

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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BEFORE THE LABOR COMMISSIONER
STATE OF CALIFORNIA

THE DAVID CRANE AGENCY, INC.,)	No. TAC 64-92
)	
Petitioner,)	
)	DETERMINATION
vs.)	
)	
BARBARA BECK,)	
)	
Respondent.)	

INTRODUCTION

On August 5, 1992, THE DAVID CRANE AGENCY (hereinafter "CRANE" or "Petitioner") filed a petition to determine controversy pursuant to Labor Code §1700.44, alleging that BARBARA BECK (hereinafter "BECK" or "Respondent") failed to pay CRANE for his services in negotiating and procuring an employment contract with television station KTLA. By its petition, CRANE seeks payment of commissions in the amount of 7.5% of Respondent's earnings at KTLA pursuant to her employment contract, interest on the unpaid commissions, and attorney's fees. BECK filed an answer to the petition, alleging that Petitioner's services were performed gratuitously, and denying that CRANE was entitled to any compensation.

1 representation agreement with CRANE.

2 3. About two weeks later, CRANE informed BECK that prior
3 to his receipt of the termination notice, he had sent tapes of her
4 broadcasts to the ABC network. Both agreed that if ABC decided to
5 offer employment to BECK, Petitioner would represent her in any
6 employment negotiations under the terms of the September 30, 1988
7 representation agreement. However, despite Petitioner's efforts,
8 ABC did not make any employment offer.

9 4. Following this unsuccessful attempt to procure
10 employment for Respondent, CRANE continued to send copies of BECK's
11 broadcast tapes to television news executives. On March 28, 1990,
12 CRANE contacted the news director at WSVN, a television station in
13 Miami, sending him BECK's broadcast tapes along with those of four
14 other television news anchors or reporters. Shortly thereafter,
15 WSVN advised CRANE of their interest in BECK, and he provided WSVN
16 with her telephone number. In early May 1990, WSVN contacted BECK
17 and on June 7, 1990 she entered into a written agreement with WSVN
18 to begin her employment as a television newscaster on August 6,
19 1990 for a two-year period, at \$65,000 per year for the first year
20 and \$70,000 a year for the second.

21 5. In July 1990, prior to her commencement of employment
22 with WSVN, BECK agreed to pay CRANE commissions in the amount of
23 3.75% of her earnings, half his usual rate of 7.5%, resulting in
24 monthly payments of \$203 throughout her employment with WSVN.
25 CRANE suggested this lower than usual rate because BECK was taking
26 a pay cut to go from WLOX to WSVN, which he nonetheless viewed as
27 a good career move for her future, as this placed Respondent in a
28 much larger market.

1 6. BECK started working for WSVN in August 1990. While
2 employed at WSVN, she continued to send sample broadcast tapes to
3 CRANE. BECK was somewhat unhappy with the station management at
4 WSVN and wanted to explore other career options. With BECK's
5 knowledge, CRANE sent one of her broadcast tapes to KTLA, a
6 television station in Los Angeles, in the hope of attracting the
7 station's interest in Respondent. Shortly thereafter, during
8 December 1990 and January 1991, CRANE sent additional copies of
9 BECK's sample broadcast tapes to stations in San Diego and Chicago,
10 to the recruitment directors for ABC and NBC television news, and
11 to Don Fitzpatrick, a recruiting consultant who works for various
12 television stations.

13 7. In March 1991, CRANE had a lengthy discussion with
14 KTLA's news director concerning the station's plans for a new
15 morning news show and the possibility of securing Respondent's
16 services as a newscaster for that show. CRANE then contacted BECK
17 encouraging her to pursue an offer from KTLA. BECK advised CRANE
18 that she would consider an offer if it was in writing, but that she
19 was primarily interested in pursuing employment with KPNX, a
20 Phoenix station which was then carrying on discussions with BECK.
21 CRANE then spoke with KTLA's executive producer, attempting to
22 shape a multi-year offer that would be acceptable to Respondent,
23 with an annual salary in excess of \$100,000.

24 8. CRANE and BECK never entered into a written agreement
25 concerning his efforts to procure employment for her at KTLA. BECK
26 testified that soon after negotiations first started with KTLA,
27 CRANE told her that he "would not charge any more than what I paid
28 him at WSVN" and that a few weeks later, CRANE said it would cost

