

1 into, work performed and monies received, during the relevant periods.

2 Respondent filed an answer to the Petition, asserting, *inter alia*, that Lenhoff breached its
3 duties under the contract by failing to use reasonable efforts to procure employment for Palmieri
4 and by breaching its fiduciary duty to Respondent. Respondent also counterclaimed for all
5 unearned commissions.

6 A Hearing on the Petition was held on July 7, 2006 in Los Angeles, California, before the
7 undersigned attorney specially designated to hear this matter. Petitioner was represented by its
8 attorney, Eli M. Kantor. Respondents were represented by their attorney, Joseph Gourneau of
9 Kenoff & Machtinger, LLP. Appearing as a witness for Petitioner was Charles Lenhoff. Appearing
10 as witnesses for Respondents were Anthony Palmieri, Budd Burton Moss and Arthur L. Stashower.

11 Due consideration having been given to the testimony, documentary evidence, briefs, and
12 arguments submitted by the parties, the Labor Commissioner now renders the following decision:

13 14 STIPULATIONS

15 The parties entered into the following stipulations at the hearing:

- 16 1. LENHOFF is a licensed "talent agency" as that term is defined under Labor Code
17 Section 1700 *et seq.*, collectively known as the Talent Agencies Act.
18 2. PALMIERI is an "artist" as that term is defined under Labor Code Section
19 1700.4(b).
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21 ISSUES

22 The issues to be decided by the Labor Commissioner are:

- 23 1. Whether Lenhoff is entitled to commissions on the television series "Monk" after
24 termination of the General Services Agreement, either pursuant to Paragraph 2¹ or
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26 ¹Paragraph 2 of the Agreement provides, in pertinent part:
27 "As compensation for your said services agreed to be rendered hereunder, I hereby agree to pay you a sum
28 equal to ten percent, (10%) of all monies or things of value as and when received by me,...as compensation for my
professional services rendered or agreed to be rendered during the term hereof under contracts, or any extensions,

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Paragraph 5² of the Agreement?

- 2. Did Lenhoff breach the Agreement by failing to make reasonable efforts to procure employment for Palmieri and by submitting multiple clients for the same jobs? If so, must Lenhoff disgorge commissions received?
- 3. Is the prevailing party in this controversy entitled to interest?
- 4. Is the prevailing party in this controversy entitled to attorney fees?

FINDINGS OF FACT

1. Lenhoff has been a licensed talent agent since 1991. Palmieri has worked in the entertainment industry, behind the camera for over 30 years and has been a cinematographer since 1994.

2. On or about February 14, 2003, Lenhoff and Palmieri entered into a General Services Agreement whereby Lenhoff agreed to act as Palmieri's sole and exclusive Agent for a period of one year to "assist in obtaining offers of employment and to negotiate contracts." The agreement was to "automatically renew for an additional one year term, for a maximum of six terms, unless notified in writing." Pursuant to Paragraph 2 of the Agreement, Lenhoff was to receive ten percent (10%) of all monies received by Palmieri for services "rendered or agreed to be rendered during the term of the contract" or "any extensions, renewals, modifications or substitutions thereof, entered into or negotiated during the term hereof." (See Footnote 1, *supra*) The other pertinent paragraph in the Agreement, as it relates to this dispute, is contained in Paragraph 5 (see Footnote 2, *supra*) which provides that if an agreement is entered into within 4

renewals, modifications or substitution thereof, entered into or negotiated during the term hereof and to pay the same to you thereafter for so long a time as I receive compensation on any such contracts, or any extensions, renewals, modifications or substitutions thereof of said contracts..."

²Paragraph 5 of the Agreement provides, in pertinent part:

"If I enter into any agreement which would have been otherwise covered by this General Services Agreement within four (4) months after termination hereof... with any person or business entity as to who a submission has been made and/or negotiations commenced on my behalf during the term of this Agreement then in said event any such employment contract entered into shall be deemed to have been entered into during the term hereof."

1 months of termination of the agreement with any person to whom a submission was made or
2 negotiations commenced during the term of the agreement, then the contract shall be deemed
3 entered into during the contract period.

