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DIVISION OF LABOR STANDARDS ENFORCEMENT  
Department of Industrial Relations  
State of California  
JOAN E. TOIGO, Special Hearing Officer  
State Bar No. 125578  
30 Van Ness Ave., Room 4400  
San Francisco, CA 94102  
(415) 557-2516

Attorney for Labor Commissioner

BEFORE THE LABOR COMMISSIONER  
OF THE STATE OF CALIFORNIA

DAVID CRANE AGENCY, INC. )

Petitioner, )

vs. )

KAREN CARNS )

Respondent. )

CASE NO. TAC 23-89

DETERMINATION

The above-entitled controversy came on regularly for hearing before the Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, by JOAN E. TOIGO, serving as Special Hearing Officer under the provisions of Section 1700.44 of the Labor Code of the State of California, Petitioner DAVID CRANE AGENCY, INC., appearing by the law offices of MCGUINN, HILLMAN

1 and PALEFSKY, by JOHN A. McGUINN, and Respondent, KAREN CARNS,  
2 appearing by the law offices of PARSONS, BEHLE and LATIMER, by  
3 MICHAEL J. STAAB.

4 Evidence, both oral and documentary, having been intro-  
5 duced, and the matter briefed and submitted for decision, the  
6 following determination is made:

7 It is the determination of the Labor Commissioner that:

8 1. Petitioner's claim is not barred by the one-year  
9 statute of limitations provision in Labor Code Section  
10 1700.44(c), therefore, the Labor Commissioner has jurisdiction  
11 over this controversy as presented to the Special Hearing Of-  
12 ficer;

13 2. An agency relationship existed between the parties  
14 during the period in question, separate and distinct from the  
15 written agreement entered into by the parties;

16 3. Petitioner has not sustained the burden of proof  
17 necessary to establish that he was the procuring cause of  
18 Respondent's employment agreement with KTSP-TV, Phoenix.

19 4. Respondent is not liable for Petitioner's agreed-  
20 upon compensation for the remaining term of the KTVX, Salt  
21 Lake City contract.

I  
INTRODUCTION

On September 14, 1989, Petitioner filed with the Labor Commissioner a Petition to Determine Controversy pursuant to Labor Code Section 1700.44. On September 27, 1989, Respondent filed an Answer to the Petition.

The Petition alleges that under the terms of a June 5, 1984 written agreement, Respondent hired Petitioner as her exclusive talent agent to negotiate contracts for Respondent's professional services. In 1984, Petitioner secured a 4-year contract for the employment of Respondent as a television news anchor with KTVX-TV in Salt Lake City, which was due to expire in March, 1989.

Petitioner alleges that, although the June 5, 1984 written agreement between the parties was due to expire by its terms in June 5, 1987 he, at the request of Respondent, continued to act as her agent beyond that date, thereby renewing the agreement on the same terms and conditions.

Petitioner further alleges that in March, 1988 Respondent requested that Petitioner begin a job search on her behalf, which resulted in Petitioner's securing a job offer for Respondent with KTSP-TV, Phoenix in September, 1988. After KTSP had indicated its intention to extend Respondent an offer of employment, but before specific terms had been negotiated, Respondent informed Petitioner that she wished to conduct the negotiations with KTSP by herself, and no longer needed his services.

1           Petitioner alleges that Respondent has breached the  
2 agreement by failing to make payments pursuant to the June 5,  
3 1984 written agreement after October 1, 1988 regarding  
4 Respondent's previous position with KTVX-TV, Salt Lake City  
5 and as of March, 1989 by her failure to make the payments re-  
6 quired by the existing agency agreement between the parties  
7 with respect to the KTSP-TV, Phoenix position.

8           In the Petitioner's prayer for relief, Petitioner has  
9 requested:

10           1. Payment of all monies due under the contract dated  
11 June 5, 1984 between Petitioner and Respondent, which was sub-  
12 sequently renewed;

13           2. All interest accrued thereon at the legal interest  
14 rate, compounded up to and including the date of payment;

15           3. Attorney's fees and costs incurred by Petitioner  
16 due to Respondent's breach of contract;

17           4. Such other relief as Labor Commissioner deems just  
18 and proper.