1 "about \$1,500 to negotiate the contract". CRANE denied ever
2 offering to negotiate the contract for \$1,500. Taking all of the
3 circumstances into account, it is impossible to credit Respondent's
4 version that CRANE offered his services to BECK for only \$1,500.
5 To begin with, at all times until then CRANE charged commissions
6 based on a percentage of BECK's earnings rather than a flat fee.
7 Secondly, it simply does not make sense that while negotiating a
8 contract that would pay BECK far more than what she was presently
9 making at WSVN, CRANE would agree to have her pay him a flat fee
10 that amounted to less than he had already received from BECK in the
11 eight months that she had been working at WSVN. On the other hand,
12 BECK's testimony that CRANE agreed not to charge any more than he
13 had been charging during the time BECK was working at WSVN is
14 believable in that it is difficult to imagine that an experienced
15 talent agent would begin negotiating on a client's behalf without
16 having made any provision for his own payment. Thus, it is
17 impossible to credit CRANE's testimony that he just "assumed" that
18 if he got any employment for BECK that did not involve a cut in
19 pay, she would pay commissions at the rate of 7.5%. Considering
20 the substantial amounts of money involved, we would expect at least
21 some discussion if CRANE intended to double his commission rate
22 from the 3.75% he had been charging since August 1990. CRANE could
23 not possibly have "assumed" such a dramatic increase in the rate of
24 his compensation. Instead, we find that the subject of
25 compensation was discussed and that CRANE agreed to limit his
26 compensation to the amount he had been charging BECK during her
27 employment at WSVN.

28 9. CRANE convinced BECK to try out for the job with

1 KTLA, and in early April 1991, BECK interviewed at KTLA. Following
2 this interview, negotiations for an employment contract
3 intensified. Meanwhile, KPNX offered BECK a news anchor position
4 starting at \$110,000 a year, but BECK decided to hold off on
5 accepting the job with KPNX, in order to allow CRANE to continue
6 the negotiations with KTLA.

7 10. On April 19, 1991, KTLA sent CRANE a copy of a
8 "letter of agreement" reflecting the understanding reached between
9 KTLA and CRANE concerning BECK's services as anchor of the KTLA -
10 morning news, under which BECK was to be paid \$120,000 for the
11 first year, with KTLA to have an option to renew for a second year
12 at \$135,000 and a third year at \$175,000. The next day, CRANE
13 faxed a letter to KTLA asking for certain changes in the agreement,
14 along with a rewrite of the "letter of agreement".

15 11. From April 22 to April 27, CRANE was in
16 Czechoslovakia pursuant to a previously scheduled commitment which
17 he had made known to all of the parties in the course of
18 negotiations. There is no indication that his five-day absence
19 from the United States caused any prejudice to Respondent, or in
20 any way slowed down her contract negotiations with KTLA. CRANE
21 spoke to KTLA en route to Czechoslovakia at a lay-over in New York
22 and later from Prague. The parties were very close to an agreement
23 and only a few minor issues remained to be ironed out.
24 Nonetheless, BECK was extremely angry at CRANE for what she
25 perceived as his unavailability during a critical phase of the
26 negotiations, and through a telephone conversation and confirming
27 letter on April 29, 1991, she advised him that she was terminating
28 his services, but that she would continue to pay him \$203 a month

1 in connection with her present contract with WSVN as long as she
2 remained employed with WSVN under that contract.

3 12. Following her termination of Petitioner's services,
4 BECK concluded her negotiations with KTLA on her own, executing a
5 written agreement with KTLA on May 1, 1991. Under the terms of
6 this agreement, her employment with KTLA was to begin on June 10,
7 1991 at a salary of \$120,000 per year, with annual salary increases
8 to \$135,000 and \$175,000 if KTLA exercised its right to extend the
9 agreement to a second and third year. The agreement differed in no
10 significant respects from that negotiated by CRANE prior to his
11 departure to Czechoslovakia.

12 13. After BECK began working for KTLA in June 1991,
13 CRANE sent her a bill seeking \$750 in commissions for the month of
14 June 1991, based on 7.5% of Respondent's salary of \$120,000 per
15 year (\$10,000 per month). BECK refused to pay this bill.
16 Subsequent efforts to reach a settlement proved fruitless resulting
17 in the filing of this petition.

18 14. In June 1992 KTLA exercised its option to renew the
19 contract with BECK, and beginning in June 1992 her salary increased
20 to \$135,000 a year (\$11,250 per month), with a possible increase to
21 \$175,000 a year in June 1993 (\$14,583.33 per month) if KTLA were to
22 exercise its final year option, with the contract then expiring on
23 June 9, 1994.

24 CONCLUSIONS OF LAW

25 1. Petitioner is a "talent agency" within the meaning of
26 Labor Code §1700.4(a). Respondent is an "artist" within the
27 meaning of Labor Code §1700.4(b). The Labor Commissioner has
28 jurisdiction to determine this controversy pursuant to Labor Code

1 §1700.44(a).

2 2. Title 8, California Code of Regulations, section
3 12002 provides: "A talent agency shall be entitled to recover a
4 fee, commission or compensation under an oral contract between a
5 talent agency and an artist so long as the particular employment
6 for which such fee, commission or compensation is sought to be
7 charged shall have been procured directly through the efforts or
8 services of such agency and should have been confirmed in writing
9 within 72 hours thereafter However, the fact that no written
10 confirmation was ever sent shall not be, in and of itself,
11 sufficient to invalidate the oral contract."

