



OFFICE OF ADMINISTRATIVE HEARINGS

State of California

GENERAL JURISDICTION DIVISION

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Department of General Services

Governor Gavin Newsom

October 22, 2021

Department of Industrial Relations
Division of Labor Standards Enforcement
320 West 4th Street, Suite 600
Los Angeles, CA 90013

Subject: Direct Models, Inc.
OAH No. 2021060699
Agency No. SC 6641

Enclosed are the following:

- The original Proposed Decision
- An agency order of adoption. If the Proposed Decision is adopted, please return a copy of the signed adoption order to the Office of Administrative Hearings.
- The original Decision
- Exhibits numbered: *see attached exhibits...*
Please make sure you have received all listed exhibits. If exhibits are missing, please contact OAH immediately.
- Email copy of the Proposed Decision to: psalazar@dir.ca.gov
- The above referenced case was resolved prior to conclusion of the hearing. We are returning the enclosed original exhibits 1 – x to you.

cb
Encl.
Transmittal Form
OAH 60 (Rev. 04/09)

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**BEFORE THE
DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS
STATE OF CALIFORNIA**

**In the Matter of the Appeal from Non-Issuance of
Provisional License of:**

DIRECT MODELS, INC., Respondent

Agency Case No. SC 6641

OAH No. 2021060699

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video and teleconference on July 12, 2021.

Barton L. Jacka, Attorney at Law, represented complainant Lilia Garcia-Brower, Labor Commissioner (Commissioner), Chief of the Division of Labor Standards Enforcement (DLSE), Department of Industrial Relations (Department).

Richard W. Freeman, Jr., Attorney at Law, represented respondent Direct Models, Inc.

Oral and documentary evidence was received. The record was held open for closing briefs. Complainant and respondent timely filed closing briefs, which were

marked for identification, respectively, as exhibits 17 and X. Complainant timely filed a reply brief, which was marked for identification as exhibit 18.

The record was closed and the matter was submitted for decision on August 16, 2021.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Respondent Direct Models, Inc., is a talent agency licensed in California from February 2005 to March 30, 2021.

2. The Commissioner is responsible for licensing talent agencies in California. (Lab. Code, § 1700.3.)

3. The Commissioner first issued Talent Agency License number TA 227393 to respondent on February 3, 2005. The license was effective for one year. The Commissioner continuously granted respondent's subsequent license renewal applications from 2006 through 2017. The last renewal application the Commissioner granted was for the period from November 1, 2017, to October 21, 2018.

4. On August 21, 2018, two months prior to respondent's license's expiration, respondent timely applied to renew the license again. The application was not granted or denied. Complainant¹ instead served a Statement of Issues on

¹ At that time, the Commissioner was Julie Su, a predecessor of current Commissioner Garcia-Brower.

respondent on November 16, 2018, and filed the Statement of Issues with OAH on July 23, 2019, to determine whether the Commissioner may deny the license renewal application. Respondent filed a request for hearing. That matter, under the same agency case number as this matter, 6641, but bearing a different OAH number, 2019070942, is set for a hearing scheduled to commence on September 20, 2021.

Provisional Licenses Issued to Respondent

5. While processing respondent's license renewal application, the Commissioner on October 16, 2018, issued respondent a 60-day temporary, or provisional, license.

6. From October 2018, through March 30, 2021, the Commissioner routinely issued respondent successive provisional licenses valid, variously, for 30, 60, or 90 days. All but the first of the provisional licenses were issued after complainant had filed the November 2018 Statement of Issues. The last provisional license the Commissioner issued was valid for 30 days, from March 1 through March 30, 2021.

7. On April 1, 2021, two days after the last provisional license expired, respondent, through its attorney, emailed the Commissioner with a request to issue another provisional license: "Happy April – following up on a further Provisional License for Direct Models – our last expired Monday (my lapse) but am hoping we can get another quickly . . . thanks for your continuing help." (Ex. 8, pp. 1-2.)

8. On April 23, 2021, the Commissioner denied respondent's request without explanation. Respondent has not been licensed since March 30, 2021.

