

1 **STATE OF CALIFORNIA**
2 Department of Industrial Relations
3 Division of Labor Standards Enforcement
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10
11 **BEFORE THE LABOR COMMISSIONER**
12 **OF THE STATE OF CALIFORNIA**

13 THE STEIN AGENCY,

14 Petitioner,

15 vs.

16 JAMES TRIPP-HAITH, an individual,

17 Respondent.

CASE NO. TAC 46-05

**DETERMINATION OF
CONTROVERSY**

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19 The above-captioned matter, a petition to determine controversy under Labor Code
20 §1700.44, came on regularly for hearing on May 22, 2006 in Los Angeles, California, before
21 the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner
22 THE STEIN AGENCY, a California Corporation, (hereinafter, referred to as "Petitioner"),
23 appeared through its President, Mitch Stein and was represented by Max Sprecher, Esq.
24 Respondent JAMES TRIPP-HAITH, (hereinafter, referred to as "Respondent"), appeared
25 and was represented by Joseph S. Ford, Jr., Esq.

26 Based on the evidence presented at this hearing and on the other papers on file in this

27
28 **DETERMINATION OF CONTROVERSY**

1 matter, the Labor Commissioner hereby adopts the following decision.

2 **FINDINGS OF FACT**

3 1. Petitioner is a licensed talent agency.

4 2. Respondent is an experienced producer who has worked on the television
5 sitcoms "Moesha" and "Eve." The procurement, negotiation and terms of "Eve" are the
6 subject of this controversy.

7 3. In February of 2001, Respondent met with Petitioner's President, Mitch
8 Stein, through the recommendation of a mutual acquaintance, Bob Kerner of Big Ticket
9 Entertainment. After the parties met, they agreed that Petitioner would represent Respondent
10 as his talent agent. Consequently, on February 22, 2001, Petitioner sent Respondent copies
11 of the Agency agreement for his review and signature. Respondent testified that he never
12 signed the Agency agreement because he wanted Petitioner to first obtain work for him
13 before signing anything.

14 4. Mr. Stein testified that he set up at least half a dozen interviews for
15 Respondent with production executives in 2001 and 2002. Petitioner submitted copies of
16 e-mails sent to various studios in attempts to procure work for Respondent. Respondent
17 confirmed this during his direct examination by testifying that he attended at least 7
18 interviews set up by Petitioner during this time.

19 5. In early 2003, Henry Johnson of Warner Brothers, and also a mutual
20 acquaintance of Mr. Stein and Respondent, approached Respondent about performing work
21 as a Line Producer and Unit Production Manager on the pilot for "Eve." Respondent
22 testified that because Mr. Johnson was both his friend and mentor, he did not want to
23 negotiate directly with him for this job. As a result, he asked Petitioner to handle the
24 negotiations.

25 There was conflicting testimony as to who set up the meetings with the
26 production company Greenblatt Janolari and Executive Producer Meg Deloatch.

1 Respondent testified that he would have been the one to set up the meetings since he was in
2 charge of his calendar. Mr. Stein, on the other hand, testified that Mr. Johnson, who knew
3 Petitioner represented Respondent, contacted him about the pilot opportunity and told him
4 that he should try to arrange for Respondent to meet with Greenblatt Janolari. In response to
5 Mr. Johnson's call, Mr. Stein contacted Mr. Janolari and his associates Mr. Cox and
6 Mr. Spencer, sent Respondent's credits and resume to Greenblatt Janolari and eventually set
7 up a meeting between Mr. Janolari and Respondent. After the meeting with Mr. Janolari,
8 Mr. Stein testified that he followed up by setting up a meeting with Ms. Deloatch.

9 Soon thereafter, Respondent was offered the Line Producer and Unit Production
10 Manager positions for the pilot, which was eventually picked up as a series.

11 6. There was also conflicting testimony as to how the salary was reached for
12 Respondent's services as a Line Producer and Unit Production Manager on the three series
13 options. Respondent testified that Mr. Henry notified him that the \$15,000 per episode being
14 offered for the first season was the "standard deal" and that he could take it or leave it.
15 Mr. Stein, however, testified that initially Mr. Henry had offered to pay Respondent only
16 \$13,000 per episode for Season 1 and that he, (Mr. Stein), responded that it was too low
17 given that Respondent had been earning \$14,000 per episode during his last year producing
18 "Moesha." Mr. Stein testified that finally, after many discussions, he was able to negotiate
19 for Respondent \$15,000 per episode for Season 1, which would increase to \$16,000 per
20 episode if Season 2 was picked up and \$17,000 per episode if Season 3 was picked up.

21 7. Mr. Stein also testified that he was able to negotiate a "retroactive
22 compensation" plan for Respondent, which provided that if the "presentation"¹ (as opposed
23 to the pilot) ran as long as a pilot, Respondent would be compensated an additional
24 \$5,000.00 on the \$17,500.00 he was already going to be paid on the "presentation."

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26 ¹A "presentation" was defined as a shorter version of a pilot (which is only 22 minutes +
27 commercials). A "presentation" could be as few as 10 minutes. Because it is shorter than a pilot, the
28 artist is paid less than they would be on a pilot.