19           In the Answer to the Petition, Respondent denies the  
20 substantive allegations raised therein and raises the affirma-  
21 tive defenses that the cause of action is barred by the  
22 Statute of Frauds, in that the alleged agreement upon which  
23 relief is sought is invalid and unenforceable because it was  
24 not in writing and subscribed to by the party to be charged,  
25 and that the cause of action is barred by the applicable  
26 statutes of limitations, including but not limited to Califor-  
27 nia Labor Code Section 1700.44(c).

1 II

2 ISSUES

3 The issues in this action are as follows:

4 1. Is Petitioner's claim barred by the one-year  
5 statute of limitations provision in Labor Code Section  
6 1700.44(c)?

7 2. Did an agency relationship exist between the  
8 parties, separate and distinct from the written agreement of  
9 June 5, 1984?

10 3. Was Petitioner the procuring cause of Respondent's  
11 employment agreement with KTSP-TV, Phoenix?

12 4. Given that Respondent was released from her con-  
13 tract with KTVX, Salt Lake City three months prior to its ex-  
14 piration, is she, nonetheless, liable for Petitioner's  
15 agreed-upon compensation for the remaining term of that con-  
16 tract?

17  
18 III

19 APPLICABLE LAW

20 Petitioners brought this action under the provisions of  
21 Division 2, Part 6, Chapter 4 of the Labor Code commencing  
22 with Section 1700. This portion of the Labor Code is commonly  
23 known as the Talent Agency Act ("Act").

24 Labor Code Section 1700.44(c), which was added to the act in  
25 1982, provides:

26 "No action or proceeding shall be brought pursuant  
27 to this chapter with respect to any violation  
which is alleged to have occurred more than one  
year prior to commencement of the action or  
proceeding."

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IV

DISCUSSION AND FINDINGS

Is Petitioner's Claim Barred By The Statute of Limitations?

The threshold issue to be decided is whether the Petitioner's claim is barred in whole or in part by the one-year statute of limitations provisions in Labor Code Section 1700.44(c).

Since Petitioner complains of a breach of the agency agreement between the parties as of October 1, 1988 and March, 1989, and his petition was received by the Labor Commissioner on September 14, 1989, Petitioner's claim is timely pursuant to Section 1700.44(c).

Did A Separate Agency Relationship Exist Between The Parties?

Regarding the existence of an agency relationship between the parties, separate and distinct from the written agreement, the evidence presented at the hearing established the following:

On June 5, 1984, the parties entered into a written agreement whereby Petitioner was to act as Respondent's sole and exclusive talent agency for a period of 3 years from the date of the contract. Petitioner's compensation was to be 10% of gross (later modified to 7%). The contract provided that, if Respondent did not obtain a bona fide offer of employment from a responsible employer during a period of time in excess of 4 consecutive months, either party would have the right to

1 terminate the contract upon the specified notice. The con-  
2 tract further provided, however, that any employment secured  
3 by the Respondent subsequent to the final termination of the  
4 agreement, but resulting from the efforts of Petitioner under  
5 the agreement, would have the effect of extending the agree-  
6 ment as to the compensation described in the agreement regard-  
7 ing that particular employment.

8 On or about October 15, 1984, Respondent sent a letter,  
9 dated October 12, 1984, to Petitioner via certified mail as  
10 required by the contract. In the letter, Petitioner requested  
11 termination of the agreement since no job had been found.

12 There is some dispute over the reason that the letter  
13 was returned, undelivered, to Respondent. The envelope is  
14 clearly stamped "postage due" and, in addition, there is a  
15 stamp bearing the words "return to sender: reason checked" in  
16 which a check mark has been placed, by hand, indicating that  
17 the letter was refused delivery.

18 Regardless of the reason the letter was returned,  
19 however, Respondent was clearly aware that Petitioner had not  
20 received notice of her intent to terminate the contract, and  
21 Respondent subsequently failed to clarify the situation.  
22 Respondent testified that she did not have a chance to contact  
23 Petitioner, as he contacted her first with news of the posi-  
24 tion he had procured for her at KTVX-TV in Salt Lake City.

25 In any case, however, there is no evidence that she  
26 communicated her desire to terminate the agreement to  
27 Petitioner even at that time.

