

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
2 State of California
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5
6 BEFORE THE LABOR COMMISSIONER
7 OF THE STATE OF CALIFORNIA
8
9

10 ELISE SHIRLEY,)	Case No. TAC 08-01
)	
11)	
)	
12 vs.)	DETERMINATION OF
)	CONTROVERSY
13)	
)	
14 ARTISTS' MANAGEMENT WEST; an unknown)	
business form; and GINA GLATIS,)	
15 an individual;)	
)	
)	
16 Respondent.)	
)	
17)	

18 INTRODUCTION

19 The above-captioned petition was filed on March 9, 2001,
20 by ELISE SHIRLEY, (hereinafter "SHIRLEY" or "Petitioner"), alleging
21 that GINA GLATIS dba ARTISTS' MANAGEMENT WEST, (hereinafter
22 "Respondent", "GLATIS" or "AMW"), had attempted to procure
23 employment for Shirley without a talent agency license in violation
24 of Labor Code §1700.5. Petitioner seeks a return of all
25 commissions paid to the respondent during the length of the
26 relationship and requests that the personal services contract
27 between the parties be voided *ab initio*.

1 Respondent filed her answer on April 20, 2001, seeking
2 protection under Labor Code §1700.44(d)'s "safe harbor" exemption
3 which allows a person who is not licensed to act in conjunction
4 with, and at the request of, a licensed talent agency in the
5 negotiation of an employment contract. Respondent seeks a
6 dismissal of the petition.

7 A hearing was scheduled and held on September 21, 2001,
8 before the undersigned attorney specially designated by the Labor
9 Commissioner to hear this matter. Petitioner was represented by
10 Robert S. Besser of Besser & Chapin; respondent appeared through
11 her attorney Erica E. Hayward of Gorry Meyer & Rudd L.L.P. Due
12 consideration having been given to the testimony; documentary
13 evidence; arguments presented; and briefs submitted, the Labor
14 Commissioner adopts the following determination of controversy.

15
16 FINDINGS OF FACT

17 1. Petitioner, an actor, entered into a personal
18 services contract with AMW on December 9, 1997. According to the
19 terms of the contract, AMW would, "[inter alia] perform all
20 activities necessary on behalf of artist - ordinarily performed by
21 a personal manager - to further the Artist's career. Particularly,
22 Manager will actively promote the Artist, negotiate all contracts
23 necessary and provide necessary advice and council in all phases of
24 Artist's career." In return, Shirley was required to compensate
25 AMW with 15% of her gross income as an artist. Shirley also
26 secured the services of a licensed talent agency during the
27 relationship. Conan Carroll of the Irv Schechter Company and
28 formerly of The Artists' Group represented Shirley as her talent

1 agent from 1996 through 1999.

2 2. In an effort to further Shirley's career, Glati
3 and Shirley would routinely scour the "breakdowns"¹ in search of
4 suitable parts. If an available part appeared on the breakdown
5 that interested Glati and Shirley, Glati would send a resume and
6 headshot directly to the casting director, in an effort to secure
7 an audition for Shirley. At the end of the day, Glati would phone
8 Carroll to discuss the various parts she had submitted Shirley for.
9 Glati testified this was done because it would look bad if Carroll
10 submitted Shirley for the same part.

11 3. Glati testified that if a casting director or
12 producer called Glati directly, regarding a role or audition for
13 Shirley, Glati would set up the audition and then call Carroll
14 later to discuss whether or not the part was in the best interest
15 of their mutual client. This routine was essentially stipulated to
16 by the respondent who added her predecessor functioned in this
17 manner and this was how she had been taught. When asked on cross-
18 examination whether Glati would submit Shirley first and notify
19 the agent later, Glati replied, "yes".

20 4. Additionally, Glati testified of the "agreement"
21 between Carroll and Glati. The "agreement" enabled Glati to seek
22 auditions for Shirley because Carroll was very busy. Carroll
23 ostensibly granted overall permission for Glati to seek the
24 auditions on Shirley's behalf. If Glati obtained the audition and
25 received a role, Carroll would negotiate the employment contract.
26 This arrangement continued throughout the relationship as the

27 ¹ The "breakdowns" are a list of available roles in the entertainment
28 industry that are comprised on a daily basis.

1 shall engage in or carry on the occupation of a talent agency
2 without first procuring a license therefor from the Labor
3 Commissioner."

4 4. Labor Code §1700.44(a) provides the Labor
5 Commissioner with the power and jurisdiction to hear and determine
6 matters falling under the Talent Agencies Act (§§1700.00 et seq.),
7 therefore the Labor Commissioner has jurisdiction to hear and
8 determine this matter.