4 3. Testimony varied with respect to what efforts Lenhoff made on behalf of Palmieri to
5 obtain employment. Palmieri testified that Lenhoff's efforts were minimal, no more than one line
6 submissions to various entities, which promoted not only Palmieri but other cinematographers
7 represented by Lenhoff; that there was no communication and that Lenhoff did not negotiate any
8 contracts. Lenhoff testified that he put together materials to promote Palmieri's career, including
9 demo reels, he shared proprietary information with Palmieri, made numerous submissions and
10 contacts on his behalf and negotiated contracts and that he had numerous contacts with Palmieri
11 though Palmieri was difficult to get in touch with.

12 4. The testimony was consistent, however, that Lenhoff initiated the contact with
13 Randy Zisk and Anthony Santa Croce, producers of the television series "Monk" and set up a
14 meeting with them which led to Palmieri's employment on that show.

15 5. Palmieri worked on Season 2 of "Monk" as Director of Photography from August
16 2003 to December 2003 pursuant to a contract with OCPI Productions. The contract was limited to
17 Palmieri's employment on Season 2 and made no provisions for renewal or options for future
18 seasons. The contract listed Lenhoff as the contact person for Respondent and Lenhoff received the
19 contract copies for signature by Palmieri.

20 6. On or about March 1, 2004 another contract was entered into for Palmieri's services
21 as Director of Photography for the "Third Broadcast Season" of "Monk," which ran from March
22 2004 to December 2004. The contract was substantially the same as the first contract except for a
23 raise in the compensation rate. Again, Lenhoff was named as the contact person for Palmieri.

24 7. After the initial contact with the producers of "Monk" Palmieri took on a more
25 active role in representing himself in negotiating contracts for employment with "Monk." Lenhoff
26 and Palmieri had very little communication thereafter, largely due to Palmieri's lack of response.
27 Palmieri testified that he was upset with Lenhoff for visiting him at home and on the set, yet failed
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1 to return phone calls. Due to this lack of communication, Lenhoff rendered minimal service to
2 Palmieri after the first year of their agreement.

3 8. Lenhoff received commissions pursuant to their General Services Agreement for
4 Palmieri's work on the second and third seasons of "Monk."

5 9. On or about December 2004, Lenhoff initiated communication with the Producers of
6 "Monk" to talk about Palmieri's work on the fourth season of "Monk" as evidenced by the emails to
7 Anthony Santa Croce dated December 16, 2004 and January 5, 2005, introduced as Exhibits 4 and 5
8 at the hearing. Although the emails are minimal, it is evidence of the submission of Palmieri's
9 name for the fourth season of "Monk."

10 10. By letter dated January 18, 2005, Palmieri terminated the General Services
11 Agreement with Lenhoff.

12 11. On or about April 14, 2005, Palmieri began employment on season 4 of "Monk"
13 pursuant to a contract entered into with Universal Network Television, LLC ("UNT"). Although
14 the production company was different than the prior seasons, Anthony Santa Croce was still the
15 producer and signatory on the Addendum to the contract. This contract also makes no provision for
16 renewal or options for future seasons.

17 12. On or about March 14, 2006, Palmieri began employment on season 5 of "Monk"
18 pursuant to contract entered into with UNT.

19 13. Palmieri failed to pay Lenhoff for Seasons 4 and 5 of "Monk" and this Petition
20 followed.

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22 CONCLUSIONS OF LAW

23 1. Petitioner is a "talent agency" within the meaning of Labor Code Section 1700.4(a).
24 Respondent is an "artist" within the meaning of Labor Code Section 1700.4(b). The Labor
25 Commissioner has jurisdiction to hear and determine this controversy pursuant to Labor Code
26 Section 1700.44(a).

