DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

BURT BLUESTEIN, aka BURTON IRA BLUESTEIN Petitioner, vs. PRODUCTION ARTS MANAGEMENT; GARY MARSH; STEVEN MILEY; MICHAEL WAGNER; Respondents.	Case No. TAC 24-98 DETERMINATION OF CONTROVERSY

INTRODUCTION

The above-captioned petition was filed on August 13, 1998, by BURT BLUESTEIN (hereinafter "Petitioner"), alleging that GARY MARSH; STEVEN MILEY; and MICHAEL WAGNER dba PRODUCTION ARTS MANAGEMENT, (hereinafter "Respondents" or "PAM"), acted as petitioner's exclusive talent agent with respect to all areas concerning petitioner's services within the entertainment industry. Petitioner alleges that respondent induced petitioner to entering into the representation agreement by misrepresenting themselves as a talent agent, when in fact respondent did not possess a talent agency license as required by Labor Code §1700.5. Petitioner alleges respondents breached their fiduciary duty owed to petitioner by not using their best efforts on his behalf. By this

petition, petitioner seeks the contract be deemed void *ab initio* and requests reimbursement for all commissions paid to respondents during the life of the contractual relationship.

Respondents through their attorney filed a response on November 6, 1998, stating in short, respondents were managers; they did not procure employment for petitioner; did not act in the capacity of a talent agent; and in the event incidental procurement activity existed, a talent agency license was secured during the applicable time period. A hearing was held on October 13, 1999, before the undersigned attorney for the Labor Commissioner. Petitioner appeared through his counsel Cynthia E. Fruchtman. Respondent, Production Arts Management, appeared through counsel Gregory T. Victoroff of Rhode & Victoroff; Michael Wagner as an individual appeared through his counsel Gregory S. Chudacoff. Based upon the testimony and evidence presented at this hearing, the Labor Commissioner adopts the following Determination of Controversy.

FINDINGS OF FACT

1. In 1995, Michael Wagner, then an employee of Production Arts Management, pursued petitioner seeking a supplemental client for respondents management group. PAM was formed for the purpose of guiding, counseling and directing careers in the entertainment industry. Mr. Wagner promised petitioner, that PAM would use best efforts to advise and counsel petitioner in all areas of the entertainment industry, as well as, actively pursue employment on petitioner's behalf.

2. On October 3, 1995, petitioner entered into a

contractual relationship with respondents for the above described services. Respondents compensation was 10% of petitioner's gross earnings for all work performed in the entertainment industry, throughout the world as a production manager/line producer. It was stipulated that respondents were not licensed talent agents when the parties entered into the management agreement.

3. During the relationship, petitioner obtained numerous employment opportunities with various production companies. Respondents collected 10% for each job petitioner performed as a production manager/line producer.

4. Petitioner's duties and responsibilities as a production manager/line producer primarily included working in conjunction with and maintaining the production companies proposed budget. Petitioner testified, "I hold the line on the budget." When asked to describe exactly what "holding the line on the budget meant", petitioner stated, "I convince the creative people, the canvas has a size." Petitioner added, "the script is the blueprint and I turn it into time and money." Upon supplemental testimony buttressing these abstract answers, it became clear that petitioner's responsibility and input toward the creation of the production fell within the ambit of maintaining the financial structure of the project. When asked specifically what his day to day duties entailed, petitioner stated, "I advise the people who provide the money. We share that responsibility and once the money is out, I sign the checks."

5. Petitioner's creative responsibilities were a significant interest to the hearing officer. When asked whether petitioner took any part in the creative process of the production,

he stated, **"no, I do not".** The parties were instructed the creative aspect of petitioner's duties were dispositive of the Labor Commissioner's jurisdiction, and complete testimony was necessary regarding this issue. Petitioner's wife testified that her husband at times acted as a second director. When asked to describe exactly petitioner's duties as a second director for purposes of examining creative input, petitioner testified, "if there is a time consuming stunt, the principle director will design the shot so that second unit can do the stunt. Then the principle can go film the actors and get the words." The petitioner stated this process was conducted for the purpose of saving time and money, as the actors need to be paid for intervening time and it was his responsibility to keep the actors working in an efficient manner.

6. Again, when asked to describe **any** creative functions or activities petitioner provided as a production manager/line producer, petitioner stated, "the creative aspects [of the job] is how to schedule." Petitioner states it was his responsibility to schedule the shots, schedule construction, and keep the production moving efficiently. Petitioner added, at times he chose the stuntmen, the camera angles and occasionally assisted in choosing the location to shoot a particular scene.

7. In April of 1998, disenchanted with respondent's performance, petitioner executed a severance letter terminating the relationship between the parties. Petitioner's subsequent investigation into the licensing history of respondents, unveiled respondent's unlicensed talent agency status throughout the majority of the relationship. Petitioner realizing that without a

talent agency license, respondents were precluded from engaging in talent agency activities, namely the procurement of employment. Petitioner filed the instant petition to determine controversy with the Labor Commissioner, pursuant to Labor Code §1700.44, seeking a determination that respondent's, PAM; Gary Marsh; Steven Miley; and Michel Wagner, violated Labor Code §1700.5 by having functioned as talent agents without a license. As a consequence of this alleged violation of the Talent Agencies Act, petitioner seeks the parties agreements are void *ab initio* and that respondent's have no rights thereunder.

CONCLUSIONS OF LAW

1. Labor Code §1700.44 vests the Labor Commissioner with exclusive and primary jurisdiction in cases arising under the Talent Agencies Act. The Act governs the relationship between artists and talent agencies.

2. The issue at bar is whether petitioner's job responsibilities as a production manager/line producer performed during the life of the management agreement fall within the definition of "artist" found at Labor Code §1700.4(b).