Alternative Writ of Mandate

9. Respondent filed a petition for a writ of mandate in the Superior Court of California, County of Los Angeles, case no. 21STCP01538, which was heard on May 27, 2021. The petition asked the court for an alternative writ of mandate, "directing [the Commissioner] to immediately set aside its denial of Petitioner's further request for a continuing Temporary Talent Agent License and issue a temporary license pending adjudication of the Statement of Issues." (Ex. Q1, p. 7.) The petition asserted the Commissioner's failure to issue a provisional license was an abuse of discretion, "arbitrary, capricious, lacking in evidentiary support, contrary to public policy, unlawful, and procedurally unfair. The result was an improper de facto suspension of Petitioner's Talent Agent License." (*Ibid.*)

10. On May 27, 2021, the Superior Court granted the petition and issued an alternative writ. The court directed the Department to set a hearing in this forum to determine whether the Commissioner abused her discretion in not issuing a provisional license to respondent effective April 1, 2021.

11. On June 15, 2021, complainant filed with OAH a request to set this matter for hearing. OAH directed complainant's counsel to file a letter, in lieu of a Statement of Issues, explaining the procedural status of this matter in order to initiate OAH jurisdiction. Complainant's counsel filed the letter on July 8, 2021, and the matter was set for hearing. Jurisdictional requirements have been met.

Evidence Offered at Hearing

12. At hearing, complainant offered no evidence to demonstrate what facts the Commissioner considered when she exercised her discretion not to issue another

provisional license. Instead, complainant relied strictly on legal argument, as set forth at Legal Conclusions 6 through 12, *infra*.

13. Respondent introduced evidence intended to show the Commissioner should have exercised her discretion to grant the provisional license. The evidence comprised a list of the 20 sequential provisional licenses the Commissioner issued that were effective, cumulatively, for over 30 months, from October 2018 through March 30, 2021; respondent's April 1, 2021 request for an additional provisional license; the Commissioner's April 23, 2021 response declining to issue one; and the writ petition and supporting documents. Respondent did not introduce any evidence, other than the Commissioner's long-standing pattern of issuing sequential provisional licenses to respondent, to show that it meets whatever qualifications are required to obtain a provisional license.

ISSUE

The issue in this matter is whether the Commissioner abused her discretion when she decided not to issue respondent a provisional license effective April 1, 2021.

Complainant argues that the Commissioner lacked power under the governing statute to issue respondent another provisional license after March 30, 2021, and, therefore, she did not abuse her discretion when she declined to do so.

In a hearing brief filed on the day of hearing, and in his opening statement, complainant's counsel also argued a second issue, in the alternative: if the Commissioner did have statutory authority to issue respondent another provisional license, the Commissioner did not abuse her discretion by refusing to do so, based on her consideration of certain facts she discovered while processing respondent's

renewal application. Complainant's counsel effectively withdrew that second issue from consideration when he decided not to introduce evidence of what factual information the Commissioner considered in making her decision.

Respondent contends, as a legal matter, there was no statutory bar to the Commissioner continuing to issue successive provisional licenses pending resolution of the Statement of Issues, so she *could have* exercised her discretion to grant the provisional license.

Respondent also offered evidence intended to show the Commissioner *should have* exercised her discretion to grant the provisional license.

As explained in more detail below, the legal issue of statutory authority is resolved against the Commissioner. In view of the writ, because complainant offered no evidence to rebut respondent's claim she acted arbitrarily, she must immediately issue respondent a provisional license. If a decision regarding the November 2018 Statement of Issues has not issued prior to the expiration of that provisional license, the Commissioner may issue a subsequent provisional license or, in the exercise of her discretion, decline to do so. If she declines to issue another provisional license at that time, she may initiate another OAH hearing to address whether she has properly exercised her discretion.

LEGAL CONCLUSIONS

1. All talent agencies in California must be licensed by the Commissioner. (Lab. Code, § 1700.5.) Licensed talent agencies must file an application for license renewal; corporate talent agency licenses shall be renewed within 30 days of the anniversary of the formation of the corporation. (Lab. Code, § 1700.10.)