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

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

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

28 8. This exemption requires a three-part analysis and

1 all three parts must be satisfied for the respondent to prevail.
2 First, we must determine whether petitioner's acts of submitting
3 respondent's photos and resumes directly to casting agents were
4 done "in conjunction with" a licensed talent agent; two, whether
5 respondents' activities were done "at the request of" a licensed
6 talent agency"; and three, whether submitting photos and resumes is
7 "the negotiation of an employment contract". We begin with the
8 former by examining legislative intent. In determining legislative
9 intent, one looks at both legislative history and the statutory
10 scheme within which the statute is to be interpreted.

11 9. In 1982, AB 997 established the California
12 Entertainment Commission. Labor Code §1702 directed the Commission
13 to report to the Governor and the Legislature as follows:

14 "The Commission shall study the laws and
15 practices of this state, the State of New
16 York, and other entertainment capitals of the
17 United States relating to the licensing of
18 agents, and representatives of artists in the
19 entertainment industry in general,..., so as
20 to enable the commission to recommend to the
21 Legislature a model bill regarding this
22 licensing."

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

11. The major, and philosophically the most difficult,

1 issue before the Commission, the discussion of which consumed a
2 substantial portion of the time was this first issue: When, if
3 ever, may a personal manger or, for that matter, anyone other than
4 a licensed Talent Agent, procure employment for an artist without
5 obtaining a talent agent's license from the Labor Commissioner?
6 (Commission Report p. 15)

7 12. The Commission considered and rejected alternatives
8 which would have allowed the personal manager to engage in "casual
9 conversations" concerning the suitability of an artist for a role
10 or part; and rejected the idea of allowing the personal manager to
11 act in conjunction with the talent agent in the negotiation of
12 employment contracts **whether or not requested to do so by the**
13 **talent agent** [emphasis added]. (Commission Report p. 18-19)

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

16 "[I]n searching for the permissible limits to activities
17 in which an unlicensed personal manger or anyone could
18 engage in procuring employment for an artist without
19 being license as a talent agent,... there is no such
20 activity, there are no such permissible limits, and that
21 the prohibitions of the Act over the activities of anyone
22 procuring employment for an artist without being licensed
23 as a talent agent must remain, as they are today, total.
24 Exceptions in the nature of incidental, occasional or
25 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)

26 14. The Commission was very clear in their conclusion
27 that a personal manager may not negotiate an employment contract
28 unless that negotiation is done "at the request" of a licensed

1 talent agent. It is not enough, as indicated in the Commission's
2 Report, that the talent agent grants overall permission. The agent
3 must advise the manager or request the manager's activity for each
4 and every submission. At the very minimum an agent must be aware
5 of the manager's procurement activity. In our case, the testimony
6 was clear that at times the petitioner submitted the respondent's
7 photos and resumes initially without the agent's knowledge. It was
8 typically after the fact the agent was notified of the submission,
9 and therefore, the acts were not done "at the request of"
10 respondent's licensed talent agent.

11 15. When a manager submits her clients for roles and
12 attempts to use the narrow licensing exemption found at Labor Code
13 §1700.44(d)², he or she is walking a very thin line. A manager who
14 attempts to secure his client employment must be prepared to
15 establish that his activity falls within the guidelines established
16 by legislative intent and the Division's previous talent agency
17 determinations.

18 16. A manager who obtains the talent agent's overall
19 permission to submit an artist for employment does not fall within
20 the exemption. This arrangement purporting to allow the petitioner
21 the freedom to act as a part-time *de facto* talent agent, as
22 discussed, was not the legislative intent behind Labor Code
23 §1700.44(d). An artist's manager may not participate in a
24 situation where the manager is free to submit an artist for roles
25 wherever and whenever the manager decides it is appropriate, with
26 or without the talent agent's acquiescence or approval.

27 _____

1 17. Moreover, in the case of "All Over Again", Carroll
2 never knew that Shirley had been submitted for that role. Here,
3 this submission was not done "in conjunction with" a licensed
4 talent agent. Consequently, the respondent has failed every prong
5 and not acted within the 1700.44(d) exemption.