1           The employment contract with KTVX-TV was for a term of  
2 4 years (from March, 1985 to March, 1989) and since Petitioner  
3 had, in fact, procured a position for Respondent, Respondent  
4 agreed to pay Petitioner the 7% commission specified in the  
5 agreement. It is Respondent's position, however, that the  
6 written agreement had been terminated by her October 12, 1984  
7 letter and that Petitioner "was her agent only with regard to  
8 the Salt Lake City position". However, as noted above, there  
9 is no evidence that Respondent clarified this to the  
10 Petitioner or that the Petitioner had any  
11 knowledge of Respondent's attempt to terminate the agreement  
12 by her October 12, 1984 letter.

13           Despite Petitioner's unsuccessful attempt to terminate  
14 the written agreement, it is clear that the parties had an on-  
15 going agency relationship from 1984 well into 1988 which is  
16 evidenced by the conduct of the parties. Respondent's posi-  
17 tion is that she spoke with Petitioner twice a year, mainly  
18 incidental to her payments to him on the KTVX, Salt Lake City  
19 contract; however, upon an examination of the evidence one  
20 reasonably concludes otherwise.

21           Initially, one must consider the language of the Oc-  
22 tober 12, 1984 letter written by Respondent to purportedly  
23 terminate the parties' agreement. It is significant that  
24 Respondent closed the letter with "keep me in mind, though,  
25 if anything wonderful comes available". This implies that,  
26 although the Respondent wished to terminate the written agree-  
27

1 ment on one hand, she was specifically granting Petitioner  
2 permission to act on her behalf in search for employment on  
3 the other hand.

4 Petitioner introduced into evidence a Christmas card  
5 sent by Respondent to Petitioner in December, 1987 in which  
6 Respondent stated that all was well in Salt Lake City but that  
7 she was planning on moving, hopefully, after the next year.  
8 She further stated that she would like to get together with  
9 Petitioner in March, 1989, if possible, for a weekend to dis-  
10 cuss the matter. Respondent testified that she, at that time,  
11 had no interest or intention in leaving KTVX or Salt Lake  
12 City; however, was unable to explain the contradiction or even  
13 explain what she meant in the card.

14 Respondent testified that she contacted Petitioner in  
15 early 1988 and informed him that she might be interested in  
16 going back to Minneapolis. Petitioner sent a tape to KSTP on  
17 June 30, 1988.

18 Further, Respondent testified that she requested  
19 Petitioner, during the week of August 1, 1988 to send a resume  
20 tape to David Howell at KTSP-TV in Phoenix, although  
21 Petitioner's records reflect that the tape was sent July 8,  
22 1988. (It should be noted here that Petitioner introduced as  
23 evidence United Parcel Service pick-up logs which indicate  
24 that he had sent out 12 tapes on Respondent's behalf from the  
25 period May, 1988 through October, 1988; however, there was no  
26 evidence that Respondent had knowledge, with the exception of  
27 the tape she requested be sent to KTSP, Phoenix and the tape

1 sent to KSTP, Minneapolis, that Petitioner was submitting  
2 tapes on her behalf). However, her consent would reasonably  
3 be implied if, in fact, an agency relationship existed.

4 As further evidence of an on-going relationship, on or  
5 around August 23, 1988, Respondent, while vacationing,  
6 provided her mother's phone number in Florida to Petitioner so  
7 that he would apparently be able to contact her if anything  
8 should come up.

9 In addition, Respondent admitted that she sought advice  
10 from Petitioner regarding a possible personal solicitation  
11 made to her by tv-radio personality Larry King and regarding  
12 her career in general. Also, she admitted to speaking with  
13 Petitioner, although there is some disagreement as to the ex-  
14 act dates, about the position with KTSP, Phoenix.

15 In a September 30, 1988 letter by Respondent's counsel,  
16 Michael Staab, Staab clarifies that Respondent did not wish to  
17 renew her contract with Petitioner's agency or to use  
18 Petitioner's services to negotiate a contract with KTSP-TV if  
19 Respondent decided to accept the employment offer. This let-  
20 ter raises the question as to why it was written at all if it  
21 was clear that the parties did not have an agency agreement.

22 Finally, David Howell, News Director of KTSP, Phoenix,  
23 testified in his deposition that he understood Petitioner to  
24 be Respondent's agent during the period that he was consider-  
25 ing Respondent for the job.