27 2. The parties are bound by the terms of the General Services Agreement which they
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1 entered into on February 14, 2003. In general, absent unconscionability, the right to commissions is
2 governed by the terms of the parties' contract. See e.g., *Steinhebel v. Los Angeles Times*
3 *Communications, LLC* (2005) 126 Cal.App.4th 696. Since Paragraph 2 provides that Lenhoff is
4 entitled to 10% commissions on employment of Palmieri during the terms of the contract, Lenhoff is
5 entitled to the commissions for Seasons 2 and 3, which he has already been paid, absent a material
6 breach of the contract.

7 3. Respondents allege that Lenhoff materially breached the Agreement because he
8 failed to use all reasonable efforts to obtain employment; failed to assist in obtaining offers of
9 employment and failed to negotiate contracts. Therefore, they contend, that not only is Lenhoff not
10 entitled to commissions for Seasons 4 and 5 but that he should disgorge the commissions for the
11 prior seasons also. A material breach of a contract is a "substantial" or "total" breach of contract
12 that excuses the other party from further performance under the contract. "While every instance of
13 non-compliance with a contract's terms constitutes a breach, no every breach is 'material,' that is,
14 not every breach justifies complete termination of the other party's contractual obligations.
15 *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051." (TAC
16 Decision 40-95 at page 9) Although there was contradictory testimony about the amount of work
17 Lenhoff put into representing Palmieri, Lenhoff did produce submission letters and emails
18 indicating that he did more than minimal work on Respondents' behalf. Therefore, any possible
19 inadequacy in Lenhoff's performance does not rise to the level of a material breach and the
20 commissions for Season 2 and 3 are not subject to disgorgement.

21 4. Although Respondents did make multiple submissions to different entities, listing
22 more than one cinematographer for possible jobs, the GSA was clear that Lenhoff would be
23 representing other artists. Thus, this action did not constitute a breach of fiduciary duty.

24 5. The real issue of this case is whether Lenhoff is entitled to commissions for Seasons
25 4 and 5 and any subsequent seasons of "Monk." This issue is determined by the terms of the
26 contract. Since the contract for Season 4 of "Monk" was entered into within 4 months of the
27 termination of the GSA and the submission of Palmieri for the job predated the termination of the
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1 GSA, Lenhoff is entitled to 10% commission for Season 4 pursuant to Paragraph 5 of the GSA.

2 6. On the other hand, Lenhoff is not entitled to any commissions for Season 5 or any
3 subsequent season under the GSA. Although Lenhoff may have been the procuring cause of the
4 initial contract, his right to commissions is based on the GSA. The GSA does not obligate Palmieri
5 to pay commissions on all income recovered from a show initially procured by Lenhoff. It
6 conditions commissions on the entering of contracts or submission of contracts during the terms of
7 the GSA. A separate contract was entered into by Palmieri for each season of "Monk." There were
8 no provisions for renewals, modification or extensions. Although Lenhoff initiated the submission
9 of Palmieri for Season 4, he was not involved in the negotiation of the contract. Lenhoff was not
10 involved at all in the submission or negotiation of Season 5. Therefore, Lenhoff is not entitled to
11 commissions for Season 5 or any season thereafter of "Monk."

12 DISPOSITION

13 Accordingly, it is hereby ordered as follows:

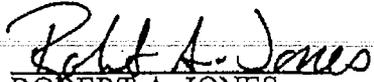
- 14 1. Respondents to provide Petitioner, within thirty days, an accounting of his earnings
15 during the fourth season (2005) of "Monk" and pay commissions to Petitioner in the
16 amount of 10% of these earnings plus interest at the rate of 10% per year from the
17 dates that the earnings upon which these commissions are based were received by
18 Respondents.
- 19 2. Respondents owe no commission to Lenhoff for the fifth season of "Monk" or for
20 any season thereafter under this General Services Agreement.
- 21 3. No statutory authority exists for an award of attorney fees in this proceeding.
22 Petitioner's request for attorney fees is denied.

23 Dated: December 18, 2006

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25 ANNE STEVASON
26 Attorney and Special Hearing Officer
27 For the Labor Commissioner
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1 The above Determination is adopted in its entirety by the Labor Commissioner.
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3 Dated: December 3, 2006

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5 ROBERT A. JONES,
6 Acting State Labor Commissioner
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