3. Labor Code §1700.4(a) defines "talent agency" in pertinent part as: "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements **for an artist or artists...**" Therefore, if petitioner does not fall within the definition of "artist", it follows that respondents could not have acted as a talent agency, which divests the Labor Commissioner of jurisdiction to hear this matter.

Labor Code §1700.4(b) defines "artists" as:

> actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organization, directors of legitimate stage, motion pictures and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists rendering professional services in the motion picture, theatrical, radio, television and other entertainment enterprises."

4. Although Labor Code §1700.4(b) does not expressly cover the term "line producer" or "production manager" within the definition of "artist", the broadly worded definition does leave room for interpretation. The statute ends with the phrase, **"and other artists and persons rendering professional services in... other entertainment enterprises."** This open ended phrase indicates the Legislature's anticipation of occupations which may not be expressly listed but warrant protection under the Act, or industry developments not contemplated at the time of drafting.

5. The Labor Commissioner has historically taken the following position with respect to this phrase. As discussed in a 1996 Certification of Lack of Controversy, the special hearing officer held, "[d]espite this seemingly open ended formulation, we believe the Legislature intended to limit the term 'artists' to those individuals who perform creative services in connection with an entertainment enterprise. Without such a limitation, virtually every 'person rendering professional services' connected with an entertainment project - - would fall within the definition of "artists". We do not believe the Legislature intended such a radically far reaching result." *American First Run Studios v. Omni Entertainment Group No. TAC 32-95, pg. 4-5.*

6. This is not to imply that production managers or

line producers can never be considered "artists" within the meaning of 1700.4(b), only there must be a significant showing that the producer's services were creative in nature as opposed to services of an exclusively managerial or business nature. Here, petitioner testified he did not occupy such a role and conversely testified the bulk of his responsibility was maintaining the budget through schedule enforcement. Occasionally assisting in shot location or stepping in as a second director as described by petitioner, does not rise to the creative level required of an "artist" as intended by the drafters. Virtually all line producers or production managers engage in de minimis levels of creativity. There must be more than incidental creative input. The individual must be primarily engaged in or make a significant showing of a creative contribution to the production to be afforded the protection of the Act. We do not feel budget management falls within these parameters.

7. Who did the Legislature intend to include in the protected class? In determining legislative intent, one looks at both legislative history and the statutory scheme within which this statute is to be interpreted.

Legislative History

8. In 1913 the "Employment Agencies Act" regulated a select few industries, including California's entertainment industries, namely circuses, vaudeville and theater. Protection focused on exhibitors and performers.

9. In 1937 the California Labor Code was established. The Legislature added "the motion picture employment agency" as an industry that required regulatory controls.

10. By 1959 the Labor Code included regulation of four categories of agents: employment agents; theatrical employment agents; motion picture employment agent; and the so-called "artists' manager." While the other categories were either repealed or moved to a different body of law and placed under the jurisdiction of other regulatory agencies, regulation of "artists' managers" remained in the Labor Code and under the jurisdiction of the Labor Commissioner. In 1978, the Act was renamed the Talent Agencies Act (1978, Stats. Ch. 1382) and "artists' managers" became "talent agents" and remains this way today. Throughout, the definition of "artist" always expressly included only the creative forces behind the entertainment industry.

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

> The Commission shall study the laws and practices of this state,...relating to the licensing of agents, and representatives of artists in the entertainment industry in general, ... so as to enable the commission to recommend to the Legislature a model bill regarding this licensing.

12. Pursuant to statutory mandate the Commission studied and analyzed the Talent Agencies Act in minute detail. The Commission concluded that the, "Talent Agencies Act of California is a sound and workable statute and that the recommendation contained in this report will, if enacted by the California Legislature, transform that statute into a model statute of its kind in the United States." (Report pg. 5) All recommendations

were reported to the Governor, accepted and subsequently signed into law.

13. This is not to say the Legislature has never expanded on the term "artist". A very significant change made by the Commission was to add the occupation of "models" to the definition of artist as defined by Labor Code §1700.4(b). The Commission reasoned that, "as persons who function as an integral and significant part of the entertainment industry, models should be included within the definition of artist."(Report p. 33-34) I am not advocating that production managers and line producers are not an integral and significant part of the entertainment industry, I am simply stating that if the Commission, who by statutory mandate analyzed the Act in minute detail, thought that production mangers and/or line producers required express protection under the Act, they could have made this recommendation to the Legislature. This was certainly the forum do make such a recommendation. Production managers and line producers are not new occupations in the entertainment industry resulting from industry evolution *i.e.*, interactive media and digital animation. These are well established industry occupations. The Commission's utter silence with respect to production managers and line producers can only be interpreted, that the Labor Commissioner's jurisdiction is invoked if in the discretion of the hearing officer, a significant showing of creative contribution is made.

14. The Division concludes that petitioner is not an artist within the meaning of Labor Code 1700.4(b), not engaged in the performing arts and hence, not a member of the protected class.

15. Once it is determined that petitioner was not an

"artist", it follows that respondents are not "talent agents", as a talent agency is defined as procuring employment for "artists".

16. We therefore find the parties agreement does not fall within the provisions of the Talent Agencies Act. Consequently, there are no grounds under the Act to declare the parties agreement void. The Labor Commissioner is without jurisdiction to hear or decide the merits of this case.

ORDER

For the above-state reasons, IT IS HEREBY ORDERED that this petition is denied and dismissed on motion by the undersigned hearing officer.

Dated: 11/3/99

DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 11/3/99

RICHARD CLARK
Chief Deputy Labor Commissioner