2. The Commissioner may refuse to grant a license or a renewal application, and may revoke or suspend an existing license on any of several specified grounds. (Lab. Code, §§ 1700.8, 1700.21, 1700.22.) Those grounds are: (1) the licensee violated or failed to comply with the Talent Agency Act; (2) the licensee is lacking good moral character; (3) there has been a change of circumstances since the license was issued; or (4) the licensee made a material misrepresentation or false statement in the application. (Lab. Code, § 1700.21.)

3. Though not explicit in the statutory scheme, the specified grounds for revocation or suspension presumably may support the Commissioner's exercise of discretion to deny an application for a provisional license.

4. When the Commissioner denies a license or license renewal application, or revokes or suspends a license, the applicant is entitled to a hearing conducted in accordance with Government Code section 11500 et seq. (Lab. Code, §§ 1700.8, 1700.21, 1700.22.)

5. "Whenever an application for a license or renewal is made, and application processing pursuant to this chapter has not been completed, the Labor Commissioner may, at his or her discretion, issue a temporary or provisional license valid for a period not exceeding 90 days, and subject, where appropriate, to the automatic and summary revocation by the Labor Commissioner." (Lab. Code, § 1700.14.) An application for a provisional license must be in writing and must include the same information, including fingerprints and affidavits of good moral character or a reputation for fair dealing, required in an ordinary talent agency license application. (Lab. Code, §§ 1700.14, 1700.6.)

6. Complainant argues that section 1700.14 allows the Commissioner to issue a licensee only one provisional license, valid for up to 90 days, and does not allow the Commissioner to issue successive provisional licenses.

7. Neither party introduced or referenced any useful legislative history. The purpose of section 1700.14 appears on its face to be to avoid depriving a licensee of licensed status pending completion of the application process. Either the Legislature must be deemed to have contemplated that the renewal process would take no longer than 90 days, or the language must be read to permit multiple sequential provisional licenses in the event the renewal application process proves time-consuming.

8. The former is unlikely, given the Legislature's experience with lengthy licensing processes involving innumerable state agencies. Where, as here, the Commissioner files a Statement of Issues to allow the applicant to contest the possible denial of a license, the process will almost invariably take longer than 90 days. The statutory language setting a maximum time limit of 90 days for a provisional license does not expressly preclude the issuance of a subsequent provisional license. The statute may be, and likely was, designed to ensure that the Commissioner will examine the status of a lengthy licensing process every 30, 60, or 90 days.

9. Finally, the Commissioner, interpreting and acting under section 1700.14, repeatedly exercised her discretion on 20 or more occasions to issue respondent successive provisional licenses. In April 2021, the Commissioner declined to issue respondent another provisional license. "The deference due an agency interpretation . . . turns on a legally informed, commonsense assessment of their contextual merit. 'The weight of such a judgment in a particular case . . . 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking

power to control.'" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8-9, quoting *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140, italics in original.)

10. Complainant offered no evidence of the Commissioner's reasoning either in issuing 20 successive probationary licenses or in her subsequent decision to deny respondent's most recent request. In view of the plain meaning of the statute and the implications of alternative interpretations, and particularly in view of the Commissioner's exercise of discretion on 20 or more occasions to issue respondent successive provisional licenses, section 1700.14 does not preclude the Commissioner from issuing more than one 90-day provisional license to a licensee awaiting license renewal, even when a Statement of Issues is set for hearing. It would not have been an abuse of the Commissioner's discretion, as a matter of law, to issue one in this case.

11. Complainant also argues that the Commissioner lacks legal authority to issue a provisional license after a license has expired. Respondent's last provisional license expired on March 30, 2021. Respondent did not apply for a subsequent provisional license until two days later, on April 1, 2021. Nothing in the language of section 1700.14 supports complainant's interpretation. The statute says a provisional license may issue while an application process is pending. Here, until a decision issues on the 2018 Statement of Issues, the application process is pending.

12. Complainant finally challenges OAH's jurisdiction to decide whether a provisional license must be issued to respondent on the grounds that neither the Labor Code nor the Government Code authorizes such review. Here, however, the Superior Court issued an alternative writ, ordering complainant to submit to the jurisdiction of OAH to determine exactly the issue of whether the Commissioner abused her discretion in denying a provisional license to respondent. Complainant did

not challenge the court order. Instead, complainant requested that OAH set a hearing, and complied with OAH instructions concerning initiating OAH jurisdiction in this matter. (See Factual Finding 11, ante.) Complainant has, therefore, waived any jurisdictional challenge, which in any case is not well-founded.

