
6 singer/songwriter, R Kelly, who expressed an interest in Lister
7 acting in Kelly's upcoming music video. Lister asked R Kelly's
8 casting director, Ruben Cannon, to contact Holzman to discuss the
9 terms for the video. Lister testified that Holzman negotiated his
10 daily rate at \$1,000.00 a day. Lister was angered because he
11 perceived his daily rate to be \$5,000.00 a day. Lister's agent,
12 Raphael Berko, testified that he was unaware of the video offer and
13 did not participate in the negotiation of this deal.

14 3. Notwithstanding Lister's desire to utilize Holzman
15 solely for television opportunities, evidence was submitted
16 demonstrating that Holzman participated in negotiating the terms
17 and conditions of employment for Lister on at least one motion
18 picture, the film "Circus". Lister's licenced talent agent,
19 Raphael Berko, testified that this negotiation was done in
20 conjunction with him and at his request¹.

21 4. In addition, credible evidence was submitted that
22 Holzman attempted to negotiate the terms and conditions of
23 employment for Lister on the independent film "Killer Weave".
24 Holzman also sought employment for other projects including,
25 "Getting There", "Concrete Jungle" and "The Second Coming of

26 ¹ 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
28 with and at the request of a licensed talent agency in the negotiation of an
employment contract."

1 within the meaning of §1700.4(b).

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

6 3. Labor Code section 1700.5 provides that "no person
7 shall engage in or carry on the occupation of a talent agency
8 without first procuring a license therefor from the Labor
9 Commissioner." It was stipulated that the respondent has never
10 held a California talent agency license.

11 4. Labor Code §1700.44(a) provides the Labor
12 Commissioner with the power and jurisdiction to hear and determine
13 matters falling under the Talent Agencies Act (§§1700.00 et seq.),
14 therefore the Labor Commissioner has jurisdiction to hear and
15 determine this matter.

16 5. In Waisbren v. Peppercorn Production, Inc (1995) 41
17 Cal.App.4th 246, the court held that any single act of procuring
18 employment subjects the agent to the Talent Agencies Act's
19 licensing requirements, thereby upholding the Labor Commissioner's
20 long standing interpretation that a license is required for any
21 procurement activities, no matter how incidental such activities
22 are to the agent's business as a whole. Applying Waisbren, it is
23 clear that respondent acted as a talent agency within the meaning
24 of §1700.4(a), evidenced by the following: respondent's conduct in
25 contacting Ruben Cannon in an effort to negotiate Lister's
26 compensation at \$1,000.00 a day in connection with his role in the
27 R Kelly music video; sending resumes and photos directly to casting
28 directors; and having communications with packagers and casting

1 directors regarding the suitability of Lister for an entertainment
2 industry role without the involvement of Lister's licensed talent
3 agent.

4 6. The only issue in this case is whether respondent's
5 actions on behalf of Lister fall within the activities described at
6 Labor Code §1700.44(d), exempting persons conducting certain
7 traditional talent agency functions from the licensing requirement.
8 Labor Code §1700.44(d) states, "it is not unlawful for a person or
9 corporation which is not licensed pursuant to this chapter to act
10 in conjunction with and at the request of a licensed talent agency
11 in the negotiation of an employment contract."

12 7. To implicate this exemption, each element of the
13 statute must be satisfied. Clearly, Holzman has not satisfied this
14 requirement. Berko testified that Holzman's conduct was **not always**
15 done with his knowledge and consequently, not done "in conjunction
16 with and at the request a licensed talent agency".

17 8. Holzman argues that setting up meetings to discuss
18 a role with a packager or any interested potential employer, does
19 not implicate the Act. The Labor Commissioner disagrees. Any
20 attempt to discuss suitable roles for an artist is an attempt to
21 "procure employment".

22 9. The word "procure" is defined in *Webster's Third New*
23 *International Dictionary, Unabridged Merriam-Webster*, as follows:

24 **"Procure...1 a (1): to get possession of; OBTAIN,**
25 **ACQUIRE... (2): GAIN, WIN... 2 a (1): to cause to happen or be**
26 **done: Bring about: EFFECT <procured temporary agreement>:**
27 **ACHIEVE..."**

28 *Webster's New Dictionary of Synonyms 1978, Merriam-*

1 Webster gives the following synonyms for "procure":

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

3 Analogous words: negotiate, arrange, concert: reach, compass,
4 gain, achieve, attain"

5 10. It is obvious that the word "procure" when used
6 with the word "employment" means either to secure employment or to
7 bring about employment or cause employment to occur. That is the
8 common sense meaning of "procure" in this context. It means to
9 arrange employment. When Holzman discussed Lister for roles with
10 potential employers, she was attempting to cause employment and
11 consequently, attempting to "procure" employment within the meaning
12 of the Act. The fact that the packager, in this instance, was a
13 licensed talent agent does not absolve the respondent of
14 culpability³.

