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7
8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA

10
11 TASARA ENTERTAINMENT, INC., a Florida) Nos. TAC 33-04/34-04
corporation; CHRISTOPHER TASARA, an)
12 individual,)
Petitioner,)
13 vs.)
14 ATCHITY ENTERTAINMENT, INC., a Delaware) DETERMINATION OF
corporation; ~~KEN ATCHITY,~~) ~~CONTROVERSY~~
15 Respondents.)
16

17 The above-captioned matters, the first (No. 33-04), a
18 petition to determine controversy under Labor Code §1700.44, and
19 the second (No. 34-04) styled as a "petition to determine
20 controversy" pursuant to Labor Code §1701, et seq., came on
21 regularly for hearing on April 14, 2005, in Los Angeles,
22 California, before the undersigned attorney for the Labor
23 Commissioner assigned to hear the matter. Petitioner appeared
24 and was represented by attorney Mark D. Johnson, and Respondent
25 was represented by attorney Richard M. Rosenthal. Based on the
26 evidence presented at this hearing and on the other papers on
27 file in this matter, the Labor Commissioner hereby adopts the
28 following decision.

1 option or license of rights in the Documentary." The agreement
2 provided that "[t]he disposition of this Documentary shall be
3 through a television network, and accordingly [AEI] shall use its
4 best efforts to obtain the commitment of a major television
5 network to air the documentary," with the first presentation to
6 be made to HBO/HBO Sports, and possibly a second presentation to
7 ESPN/ESPN Classics. The agreement provided that TEI would be
8 compensated for its services in the form of an initial one-time
9 consultation fee of \$1,250, plus an initial payment of \$2,500 to
10 cover the presentation to HBO/HBO Sports, plus an additional
11 payment of \$2,500 for any additional presentations to other
12 networks, plus commissions equal to either 7.5% or 15% of all
13 amounts received by TEI generated by the sale, option or license
14 of the Documentary during the term of the agreement, depending
15 upon whether the sale, option or license agreement was the result
16 of AEI's efforts. The agreement expressly permits AEI to
17 "negotiate separately between itself and a Network ... to share
18 production rights and credit under the auspices of the Network's
19 production agreement with [TEI]," and provides that if AEI
20 receives a share of the production rights and/or receives
21 compensation from a network pursuant to such separate agreement,
22 TEI will not be obligated to pay any commissions to AEI, and AEI
23 will refund to TEI any commissions previously paid. Finally, the
24 agreement acknowledged that the documentary would be edited to
25 make it conform to current standards and practices in the
26 television industry, and that AEI would begin editing the
27 documentary immediately after execution of the agreement, and
28 complete the editing as soon as possible. It was understood

1 between the parties that submissions would not be made to any
2 networks until the editing was completed.

3 5. Prior to entering into this agreement, Atchity
4 represented to Tasara that he had many contacts at HBO and at
5 ESPN, and that through these contacts, he should be able to
6 secure a sale, option, or license agreement for the documentary.
7 Atchity did not make any representations as to whether he would
8 attempt to seek any sort of future employment for Tasara, and no
9 such representations are contained in the parties' management
10 agreement. No credible evidence was presented that would suggest
11 that Atchity or AEI ever procured, offered, promised or attempted
12 to procure any sort of employment for Tasara, for any television
13 network or for any production company or for any entertainment
14 enterprise.

15 6. Petitioners paid a total of \$3,750 to Respondents
16 pursuant to the parties' management agreement.

17 7. Both petitions, TAC Nos. 33-04 and 34-04, were filed on
18 September 7, 2004. The former petition states that it is filed
19 pursuant to Labor Code §1700.44, and seeks a determination that
20 Respondents violated the Talent Agencies Act by procuring,
21 offering, promising or attempting to procure employment for
22 petitioners without a talent agency license, and that therefore,
23 the parties' management agreement, and any other agreements, are
24 void *ab initio*, and that no monies are payable under any such
25 agreements to Respondents. Also, petitioners seek an order that
26 Respondents reimburse petitioners for all amounts that have been
27 paid to Respondents pursuant to such agreement(s). The latter
28 petition states that is filed pursuant to Labor Code §1701, et

1 seq., and seeks a determination that Respondents violated Labor
2 Code §1701 et seq., by procuring, offering, promising or
3 attempting to procure employment for petitioners, and by making
4 certain alleged misrepresentations concerning the services to be
5 provided under the management agreement, and that therefore,
6 pursuant to Labor Code §1701.16, Respondents are liable to
7 petitioners for three times petitioners' actual damages resulting
8 from Respondents' violations of Labor Code §1701 et seq.

9 LEGAL ANALYSIS

10 1. Labor Code §1700.4(b) defines "artists" to include
11 "actors and actresses rendering services on the legitimate stage
12 and in the production of motion pictures, radio artists, musical
13 artists, musical organizations, directors of legitimate stage,
14 motion picture and radio productions, musical directors, writers,
15 cinematographers, composers, lyricists, arrangers, models, and
16 other artists and persons rendering professional services in
17 motion picture, theatrical, radio, television and other
18 entertainment enterprises." This definition is broad enough to
19 include the director of a video documentary, and therefore, we
20 find that Tasara is an "artist" within the meaning of this
21 statute.

