

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 KEVIN BEYELER,)

13)
14) Petitioner,)

15 vs.)

16 WILLIAM MORRIS AGENCY, INC, a)
17 corporation,)

18) Respondents.)

19 WILLIAM MORRIS AGENCY, INC., a)
20 corporation,)

21) Cross-Petitioner,)

22 vs.)

23 KEVIN BEYELER,)

24) Cross-Respondent,)
25)
26)
27)
28)

No. TAC 32-00

DETERMINATION OF
CONTROVERSY

INTRODUCTION

The above-captioned petition was filed on October 4, 2000, by KEVIN BEYELER (hereinafter "Petitioner" or "BEYELER"), alleging that WILLIAM MORRIS AGENCY, INC., and HENRY K. REISCH, as an individual, (hereinafter "Respondent" or "WMA"), violated the

1 California Talent Agencies Act by failing to send written
2 confirmation of the terms of the employment agreement negotiated by
3 WMA on Beyeler's behalf. And petitioner alleges WMA violated the
4 Act by filing a breach of contract lawsuit with the Los Angeles
5 Superior Court and failing to file the suit first with the Labor
6 Commissioner. Finally, petitioner maintains any oral contract
7 between the parties is procedurally and substantively
8 unconscionable. Petitioner requests disgorgement of commissions
9 paid, attorney's fees, and seeks the oral contract between the
10 parties be deemed void *ab initio*.

11 Respondent filed its answer and cross-petition on
12 December 10, 2000, alleging petitioner breached the oral agreement
13 by failing to pay commissions for employment procured by the
14 respondent. The respondent seeks an accounting to determine the
15 actual compensation petitioner earned during the contract's term,
16 10% commissions on those earnings, and attorney's fees.

17 A hearing was scheduled before the undersigned attorney,
18 specially designated by the Labor Commissioner to hear this matter.
19 The hearing commenced on April 20, 2001 and concluded on April 25,
20 2001, in Los Angeles, California. Petitioner/cross-respondent was
21 represented by Stephen D. Rothschild of King, Purtich, Holmes,
22 Paterno, & Berliner, LLP; respondent/cross-petitioner was
23 represented by Michael B. Garfinkel of Rintala, Smoot, Jaenicke &
24 Rees. Due consideration having been given to the testimony,
25 documentary evidence and arguments presented, the Labor
26 Commissioner adopts the following determination of controversy.

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2 FINDINGS OF FACT

3 1. The parties stipulated that Henry K. Reisch shall be
4 removed as a named respondent.

5 2. The petitioner is a Los Angeles radio personality who
6 along with his partner, Gene Baxter, makes up the popular morning
7 show "Kevin & Bean" broadcast on radio station KROQ. Sometime in
8 1995, as a result of the popularity of "Kevin & Bean", Steven
9 Weiss, of the William Morris Agency contacted the duo and suggested
10 WMA could expand their presence into the television industry.
11 Beyeler and Baxter accepted the offer and Weiss began to seek
12 opportunities on behalf of "Kevin & Bean". In an attempt to reduce
13 the agreement to a writing, WMA sent various general services
14 agreements for Beyeler's signature, reflecting the terms of the
15 deal. Beyeler didn't sign the various contracts, but it was clear
16 through Beyeler's testimony that he accepted WMA's offer to
17 represent him in the television industry.

18 3. The television opportunities for "Kevin & Bean" were
19 sparse, but in the fall of 1996, Beyeler and Baxter's three-year
20 employment contract with KROQ came up for renewal. Weiss
21 introduced Beyeler to WMA Vice President, Henry Reisch. Reisch
22 specialized in radio employment negotiations and it was Reisch who
23 believed that Beyeler was being grossly undervalued by his
24 employer. Beyeler agreed to have WMA negotiate his KROQ contract
25 and it was Reisch who conducted the negotiations with Beyeler's
26 employer. In early 1997, the new three-year contract valid through
27 November 20, 1999, between Beyeler and KROQ was finalized. Reisch
28 had negotiated many favorable terms as requested by Beyeler and
Beyeler expressed contentment and gratification for the outcome of

1 the deal.

2 4. The representation agreement between Beyeler and WMA
3 was never reduced to a writing, and it is the lack of specific
4 contractual terms contained in a writing (i.e., duties and
5 compensation) that propel this litigation.

6 5. Initially, Beyeler forwarded 10% commission payments
7 based on his annual compensation and bonuses regularly to WMA over
8 the next year. At some point in 1998, Beyeler began to fall behind
9 in his payments and in June of 1998, Beyeler ceased his payment of
10 commissions to WMA. During Beyeler's sporadic payment period, WMA
11 believed that Beyeler was experiencing cash flow problems and WMA
12 agreed to defer Beyeler's commission payments until 1999.