15 11. In 1982, AB 997 established the California
16 Entertainment Commission. Pursuant to statutory mandate the
17 Commission studied and analyzed the Talent Agencies Act in minute
18 detail. The major, and philosophically the most difficult, issue
19 before the Commission, the discussion of which consumed a
20 substantial portion of the time was when, if ever, may a personal
21 manager or, for that matter, anyone other than a licensed Talent
22 Agent, procure employment for an artist without obtaining a talent
23 agent's license from the Labor Commissioner? (Commission Report p.
24 15)

25
26 ³ Respondent attempts to apply the exemption found at Labor Code
27 §1700.44(d). This exemption applies only when the artist's licensed talent agent
28 works in conjunction with the manager in negotiating the terms of an employment
contract as part of a cooperative team for the benefit of the artist. Here, the
"packager" was not involved in a representative capacity with the petitioner.

1 12. The Commission considered and rejected alternatives
2 which would have allowed the personal manager to engage in "casual
3 conversations" concerning the suitability of an artist for a role
4 or part. (Commission Report p. 18) The Commission concluded:

5
6 "[I]n searching for the permissible limits to activities
7 in which an unlicensed personal manager or anyone could
8 engage in procuring employment for an artist without
9 being license as a talent agent,... there is no such
10 activity, there are no such permissible limits, and that
11 the prohibitions of the Act over the activities of anyone
12 procuring employment for an artist without being licensed
13 as a talent agent must remain, as they are today, total.
14 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)

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

27 14. Holzman attempts to expand the exemption, which
28 would result in a subterfuge designed to evade the Act's licensing

1 requirements. This would defeat obvious legislative intent.
2 Again, one either is an agent or is not. The person who chooses to
3 manage an artist and avoid statutory regulation may not cross that
4 line, unless that activity falls squarely within the narrow
5 exception of §1700.44(d).

6 15. Lister seeks disgorgement of all commissions paid
7 to the petitioner during the relationship between the parties. It
8 was determined that Lister compensated Holzman with \$500.00 during
9 the one-year preceding the filing of the petition⁴. Having made
10 a showing that Lister paid commissions to respondent during the
11 one-year period, entitles Lister to an accounting and to recoup any
12 commissions paid.

13
14
15 ORDER

16 For the above-stated reasons, IT IS HEREBY ORDERED that
17 the 1999 oral contract between petitioner, TOMMY LISTER a/k/a TINY
18 LISTER, and respondent, TAMARA HOLZMAN dba HOLZMAN MANAGEMENT is
19 unlawful and void *ab initio*. Respondent has no enforceable rights
20 under that contract.

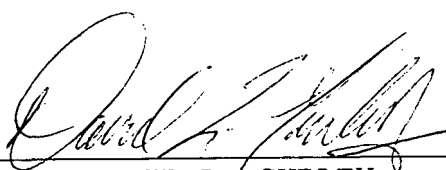
21 Petitioner is entitled to an accounting of all
22 commissions paid to Holzman during the period of February 8, 1999,
23 through February 7, 2000. The respondent shall provide that

24
25 ⁴ Labor Code §1700.44(c) provides that "no action or proceeding shall be
26 brought pursuant to [the Talent Agencies Act] with respect to any violation which
27 is alleged to have occurred more than one year prior to the commencement of this
28 action or proceeding." As a result, the Labor Commissioner has historically held
that a request for affirmative relief must stem from a violation occurring within
one-year prior to the filing of the petition.

1 accounting to the petitioner on or before August 24, 2001, and
2 disgorge those commissions to the petitioner on or before September
3 7, 2001.

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

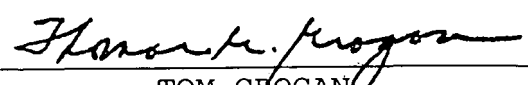
12 Dated: July 25, 2001



DAVID L. GURLEY
Attorney for the Labor Commissioner

16 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

20 Dated: JULY 25, 2001



TOM GROGAN
Deputy Chief