6 18. The respondent argues that Labor Commissioner
7 Determination, Wesley Snipes v. Dolores Robinson Entertainment, TAC
8 36-96 expands §1700.44(d), by allowing a manager to submit the
9 artist, "as long as the activities were done as part of a `team
10 effort' with a licensed agent." This case is distinguishable
11 because the hearing officer in Snipes expressly stated, "it is
12 clear that she [the manager] acted at the request of and in
13 conjunction with a licensed talent agency within the meaning of
14 Labor Code section 1700.44(d) **at all times.**" Snipes, supra p.7
15 Further, because the Snipes Determination is expressly limited to
16 that set of facts based on "undisputed evidence presented, which
17 was well documented by the correspondence and other exhibits", and
18 that type of undisputed evidence was not presented in our case, we
19 decline to follow Snipes, to the extent it expands Labor Code
20 §1700.44(d) beyond our discussion here.

21 19. The petitioner has failed the first two prongs of
22 the analysis, and therefore the third prong does not require
23 discussion, but will be briefly addressed. The Commission was
24 silent as to what constitutes "the negotiation of an employment
25 contract", but as stated in Anderson v. D'avola (1995) TAC 63-93,
26 "[t]his statute [§1700.44(d)] does not permit such an unlicensed
27 person to engage in any procurement activities other than the
28 `negotiation of an employment contract.' Discussions with

1 producers or casting directors in an attempt to obtain auditions
2 for an artist exceed the scope of this statute." Anderson
3 illustrates the "negotiation of an employment contract" must also
4 be narrowly defined. Allowing submissions and direct discussions
5 with production companies and casting agents by a manager in an
6 attempt to obtain employment on behalf of the artist would again
7 frustrate legislative intent by expanding permissible unlicensed
8 activity. Again, respondents' activities do not fall within the
9 exemption at Labor Code §1700.44(d).

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

25 21. Shirley seeks disgorgement of all commissions
26 paid to AMW during the parties relationship. Shirley filed her
27 petition on March 9, 2001. Labor Code §1700.44(c) provides that
28 "no action or proceeding shall be brought pursuant to [the Talent

1 Agencies Act] with respect to any violation which is alleged to
2 have occurred more than one year prior to the commencement of this
3 action or proceeding." Having made no clear showing that AMW
4 received commissions during the period of March 10, 2000, through
5 March 9, 2001, Shirley is not entitled to a disgorgement of
6 commissions.

7
8 ORDER

9 For the above-stated reasons, IT IS HEREBY ORDERED that
10 the 1997 contract between petitioner, ELISE SHIRLEY and respondent,
11 GINA GLATIS dba ARTISTS' MANAGEMENT WEST, is unlawful and void *ab*
12 *initio*. Respondent has no enforceable rights under that contract.

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

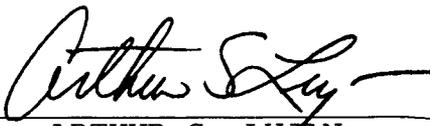
17 The parties will bear the expense of their own attorneys'
18 fees.

19 Dated: 1-10-02


David L. Gurley
Attorney for the Labor Commissioner

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23
24 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

25
26
27
28 Dated: 1/10/02


ARTHUR S. LUJAN
State Labor Commissioner

4 **CERTIFICATION OF SERVICE BY MAIL**

(C.C.P. §1013a)

5 **ELISE SHIRLEY VS ARTISTS' MANAGEMENT WEST, AN UNKNOWN**
6 **BUSINESS FORM; AND GINA GLATIS, AN INDIVIDUAL**
7 **SF 008-01 TAC 8-01**

8 I, Benjamin Chang, do hereby certify that I am employed in
9 the county of San Francisco, over 18 years of age, not a party to
10 the within action, and that I am employed at and my business
11 address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA
12 94102.

13 On January 10, 2002, I served the following document:

14 **DETERMINATION OF CONTROVERSY**

15 by facsimile and by placing a true copy thereof in envelope(s)
16 addressed as follows:

17 **ROBERT S. BESSER, ESQ.**
18 **CHRISTOPHER CHAPIN, ESQ.**
19 **BESSER & CHAPIN**
20 **15332 ANTIOCH STREET, PMB 807**
21 **PACIFIC PALISADES, CA 90272**

22 **TIMOTHY J. GORRY, ESQ.**
23 **FRANK SANDELMANN, ESQ.**
24 **ERICA E. HAYWARD, ESQ.**
25 **GORRY MEYER & RUDD LLP**
26 **2029 CENTURY PARK EAST, STE 400**
27 **LOS ANGELES, CA 90067**

28 and then sealing the envelope with postage thereon fully prepaid,
depositing it in the United States mail in the city and county of
San Francisco by ordinary first-class mail.

I certify under penalty of perjury that the foregoing is
true and correct. Executed on January 10, 2002, at San
Francisco, California.

24 
25 _____
26 BENJAMIN CHANG