13 6. Beyeler's account was in direct contradiction.
14 Beyeler maintained he authorized his accountant, Joanne Waldo, to
15 terminate the relationship in June of 1998. Waldo did not testify
16 and there were no supporting documents reflecting this alleged
17 termination. The crux of Beyeler's claim is that Beyeler believed
18 WMA would seek extra work (i.e., voice-overs) on his behalf, in
19 addition to the contract negotiations conducted for Beyeler between
20 him and KROQ. That didn't occur. After the employment contract
21 was completed, WMA, Weiss and Reisch expended minimal effort on
22 Beyeler's behalf. According to Beyeler, he agreed to pay 10% of
23 his commissions for "as long as we [Beyeler and Reisch] were
24 working together."¹ Beyeler contends after the KROQ negotiation,

25 ¹ Beyeler testified, "I probably wrongly assumed that when you get somebody
26 from William Morris, they continue to work on your behalf, and I assumed that he
27 was going to continue to work on my behalf. And after ... a year and a half or
28 two years of paying and he did nothing on my behalf, I decided I didn't want to
pay anymore because he wasn't doing anything ... My only regret is that I paid
for two years for nothing."

1 Reisch and the WMA abandoned him. Notably, Beyeler never
2 complained or requested Reisch or anyone from WMA to continue
3 seeking other employment opportunities for him.

4 7. According to Henry Reisch, he had no personal
5 knowledge of the specific terms between Beyeler and WMA. Reisch
6 testified it was his understanding that Beyeler was simply a client
7 of WMA and as a client it was his responsibility to obtain "more
8 money, more vacation, [and] enhance his bonus schedule", as
9 requested by Beyeler². It is WMA's position that they are entitled
10 to a 10% commission on Beyeler's annual compensation plus bonuses
11 for the duration of the employment agreement negotiated by WMA.
12 WMA also contends that Beyeler knew the arrangement, agreed to its
13 terms, which are industry standards and customs and performed under
14 those terms.

15 8. In 1999, after failing to receive commissions, WMA's
16 accountant began collection activity and contacted Beyeler's
17 accountant. Business records produced by WMA, established that on
18 November 17, 1999, Beyeler's authorized accountant³ agreed with WMA
19 to reduce his monthly payment plan, but still collect on the full

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21 ² Documentary evidence produced at the hearing confirmed that, *inter alia*,
22 Beyeler's bonus, vacation and salary were all substantially increased through the
efforts of Reisch.

23 ³ Petitioner expended a significant amount of testimony arguing that Joanne
24 Waldo was not authorized by Beyeler to enter into a payment plan and any evidence
of a payment plan constitutes inadmissible settlement negotiations. First,
25 Beyeler clearly testified that he "authorized" and "commissioned" Waldo to pay
his commissions to WMA and instructed her to terminate his relationship with WMA.
26 It was clear that in Beyeler's mind, Waldo was authorized to enter into a payment
plan with WMA. Second, Waldo acknowledged the full amount of commissions
27 outstanding. Third, Cal. Code of Regulations §12031 states, "the Labor
Commissioner is not bound by the rules of evidence or judicial procedure." In
28 short, Waldo's agreement to compensate WMA for the full amount in November 1999,
was reliable evidence establishing that Beyeler had not expressed his intent to
cease commission payments and/or terminate the relationship in June of 1998.

1 \$75,249.96⁴ owed on the delinquent account by extending his
2 repayment time. This agreement between Waldo and WMA never
3 materialized. Documents revealed when Beyeler's accountant took
4 the payment agreement to her superior for final approval, the
5 payment plan became contingent upon speaking with Beyeler's legal
6 representation. It was after discussions with counsel that on
7 November 22, 1999, WMA received correspondence from Beyeler's legal
8 representation maintaining Beyeler had terminated the relationship
9 "prior to June 30, 1998" and Beyeler was relieved from any further
10 payment obligation. Again, there was no written evidence nor
11 additional testimony reflecting the June 1998 termination.

12 9. On May 18, 2000, WMA assigned their right to the
13 alleged outstanding commissions to L.A. Commercial Group, Inc., dba
14 Continental Commercial Group (CCG). CCG then filed a breach of
15 contract lawsuit in the Los Angeles Superior Court seeking
16 \$75,249.96 in unpaid commissions. After the Talent Agencies Act
17 was invoked, WMA substituted back as the party in interest and the
18 superior court lawsuit was stayed pending resolution of this
19 administrative proceeding.

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21 CONCLUSIONS OF LAW

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23 1. Labor Code §1700.4(b) includes "radio artists" in the
24 definition of "artist" and petitioner is therefore an "artist"
25 within the meaning of Labor Code §1700.4(b).

