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1 DIVISION OF LABOR STANDARDS ENFORCEMENT
 2 By: FRANK C. S. PEDERSEN,
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8 BEFORE THE LABOR COMMISSIONER
 9 STATE OF CALIFORNIA

10	CATHRYN DAMON,)	
)	
11	Petitioner,)	NO. TAC 36-79
)	SF MP 63
12	vs.)	
)	
13	RICHARD LEE EMLER dba)	<u>DETERMINATION</u>
	RICHARD LEE EMLER ENTERPRISES,)	
14)	
	Respondent.)	
15	_____)	

16 The above-entitled controversy came on regularly for
 17 hearing in Los Angeles, California, on January 12, 1981 and
 18 March 16, 1981, before the Labor Commissioner of the State of
 19 California by Frank C. S. Pedersen, Counsel for the Division
 20 of Labor Standards Enforcement, serving as Special Hearing
 21 Officer under the provisions of Section 1700.44 of the Labor
 22 Code of the State of California; petitioner Cathryn Damon
 23 appearing by the law office of Mitchell, Silberberg & Knupp by
 24 Marilyn E. Levine and respondent Richard Lee Emler dba Richard
 25 Lee Emler Enterprises appearing by Larry Ball.

26 Evidence, both oral and documentary having been intro-
 27 duced, and the matter having been briefed and submitted for

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1 decision, the following determination is made:

2 It is the determination of the Labor Commissioner:

3 1. That the Labor Commissioner has exclusive jurisdic-
4 tion over the controversy set forth in the Petition to Deter-
5 mine Controversy.

6 2. That any oral agreements entered into are illegal
7 and respondent is not entitled to any further commissions
8 thereunder.

9 3. That petitioner is not entitled to the return of
10 any compensation heretofore paid to respondent.

11 I

12 INTRODUCTION

13 Petitioner Cathryn Damon is a well known actress appear-
14 ing in the television series "Soap" and has been an actress
15 for many years, and respondent Richard Lee Emler is admittedly
16 not licensed as a talent agency.

17 The Petition to Determine Controversy made various claims
18 and raised various issues but at the time of the hearing
19 petitioner narrowed the issue to whether or not respondent
20 procured or attempted to procure employment for petitioner
21 and requested the return of all compensation that respondent
22 had received from petitioner and alleged that any agreement
23 between the parties was void because of respondent's failure
24 to obtain a talent agency license.

25 Respondent alleged that the Labor Commissioner was without
26 jurisdiction to determine any issues alleged in the Petition
27 to Determine Controversy and raised as an affirmative defense

1 that petitioner employed licensed talent agents and attorneys
2 to perform the duties that required a talent agency license.
3 During the course of the hearing respondent argued that the
4 respondent was a personal manager and that the mere procuring
5 of incidental employment by a personal manager does not alter
6 his role to that of a talent agent.

7 II

8 DISCUSSION

9 Cathryn Damon admittedly is and was an artist as that
10 term is defined in Labor Code Section 1700.4, and Richard
11 Lee Emler was admittedly not licensed as a talent agency but
12 alleged that all services he performed for petitioner were
13 those ordinarily performed by a personal manager.

14 Initially the parties met in the company of several other
15 people in a restaurant in 1978 to discuss the possibility
16 of respondent representing petitioner in some capacity. One
17 of the parties present was a Paul Matz, a musical writer and
18 conductor whose personal manager was Richard Lee Emler.

19 Mr. Matz was an old friend of petitioner's and suggested
20 that she meet with respondent.

21 Thereafter various agents and casting directors testified
22 directly or by declaration and specifically Kris Kromas testi-
23 fied that respondent was the first one to inform her that
24 petitioner had recently undergone cosmetic surgery which made
25 her appear younger. This statement was not denied by respon-
26 dent. It appears that as a direct result of this knowledge
27 that petitioner was reconsidered and hired for a part in a

1 TV movie called "Friendships, Secrets and Lives".

2 There was a great conflict in the evidence before the Hear-
3 ing Officer as to the part respondent played in negotiating or
4 re-negotiating for petitioner regarding the TV series "Soap"
5 and others.

6 Some of respondent's efforts were those ordinarily associat-
7 ed with the duties of a personal manager but there was evidence
8 that respondent had procured or attempted to procure employment
9 for petitioner at least insofar as re-negotiation of her salary
10 in "Soap" and her role in "Friendships, Secrets and Lives".

11 A talent agency license is necessary even where procurement
12 activities are only "incidental" to the agent's duties and obli-
13 gations and any previous determinations by the Labor Commission-
14 er to the contrary, as cited by respondent, are specifically
15 overruled.

16 Petitioner correctly sets forth in her trial brief that
17 the Legislature has already rejected that concept and refers
18 to S.B. 686 (1972), at 1 (as amended May 15, 1972).

19 Furthermore, the Legislature specifically rejected a propos-
20 al introduced by Senator Zenovich on March 16, 1978, that would
21 have permitted personal managers to procure employment as long
22 as it was only "incidental to the obligations contracted for".
23 (Walter L. M. Lorimer in a speech to the Entertainment Law Com-
24 mittee of the Beverly Hills Bar Association, as reported in
25 the Los Angeles Daily Journal Special Report of April 6, 1979,
26 entitled "The New Statute Regulating Artists Managers and Perso-
27 al Managers".)