22 2. Labor Code section 1700.4(a) defines "talent agency" as
23 "a person or corporation who engages in the occupation of
24 procuring, offering, promising, or attempting to procure
25 **employment or engagements** for an artist or artists, except that
26 the activities of procuring, offering or promising to procure
27 recording contracts for an artist or artists shall not of itself
28 subject a person or corporation to regulation and licensing under

1 this chapter." (Emphasis added.) The Act does not define the
2 terms "employment" or "engagements." The term "employment" was
3 construed as follows in *Malloy v. Board of Education* (1894) 102
4 Cal. 642: "Employment implies a contract on the part of the
5 employer to hire, and on the part of the employee to perform
6 services, and until such a contract is mutually entered into it
7 can have no binding obligation upon either party." In its
8 various orders governing wages, hours and working conditions of
9 California employees, the Industrial Welfare Commission ("IWC")
10 defines "employ" to mean "to engage, suffer or permit to work."
11 See, e.g., IWC Order 4-2001, subd. 2(E). Despite these
12 differences in the way the term has been construed or defined,
13 the one constant is that there is no "employment" unless the
14 employee agrees to perform, or does perform, services for the
15 employer. In other words, there is no "employment" when what is
16 being purchased is the already finished product of a person's
17 labors. Likewise, the term "engagement," has the following
18 commonly understood relevant definition: "booking; employment for
19 performers or performing groups that last for a limited period of
20 time." See www.wordreference.com/definition/engagement.

21 4. Offering, promising or attempting to negotiate the sale,
22 license or option of a completed video documentary, and offering,
23 promising, or attempting to set up meetings with television
24 networks in order to commence such negotiations, does not
25 constitute "offering, promising or attempting to procure
26 **employment or engagements**" within the meaning of Labor Code
27 §1700.4(a). In the absence of any credible evidence that
28 Respondents engaged in any employment procurement activities, we

1 conclude that Respondents did not act as a "talent agency" within
2 the meaning of Labor Code §1700.4, and thus, were not subject to
3 the licensing requirement found at Labor Code §1700.5.

4 Therefore, the Talent Agencies Act does not make the parties'
5 management agreement void or unenforceable.

6 5. Labor Code §1700.44 provides that the Labor Commissioner
7 has primary jurisdiction to hear and resolve "cases of
8 controversy arising under this chapter," i.e., disputes under the
9 Talent Agencies Act (Labor Code §§1700-1700.47.) Here, TAC No.
10 33-04 is a controversy under the Talent Agencies Act, and thus,
11 it is properly before the Labor Commissioner. In contrast, the
12 Labor Commissioner lacks jurisdiction to hear and decide
13 petitioners' claims under Labor Code §1701, et seq. (the so-
14 called Advance-Fee Talent Services Act), set out in TAC No. 34-
15 03. Pursuant to Labor Code §1701.16, "A person who is injured by
16 any violation of this chapter [Labor Code §§1701-1701.20] or by
17 the breach of contract subject to this chapter may bring an
18 action for recovery of damages or to restrain and enjoin a
19 violation, or both." Claims arising under the Advance Fee Talent
20 Services Act may be heard through the filing of a civil action,
21 not through the filing of a petition to determine controversy
22 with the Labor Commissioner. As the Labor Commissioner lacks
23 jurisdiction to hear such claims, there is obviously no
24 exhaustion of remedies requirement.

25 ORDER

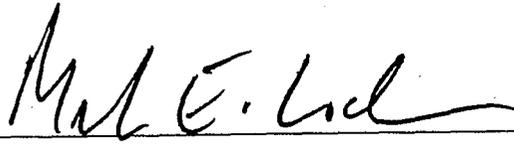
26 For all of the above reasons, IT IS HEREBY ORDERED that:

27 (1) Petitioner is not entitled to the relief sought in TAC
28

1 No. 33-04 because Respondents did not act as a "talent agency"
2 within the meaning of Labor Code §1700.4, and thus, were not
3 subject to the licensing requirement found at Labor Code §1700.5,
4 so that the Talent Agencies Act does not make the parties'
5 management agreement void or unenforceable.

6 (2) TAC No. 34-04 is dismissed as the Labor Commissioner
7 lacks jurisdiction to hear or decide claims under the Advance Fee
8 Talent Services Act.

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10 Dated: 10/20/05

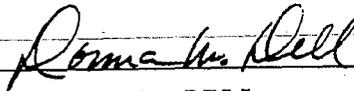


MILES E. LOCKER

Attorney for the Labor Commissioner

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13 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

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15 Dated: 11/16/05



DONNA M. DELL

State Labor Commissioner