12 3. Here, there is no doubt that Respondent's employment
13 with KTLA was "procured directly through the efforts or services"
14 of Petitioner. Although Petitioner failed to provide BECK with a
15 timely written confirmation of the commissions sought to be
16 charged, the absence of such written confirmation by itself is not
17 sufficient to invalidate an oral contract.

18 4. In order for a binding contract to arise, there must
19 be mutual assent between the parties --- that is, each party must
20 intend to enter into the contract under the terms and conditions of
21 the agreement. Civil Code §§1550, 1565. Consent of the parties
22 may be communicated by word or act. Whether there has been mutual
23 assent is tested by an objective standard, that is, what a
24 reasonable person in the position of each of the parties would be
25 led to believe by the words or conduct of the other party. Zurich
26 General Acc. & Liability Assur. Co. v. Industrial Acc. Com. (1933)
27 132 Cal.App.101. Mutual assent may be inferred either by the
28 express words of the agreement, oral or written, or by the actions

1 of the parties. If the agreement of the parties to the terms of
2 the contract is inferred from their subsequent acts or conduct, the
3 contract is an "implied in fact contract". Civil Code §1621.

4 5. To determine if a contract is sufficiently certain to
5 be enforced, courts will liberally construe the language that was
6 used by the parties. "If the parties have concluded a transaction
7 in which it appears that they intend to make a contract, the court
8 shall not frustrate their intention, if it is possible to reach a
9 fair and just result, even though this requires a choice among
10 conflicting meanings". Rivers v. Beadle (1960) 183 Cal.App.2d 691,
11 695. "The law does not favor but leans against the destruction of
12 contracts because of uncertainty; and it will, if feasible, so
13 construe agreements as to carry into effect the reasonable
14 intentions of the parties, if that can be ascertained". McIllmoil
15 v. Frawley Motor Co. (1923) 190 Cal. 546, 549.

16 6. Ordinarily, acceptance must be expressed or
17 communicated by the offeree to the offeror, in order to manifest
18 mutual assent. Civil Code §§1565, 1581; Drovin v. Fleetwood
19 Enterprises (1985) 163 Cal.App.3d 486, 491. However, acceptance
20 will be inferred by the conduct of the parties in cases where the
21 offeree, with freedom to do otherwise, make use of the services
22 provided by the offeror. See Civil Code §§1584, 1589; Durgin v.
23 Kaplan (1968) 68 Cal.2d 81, 91.

24 7. Applying the above principles to the facts herein, we
25 hold that there was an implied in fact agreement between the
26 parties to compensate CRANE for the work he performed procuring and
27 negotiating Respondent's employment contract with KTLA. CRANE's
28 offer to provide his services to BECK for no more than what he had

1 been paid during BECK's employment at WSVN can reasonably and
2 fairly be construed as an offer to provide these services on a
3 commission basis at the rate of 3.75% of Respondent's earnings ---
4 the amount he was charging her from the commencement of her
5 employment at WSVN. It would be far less reasonable to construe
6 this as an offer to perform services at the fixed rate of \$203 per
7 month, since the contract CRANE was negotiating with KTLA was far
8 more lucrative than the contract BECK was working under at WSVN,
9 and since the \$203 monthly amount was computed as a percentage of
10 her employment earnings --- that is, the \$203 figure has no
11 independent significance in itself. BECK's acceptance of CRANE's
12 offer can be inferred by her subsequent use of his services in the
13 negotiations with KTLA. Finally, BECK's termination of CRANE's
14 services two days before the KTLA contract was executed does not
15 affect his right to compensation, as an examination of the terms of
16 the executed contract reveals that it was procured and
17 substantially negotiated by CRANE.

18 8. Petitioner is therefore entitled to payment of
19 commissions in the amount of 3.75% of BECK's earnings pursuant to
20 her employment contract with KTLA. These commissions should amount
21 to \$4,500 (\$375 per month) for BECK's first year of employment,
22 \$5,062.50 (\$421.87 per month) for BECK's second year of employment,
23 and if KTLA exercised its final year option to review, \$6,562.50
24 (\$546.87 per month) for BECK'S final year of employment under this
25 contract.

26 9. Petitioner is also entitled to interest pursuant to
27 Civil Code sections 3287 and 3289, in the amount of 10% per annum,
28 on each monthly commission payment as it became due.

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The above Determination is adopted by the Labor
Commissioner in its entirety.

DATED: 2-11-94

Victoria Bradshaw
VICTORIA BRADSHAW
STATE LABOR COMMISSIONER