26 2. It was stipulated that the William Morris Agency,
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1 Inc., is a California licensed talent agency.

2 3. Labor Code §1700.23 provides that the Labor
3 Commissioner is vested with jurisdiction over "any controversy
4 between the artist and the talent agency relating to the terms of
5 the contract," and the Labor Commissioner's jurisdiction has been
6 held to include the resolution of contract claims brought by
7 artists or agents seeking damages for breach of a talent agency
8 contract. Garson v. Div. Of Labor Law Enforcement (1949) 33 Cal.2d
9 861, Robinson v. Superior Court (1950) 35 Cal.2d 379. Therefore
10 the Labor Commissioner has jurisdiction to determine this matter.

11 4. The issues in this case are as follows:

12 a) Was a contract formed?

13 b) If so, what were the terms?

14 c) Was there a valid termination in June 1998,
15 excusing the petitioner's continued
16 performance?

17 d) Is the contract void for unconscionability?

18 e) Does a violation of Title 8 California Code of
19 Regulation §12002, or failure to first file
20 this case with the Labor Commissioner require
21 a voiding of the contract?

22
23 **a) Was a Contract Formed?**

24 5. The essential elements of a contract were present.
25 Parties capable of contracting who consented with a lawful object
26 and sufficient consideration. (C.C. 1550.) The parties' agreement
27 for the procurement of employment in the entertainment industry was
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1 for a lawful purpose and the oral agreement for WMA to negotiate
2 employment contracts on behalf of Beyeler for a 10% commission
3 established sufficient consideration for both parties. Beyeler's
4 acceptance and the requisite "meeting of the minds" were
5 established through his conduct. Beyeler paid 10% of his
6 employment compensation to WMA for more than one year.
7 Consequently, an implied oral contract, "one the existence and
8 terms of which are manifested by conduct", was formed. (C.C. 1621)

9
10 **b) If So, What Were the Terms?**

11 6. It was clear Beyeler agreed to pay 10% of his income
12 for WMA's negotiation of his employment contract. And it was clear
13 WMA agreed to represent Beyeler in the negotiation of his
14 employment contract for 10% of his compensation. The question is
15 whether the contract was conditioned upon the rendering of future
16 services and whether the breach of that covenant extinguished the
17 petitioner's promise to pay. There simply was no evidence that the
18 breach of a duty to render future services excused the petitioner's
19 obligation to pay for services previously rendered. Despite the
20 lack of express terms, the intent of the parties could be
21 ascertained from the surrounding circumstances, including payment
22 history, testimony of Beyeler, and industry custom.

23 7. In addition to paying 10% of his salary for over a
24 year, Beyeler manifested his intent to pay 10% for the entire
25 duration of the employment contract, by authorizing his accountant
26 to accept the payment plan to reduce the monthly amount but extend
27 the duration for repayment, which equaled exactly 10% of the total

1 value of the employment contract. Moreover, an inference may be
2 drawn that Beyeler was aware that the 10% commission owed to WMA
3 for their efforts created an obligation for him to pay for the
4 duration of the employment agreement, because those are the precise
5 terms every agreement sent by WMA to Beyeler stated. In fact, all
6 of the contracts offered to Beyeler for signature contained the
7 same compensation terms. Indeed, identical or similar compensation
8 terms are industry standards, including the following provision of
9 a standard, exclusive, agency contract approved by the American
10 Federation of Television and Radio Artists (AFTRA) presented to
11 Beyeler from the WMA:

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13 "The Artist agrees to pay to the agent a sum equal to ten
14 percent (10%) ... of all moneys or other consideration
15 received by the Artist directly or indirectly, under
16 contracts of employment entered into during the term
17 specified herein as provided by the regulation.
Commissions shall be payable when and as such moneys or
other consideration are received by the Artist or by
anyone for or on the Artist's behalf."

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19 8. Beyeler embraced the work performed by WMA, but
20 unilaterally determined after an arbitrary time period he didn't
21 want to pay anymore. Courts have long held, "he who shakes the
22 tree is the one to gather the fruit." Willison v. Turner 89
23 Cal.App.2d 589 (1949). Beyeler testified that "after ... a year
24 and a half or two years of paying and he did nothing on my behalf,
25 I decided I didn't want to pay anymore." Certainly, Beyeler may
26 terminate a personal services agreement if he feels that his agent
27 is not providing the services contracted for. But he may not
28 unilaterally determine that he has no further obligation to pay for

1 work already performed.
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3 **c) Was There a Valid Termination in June 1998?**

4 9. There was not a shred of credible evidence
5 establishing the relationship was terminated in June of 1998.
6 Termination did not occur until the November 22, 1999 letter to WMA
7 was received from Beyeler's legal representation. Additionally,
8 California Code of Regulation Title 8 §12001 states, a talent
9 agency contract may provide for the payment of compensation after
10 the termination thereof with respect to any employment contracts
11 entered into or negotiated for or to any employment accepted by the
12 artist during the term of the talent agency contract, or any
13 extensions, options or renewals of said employment contracts or
14 employment.