1 8. The Warner Brothers "Eve" contract, signed by Respondent, expressly
2 provided that all notices and payments be sent to Petitioner and specifically, to the attention
3 of Mitch Stein. Respondent admitted that this was done because Petitioner was
4 Respondent's talent agent at the time the "Eve" contract was signed.

5 9. During Season 1 of the "Eve" show, Respondent became increasingly
6 dissatisfied with his employment as a Line Producer and Unit Production Manager and
7 repeatedly requested that Petitioner find him a new job. Respondent paid petitioner 10% of
8 all earnings for Season 1. However, when Petitioner failed to find Respondent a new job,
9 Respondent terminated Petitioner's services on April 23, 2004.

10 10. Two days prior to Respondent terminating Petitioner's services as a talent
11 agent, Mr. Stein informed Respondent that he had been notified by Warner Brothers that
12 Season 2 was being picked up.

13 11. After receiving a voice mail message from Respondent on April 23, 2004,
14 Mr. Stein wrote Respondent a letter notifying him that Petitioner expected to be paid
15 commissions on the next two seasons, should Respondent continue working as a Line
16 Producer and Unit Production Manager for "Eve" and should the option for Season 3 also be
17 exercised.

18 12. At no time during the agency relationship, did Respondent sign the Agency
19 agreement provided to him by Petitioner.

20 13. Respondent continued to work as a Line Producer and Unit Production
21 Manager for the "Eve" show for Seasons 2 and 3. While Respondent eventually paid
22 Petitioner 10% of all earnings for Season 2, he failed to pay any commissions to Petitioner
23 for Season 3. Respondent testified that he paid Petitioner for Season 2 because the option
24 had been picked up prior to Respondent terminating Petitioner's services as a talent agent.
25 Prior to paying the commissions to Petitioner for Season 2, Respondent approved a letter
26 dated July 26, 2004 from his counsel Joseph S. Ford to Petitioner's then counsel, Michael
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1 Plonsker of Alschuler, Grossman, Stein & Kahan, stating that Respondent would pay
2 Petitioner all commissions due and owing for payments made to him for Season 2. The
3 letter also stated that Respondent would deliver to Petitioner any *future* commissions that
4 may become due and owing to Petitioner under the "Warner Agreement" (also known as the
5 "Eve" contract). Notwithstanding this letter, approximately one year later, Respondent's
6 counsel, Mr. Ford, requested a copy of the written Agency agreement from Petitioner
7 knowing that Respondent had never signed such an agreement. Respondent now argues that
8 no commissions are due Petitioner for Season 3 since Petitioner was terminated long before
9 the option for Season 3 was exercised.

10 14. Respondent testified that he performed work on 22 episodes in Season 3 and
11 was paid \$17,000 per episode.

12 LEGAL ANALYSIS

13 1. Respondent is an "artist" within the meaning of Labor Code §1700.4(b).²

14 2. Petitioner is a licensed talent agent.

15 3. Labor Code §1700.44(a) provides that in cases of controversy arising under
16 this chapter, the parties involved shall refer the matters in dispute to the Labor
17 Commissioner, who shall hear and determine the same, subject to an appeal within 10 days
18 after determination, to the superior court where the matter shall be heard de novo.

19 4. Labor Code §1700.23 provides that the Labor Commissioner is vested with
20 jurisdiction over "any controversy between the artist and the talent agency relating to the
21 terms of the contract." The Labor Commissioner's jurisdiction has been held to include the
22 resolution of contract claims brought by artists or agents seeking damages for breach of a
23 talent agency contract. See *Garson v. Div. Of Labor Law Enforcement* (1949) 33 Cal.2d

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25 ²A producer may or may not be considered an "artist" within the meaning of Labor Code
26 §1700.4(b). The burden was on the Respondent to show that he didn't provide "creative" services, and
27 thus, didn't fall within the definition of an "artist" under the code. Having failed to even raise this issue,
28 we have decided to proceed.

1 861, *Robinson v. Superior Court* (1950) 35 Cal.2d 379. Accordingly, the Labor
2 Commissioner has jurisdiction to determine this matter.

3 5. As Petitioner points out in its closing brief, this case is factually and legally
4 similar to a prior talent agency determination entitled *Beyeler v. William Morris Agency,*
5 *Inc.*, TAC 32-00. In response to a suit filed by William Morris for unpaid commissions,
6 Kevin Beyeler of the "Kevin & Bean" morning show broadcast on the radio station *KROQ*,
7 brought an action before the Labor Commissioner alleging that William Morris violated the
8 Talent Agencies Act by failing to send written confirmation of the terms of the employment
9 agreement negotiated on Beyeler's behalf with the radio station. Although Beyeler never
10 signed a written agency agreement with William Morris, it nonetheless allowed William
11 Morris to negotiate a three-year contract with *KROQ*. Beyeler paid William Morris 10% of
12 all earnings for the first year and part of the second year, terminated William Morris during
13 the second year and thus, refused to pay the remaining commissions for the 2nd and 3rd
14 years of the three year contract. As in this case, Beyeler argued that absent a written agency
15 contract, he had no legal obligation to pay William Morris for future commissions that
16 became due after he terminated William Morris. As we pointed out in the decision,
17 *California Code of Regulations*, Title 8, Section 12001 provides that "a talent agency
18 contract may provide for the payment of compensation after the termination thereof with
19 respect to any employment contracts entered into or negotiated for or to any employment
20 accepted by the artist during the term of the talent agency contract, or any extensions,
21 options or renewals of said employment contracts or employment."