1 The case of Buchwald v. Superior Court, 254 Cal. App. 2d
2 347, while affirming the broad powers of the Labor Commissioner
3 to prevent improper persons from becoming talent agencies and
4 to regulate their activities for the protection of the public,
5 does not make it mandatory for the Labor Commissioner to order
6 the return of all commissions.

7 Petitioner states that she is entitled to restitution of
8 all sums paid and refers to 1 Witkin, Summary of California Law,
9 Contracts, §358 at 301, and cases cited therein. However, 2
10 Witkin, Summary of California Law, "Contracts", §362 (page 304)
11 and cases cited therein, states that:

12 "In situations in which no strong objections of public
13 policy are present, a party to the illegal agreement may
14 be permitted to enforce it. Various reasons have been
15 assigned, either singly or together; the principal ones are:
16 (1) The parties are not in pari delicto; (2) the viola-
17 tion of law did not involve serious moral turpitude; (3) the
18 adverse party would be unjustly enriched if enforcement
19 were denied; (4) the forfeiture would be disproportionately
20 harsh in proportion to the extent of illegality."

21 See also Southfield v. Barrett, 13 C.A. 3d 290, 91 Cal.

22 Rptr. 514, which states:

23 "...The rule requiring courts to withhold relief under the
24 terms of an illegal contract is based on the rationale that
25 the public importance of discouraging such prohibited trans-
26 actions outweighs equitable consideration of possible injus-
27 tice as between the parties. However, the rule is not an
inflexible one to be applied in its fullest rigor under
any and all circumstances. A wide range of exceptions has
been recognized. Where the public cannot be protected be-
cause the transaction has already been completed, no serious
moral turpitude is involved, defendant is the only one
guilty of the 'greatest moral fault,' and defendant would
be unjustly enriched at the expense of plaintiff if the
rule were applied, the general rule should not be applied.
In such circumstances, equitable solutions have been
fashioned to avoid unjust enrichment to a defendant and
a disproportionately harsh penalty upon the plaintiff."
(Cases cited)

1 As Professor Corbin notes:

2 "There are many varieties and degrees of 'illegality.'
3 These varieties and degrees must be taken into account in
4 determining the juristic effect of a transaction that in-
5 volves some sort of illegality. It is far from correct
6 to say that an illegal bargain is necessarily "void" or
7 that the law will grant no remedy and will always leave
8 the parties to such a bargain where it finds them. Such
9 general statements are indeed found in great number,
10 faithfully reprinted in long columns of digests; they
11 render only a wearisome disservice when repeated with no
12 reference to the facts of the cases in which they have
13 been made. Before granting or refusing a remedy, the
14 courts have always considered the degree by the offense,
15 the extent of public harm that may be involved, and the
16 moral quality of the conduct of the parties in the light
17 of the prevailing mores and standards of the community."
18 (6A Corbin on Contracts, section 1534 (page 816)).

19 From evidence in this case it must be concluded that respon-
20 dent committed no acts involving moral turpitude and that peti-
21 tioner at all times was represented by others and was not the
22 type of person that could have been taken advantage of.

23 Furthermore, there is no testimony that respondent would
24 have been refused a talent agency license had he applied for
25 one.

26 The Hearing Officer now makes the following Findings of
27 Fact and Conclusions of Law:

FINDINGS OF FACT

1. Petitioner Cathryn Damon is and was at all times an
artist as defined in Section 1700.4 of the Labor Code.
2. Respondent Richard Lee Emler never applied for nor had
a license to act as a talent agency.
3. Respondent did procure, offer, promise and attempt to
procure employment and engagements for petitioner within the
meaning of Section 1700.4 of the Labor Code.

1 4. Respondent did perform other functions for petitioner
2 that would ordinarily be performed by personal managers.

3 5. Petitioner and respondent did enter into an oral agree-
4 ment whereby respondent received certain commissions and was
5 to receive further commissions, which agreement constituted an
6 agreement in violation of the Labor Code since some of the acts
7 which respondent agreed to and did perform constituted those
8 of an unlicensed talent agency.

9 6. The agreement entered into between the parties was an
10 illegal contract that did not involve moral turpitude nor was
11 it entered into with intent to evade the requirements of the
12 Talent Agency Act.

13 7. The repayment of all commissions by respondent would
14 be disproportionately harsh in proportion to the extent of the
15 illegality.

16 8. The agreement between the parties was terminated by
17 petitioner and respondent is not entitled to any further compen-
18 sation thereunder.

19 CONCLUSIONS OF LAW

20 1. The Labor Commissioner has jurisdiction to determine
21 the within controversy pursuant to Section 1700.44 of the Labor
22 Code.

23 2. Petitioner is and was an artist as defined in Section
24 1700.4 of the Labor Code.

25 3. The agreement entered into between the parties hereto
26 is an illegal agreement and respondent is not entitled to any
27 further compensation thereunder.

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4. Respondent is not required to repay any compensation already received to petitioner.

DATED: January 12, 1982.

Frank C. S. Pedersen
Frank C. S. Pedersen
Special Hearing Officer

ADOPTED:

Patrick W. Henning
Labor Commissioner
State of California