1 In sum, Respondent's October 12, 1984 letter was inef-  
2 fective to terminate the written agreement because, for  
3 whatever reason, it was not received by Petitioner. In addi-  
4 tion, Respondent made no attempt at any time before the Sep-  
5 tember 30, 1988 letter from her counsel to clarify the situa-  
6 tion or inform Petitioner that she wished to terminate the  
7 agreement. In any case, however, the agreement expired by its  
8 own terms on June 5, 1987 and provided that it could not be  
9 enlarged, modified or altered, except in writing by both  
10 parties which was never done.

11 The evidence does, however, indicate the creation of an  
12 agency relationship by the parties' conduct, separate and  
13 apart from the written agreement. Respondent simply cannot,  
14 in good faith, take the position that she did not consider  
15 Petitioner as her agent but then, at the same time, request  
16 him to "be aware" of available positions for her, request him  
17 to submit tapes on her behalf (even if only occasionally) and  
18 to be in what appeared, from the evidence presented, to be in  
19 fairly regular contact with him regarding her career.

20  
21 Did Petitioner Procure the KTSP-TV Position on Respondent's  
22 Behalf?

23 The question of who was ultimately responsible  
24 (Petitioner or Respondent) for procuring Respondent's position  
25 with KTSP, Phoenix is not easily determined by the parties'  
26 testimony, nor even from the documentary evidence presented.  
27 In addition, David Woodcock, General Manager of KTVX, Salt

1 Lake City, was unable to remember an alleged telephone conver-  
2 sation with Petitioner regarding the Respondent's early  
3 release from her KTVX contract. Subsequently, the deposition  
4 of David Howell, Jr., News Director of KTSP, Phoenix, was the  
5 most useful source of information regarding the chronology of  
6 events leading to Respondent's position with KTSP.

7 One thing is quite clear. Respondent first came to  
8 Howell's attention as a result of a producer audition tape  
9 submitted by Jennifer Rigby (who was subsequently hired by  
10 KTVX as a producer) early in 1988 which contained various  
11 clips of Respondent in her anchor position.

12 It is also clear; however, that Respondent was not  
13 being considered by Howell for the KTSP anchor position at the  
14 time she was seen on the Rigby tape -- Howell testified that  
15 the first time he looked at a tape of Respondent with the in-  
16 tent of "looking at her" for the position would have been in  
17 early July, 1988.

18 At this point, the chronology becomes less apparent.  
19 It appears that Petitioner mailed a tape to Howell on July 8,  
20 1988, as indicated in his UPS pick-up log for that day.  
21 Petitioner testified that he heard from another client, Dewey  
22 Hopper, several days earlier that Howell was looking for an  
23 anchor; however, this testimony is not corroborated.  
24 Petitioner testified that, on July 7, 1988 at 12:13 p.m. he  
25 placed a call to KTSP which is confirmed by his telephone  
26 bill; however, it is not known if Petitioner actually spoke to  
27 Howell. (In addition, Petitioner's phone bills show several

1 additional calls placed to KTSP from July 25, 1988 to Septem-  
2 ber 8, 1988 although, again, it is not known for certain  
3 whether Petitioner actually spoke to Howell on any or all  
4 occasions.)

5 Howell testified in his deposition that he did not  
6 recall Petitioner bringing Respondent's name or tape to his  
7 attention prior to his contact with Respondent, (he had sur-  
8 mised that Respondent was a client of Petitioner's because of  
9 Petitioner's mailing label on one of the tapes he received)  
10 and maintains that he initiated the first call to Respondent  
11 directly. Howell also testified, however, that it was not un-  
12 til late July or early August when he first spoke with Respon-  
13 dent (which would be after he had received the July 8, 1988  
14 tape from Petitioner). Respondent testified that she did not  
15 request Petitioner to send a tape until on or about August 1,  
16 1988.

17 The Hearing Officer, however, disagrees with the asser-  
18 tion of Petitioner's counsel in his Post-Trial Brief that  
19 Petitioner has produced irrefutable evidence of telephone con-  
20 versations with Howell on July 7 and July 25, 1988; the  
21 evidence merely indicates that calls were placed to KTVX on  
22 that date, 2 and 3 minutes in duration, respectively. The  
23 only fact which was established with any degree of certainty  
24 is that Petitioner sent a tape to Howell sometime before  
25 Respondent and Howell both testified that they spoke to each  
26 other.  
27

1 In any case, Howell testified that the July 8, 1988  
2 tape arrived too late for inclusion in the first-round search  
3 started in May or June of 1988 which, by early July, had  
4 produced the top ten possibilities, with a Las Vegas anchor,  
5 Tommi Jo Taylor, at the top (who was offered the position and  
6 turned it down). Howell testified that, at that time, he was  
7 unaware of Karen's availability. Howell testified that he  
8 "looked at the tape of Karen with the intent of looking at  
9 Karen" in early July, 1988, and that he had "several tapes" in  
10 his possession at that time, the first of which was the Rigby  
11 tape (on which he had initially become aware of Karen) and one  
12 of which had Petitioner's mailing label on it.