15 10. To be entitled to the payment of compensation after
16 termination of the contract between the artist and the talent
17 agency, the talent agency shall be obligated to serve the artist
18 and perform obligations with respect to any employment contract or
19 to extensions or renewals of said employment contract or to any
20 employment requiring the services of the artist on which such
21 compensation is based. WMA was willing and able to service that
22 employment contract should it have been necessary. In this case,
23 there were no continuing services required of that employment
24 contract and consequently WMA fully performed their duty with
25 respect to the KROQ employment contract.

26 **d) Is the Contract Void for Unconscionability?**
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1 11. Petitioner argues that the contract should be void
2 because the contract meets the elements of both procedural and
3 substantive unconscionability. C.C. §1670.5. states:

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5 (a) If the court as a matter of law finds the contract or
6 any clause of the contract to have been unconscionable at
7 the time it was made the court may refuse to enforce the
8 contract, or it may enforce the remainder of the contract
9 without the unconscionable clause, or it may so limit the
10 application of any unconscionable clause as to avoid any
11 unconscionable result.

12 12. Here, neither the terms, [10% commission], nor the
13 alleged unequal bargaining power of the parties rises to a level
14 that would require this oral contract to be void for
15 unconscionability. The petitioner is an intelligent sophisticated
16 individual, who had entered into several lengthy employment
17 contracts in the past. The standard agency representation
18 agreement entered into between the parties was both fair,
19 disclosed, understood and not prejudicial to the artist.

20 **e) Does a Violation of Title 8 CCR §12002, or Failure to**
21 **First File this Case with the Labor Commissioner, Require a Voiding**
22 **of the Contract?**

23 13. Finally, the petitioner alleges that respondent
24 violated Title 8 California Code of Regulation §12002, requiring a
25 voiding of the contract? §12002 states:

26 A talent agency shall be entitled to recover a fee,
27 commission or compensation under an oral contract between
28 a talent agency and an artist as long as the particular
employment for which such fee, commission or compensation
is sought to be charged shall have been procured directly
through the efforts or services of such talent agency and

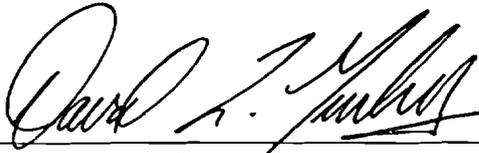
1 shall have been confirmed in writing within 72 hours
2 thereafter. Said confirmation may be denied within a
3 reasonable time by the other party. However, the fact
4 that no written confirmation was ever sent shall not be,
in and of itself, be sufficient to invalidate the oral
contract.

5 14. It was not established that WMA complied with this
6 regulation and it should be stressed that a violation of this
7 regulation could serve to repudiate an oral contract between an
8 agent and an artist. The obvious intent of this regulation is to
9 avoid unfair surprise and facilitate full disclosure. All terms of
10 an employment contract must be disclosed to the artist, so that the
11 artist is aware of his duties and responsibilities and the duties
12 and responsibilities of his employer. Here, the duties between
13 Beyeler and KROQ were not in issue. So, notwithstanding the fact
14 that no written confirmation was sent to Beyeler of the KROQ
15 agreement, it was determined that Beyeler was aware of all of the
16 essential terms of that agreement and that he benefitted
17 considerably. In fact, Beyeler received almost every single term
18 he requested. As a result, the noncompliance of this regulation
19 under these circumstances is not sufficient to invalidate the oral
20 contract between the parties.

21 15. The petitioner cites several cases in support of
22 his proposition, but all of those Labor Commissioner's
23 determinations cited by petitioner are distinguishable for several
24 reasons. First, all of the cases occurred prior to the 1989
25 amendment to the regulation, which now affords the Labor
26 Commissioner with discretion to determine whether an oral contract
27 will be void. Second, in each case cited by Beyeler, the

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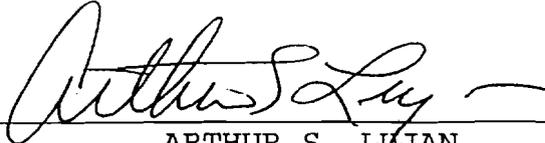
Dated: September 4, 2001



DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 9-05-01



ARTHUR S. LUJAN
State Labor Commissioner