22 However, in order to be entitled to the payment of compensation after termination of
23 the contract between the artist and the talent agency, the talent agency shall be obligated to
24 serve the artist and perform obligations with respect to any employment contract or to
25 extensions or renewals of said employment contract or to any employment requiring the
26 services of the artist on which such compensation is based. Because no continuing services
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1 were required of William Morris on the three-year contract it negotiated for Beyeler with
2 *KROQ*, we held that William Morris fully performed its duty and was therefore entitled to
3 commissions for the entire three year term.

4 6. Similarly, in this case, Petitioner also performed all the duties necessary in
5 regard to the "Eve" contract. It negotiated the salary and terms for the pilot/presentation,
6 negotiated retroactive compensation in the event the presentation lasted as long as a pilot
7 normally lasts, and it negotiated the base rate for Seasons 1-3 in the event those options were
8 exercised.

9 7. Respondent argues that Petitioner's alleged oral agreement to receive
10 commissions from future seasons of "Eve" is void due to Respondent's rejection of the
11 agency agreement. We disagree. The evidence presented at the hearing established that an
12 oral agreement was formed between the parties along the lines of the written agency
13 agreement. While Respondent never signed the Agency agreement, he was aware of the
14 terms, including the standard language reflecting industry custom and providing that
15 commissions encompass all option periods where the initial engagement is procured during
16 the agency.

17 8. Respondent also argues that under *California Code of Regulations*, Title 8,
18 Section 12002, Petitioner is only entitled to commissions under an "oral contract" where the
19 commission sought to be charged is procured directly through the efforts or services of such
20 talent agency and is confirmed in writing within 72 hours thereafter. As we stated in the
21 *Beyeler* decision, the Labor Commissioner has the discretion to determine whether an oral
22 contract will be void. Moreover, in *Beyeler*, we held that the obvious intent of this
23 regulation is to avoid unfair surprise and to facilitate full disclosure. Here, all the terms were
24 disclosed to Respondent through the written agency agreement which he was provided with
25 by Petitioner. Thus, there was no unfair surprise.

26 Additionally, we find that Petitioner didn't just "negotiate" the terms of the "Eve"
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1 agreement with Warner Brothers, it was also instrumental in procuring the work. Black's
2 Law Dictionary, Sixth Edition, defines the term "procure" as "to initiate a proceeding; to
3 cause a thing to be done; to instigate; to contrive, bring about, effect or cause. To persuade,
4 induce, prevail upon, or cause a person to do something." Here, Respondent did not secure
5 the position as a Line Producer and Unit Production Manager until after Petitioner assisted in
6 setting up meetings with Greenblatt Janolari and Meg Deloatch. Petitioner was instrumental
7 in bringing about an offer for the Line Producer and Unit Production Manager jobs. Thus,
8 we find that under Section 12002, the "Eve" show was procured directly through the efforts
9 and services of Petitioner. Failure to confirm in writing within 72 hours thereafter, the
10 particular employment for which such fee, commission or compensation is sought, in and of
11 itself, is not sufficient to invalidate the oral contract between the parties herein.

12 9. Significantly, the evidence that convinces us the most that commissions are
13 due Petitioner for Season 3, is the behavior of the parties. In a letter written to Respondent
14 the day it received a voice mail stating that its services were being terminated, Petitioner
15 made it clear to Respondent that it expected to receive commissions for any future options,
16 including Season 3. No evidence was produced showing that Respondent took issue with
17 this communication and understanding on Petitioner's part. Rather, in the months following
18 the termination, Respondent approved several letters written by his counsel to Petitioner's
19 counsel, agreeing to pay *future* commissions. Thus, as in *Beyeler*, Respondent's behavior in
20 this case is determinative.

21 **ORDER**

22 For the reasons set forth above, IT IS HEREBY ORDERED that:

23 1. Respondent pay to Petitioner \$37,400.00 which reflects 10% of his earnings
24 for the 22 episodes he worked on during Season 3 of the "Eve" show (\$17,000.00 per
25 episode).

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1 2. Respondent is also ordered to pay interest to date commencing on the date the
2 last payment was received from Warner Brothers for his services as a Line Producer on the
3 3rd Season of the "Eve" show.

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5 Dated: *October 30, 2006*

Edna Garcia Earley
EDNA GARCIA EARLEY
Special Hearing Officer

7 **Adopted:**

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10 Dated: *Oct. 30, 06*

Robert H. Jones
ROBERT JONES
Acting State Labor Commissioner