13 Howell also testified during his deposition that it was  
14 the policy of KTSP at that time to negotiate directly with the  
15 perspective employee, and not with agents or attorneys. Al-  
16 though negotiating the deal points of a contract is vastly  
17 different from bringing the employer and potential candidate  
18 together in the first place, this testimony lends further  
19 credence to Respondent's position that she and Howell were  
20 dealing directly with respect to the anchor position.

21 In sum, the evidence presented by Petitioner regarding  
22 the procurement issue simply does not establish the degree of  
23 involvement necessary for a determination that he was the  
24 procuring cause of Respondent's position with KTSP.

1 Is Respondent Liable for Petitioner's Compensation for the  
2 Remaining Term of the KTVX, Salt Lake City Contract?

3 It is not disputed that the June 5, 1984 written agree-  
4 ment between the parties (as orally modified) sets forth  
5 Petitioner's compensation with respect to Respondent's con-  
6 tract with KTVX, Salt Lake City. However, Petitioner alleges  
7 in his Petition that Respondent has breached the agreement by  
8 failing to make Petitioner's compensation payments after Oc-  
9 tober 1, 1988 on the KTVX contract.

10 Upon examination of the contract, it clearly provides  
11 for the monthly payment of Petitioner's compensation for so  
12 long a time that Respondent receives compensation under any  
13 contracts covered by the agreement. Therefore, Respondent  
14 would clearly not be liable for the last months for which she  
15 received no compensation from KTVX as a result of her early  
16 release from the contract.

17  
18 V

19 CONCLUSION

20 For the reasons set forth above, the Hearing Officer  
21 disagrees with Respondent's contention that Petitioner has  
22 failed to demonstrate the subsequent creation of an agency  
23 relationship with Respondent due to Petitioner's activities on  
24 her behalf; however, the Hearing Officer also disagrees with  
25 Petitioner that the credible evidence is "overwhelming" that  
26 it was Petitioner who brought Respondent and KTSP together.

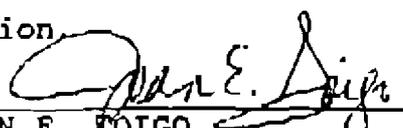
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1 It is apparent from the evidence that Respondent first  
2 came to Howell's attention as a result of the Jennifer Rigby  
3 tape. It is also apparent that Petitioner failed to submit a  
4 tape of Respondent in time for consideration in KTSP's first-  
5 round search which produced Tommi Jo Taylor as the first  
6 choice. Further, it is not apparent that Petitioner sig-  
7 nificantly assisted in bringing about Respondent's early  
8 release from her contract with KTVX, Salt Lake City; however,  
9 even if such were the case it would still not determine who  
10 was, in fact, responsible for initially bringing Respondent to  
11 Howell's attention.

12 In conclusion, Petitioner has not met the burden of  
13 proof necessary to establish that he was the procuring cause  
14 of the KTSP contract. His phone bills indicate several calls  
15 of very short duration placed to KTSP. It is not known on  
16 which occasions he spoke to Howell. The UPS log shows a tape  
17 sent to KTSP on July 8, 1988; however, no confirming letter  
18 was ever sent or received by Petitioner.

19 Since it is apparent that Respondent was first seen by  
20 Howell on the Rigby tape, without more evidence of  
21 Petitioner's involvement, the Hearing Officer cannot determine  
22 that Petitioner has satisfied the required burden of proof  
23 necessary for a determination that he is entitled to renumera-  
24 tion for procuring Respondent's position.

25 Dated: May 7, 1990

  
JOAN E. FOIGO  
Special Hearing Officer

26 ADOPTED:

27 Dated: May 10, 1990

  
State Labor Commissioner