13. These legal issues being resolved, one issue remains—whether, having the statutory authority to issue respondent a provisional license, the Commissioner abused her discretion by denying one.

14. Complainant did not establish a factual basis for the Commissioner to deny respondent an additional provisional license in April 2021. (See Factual Finding 12.)

15. As evidence of its qualification for the issuance of a provisional license in April 2021, however, respondent demonstrated that the Commissioner has routinely issued successive provisional licenses to respondent since filing the Statement of Issues in response to its application for license renewal, thereby preventing respondent's licensed status from expiring. Respondent argued that, once the Commissioner embarked on a discretionary course of action, i.e., continually issuing successive provisional licenses pending resolution of respondent's renewal application, she was compelled to follow that course of action in a manner that is not arbitrary, capricious, or retaliatory.

16. Because the Commissioner offered no evidence to dispute that she issued sequential provisional licenses over the course of two years, and no evidence to show the Commissioner considered facts that would cause her to alter this pattern, there is no basis to support a finding that the Commissioner's denial of respondent's application for a further provisional license was not an abuse of discretion.

17. Respondent also argued that the Commissioner acted arbitrarily when she changed her practice of issuing respondent successive provisional licenses, deprived respondent of vested rights, and deprived respondent of due process:

a. The Commissioner chose to file the November 2018 Statement of Issues, which triggered the setting at OAH of an Administrative Procedure Act hearing to determine whether grounds to deny respondent's application for license renewal exist. Denying respondent's request for provisional licenses to bridge the time gap until the Statement of Issues may be heard and a final decision issued was "an abrupt and unwarranted reversal of [the Department's] chosen course of action," was unexpected, and was arbitrary and capricious, an abuse of discretion, and a violation of the Commissioner's ministerial duties. (Ex. W at pp. 6, 9.)

b. The Commissioner's denial of another provisional license pending the adjudication of the Statement of Issues effectively deprived respondent of its vested interest in its licensed status, which it had enjoyed for years, without the hearing to which respondent is entitled. Whether denial of a provisional license constitutes deprivation of a vested right (see, e.g., *Unterthiner v. Desert Hospital Dist.* (1983) 33 Cal.3d 285, 296-297) [license to engage in a profession or vocation gives licensee a "fundamental vested right"]), respondent justifiably had an expectation of continued licensure pending resolution of the November 2018 Statement of Issues, absent cause for the Commissioner to deny a provisional license.

c. Complainant cannot arbitrarily avoid a required administrative hearing and deny respondent due process by declining to issue a provisional license while the November 2018 Statement of Issues is being adjudicated. Respondent argued:

The effect of [the Commissioner's] capricious and arbitrary decision in April 2021 is also indisputable: Direct Models has been denied a license without the hearing required by Labor Code Section 1700.8. Without a determination on the merits of [the Commissioner's] alleged basis to deny the license renewal, Direct Models has been deprived of the statutory due process for licensing and summarily and arbitrarily divested of its right and ability to continue its business operations and the representation of its clients.

(Ex. W, pp. 11-12.)

18. Respondent's argument is persuasive. Issuing a provisional license is discretionary during a pending new license or renewal application process. But where the Commissioner, rather than issue a renewed license, invokes the administrative hearing process by filing a Statement of Issues, it cannot, unless evidence establishes cause, deprive a licensee of continued licensure merely by refusing a "bridge" license, i.e., a provisional license or a series of provisional licenses, to the licensee before the Statement of Issues is heard and a decision issues. Any other ruling would render the requirements of sections 1700.8, 1700.21, and 1700.22 meaningless and would vitiate Legislative intent.

19. While section 1700.14 permits the Commissioner to summarily revoke a license, revocation must be based on a finding of at least one of the revocation criteria in section 1700.21:

(a) The licensee or his or her agent has violated or failed to comply with any of the provisions of this chapter.

(b) The licensee has ceased to be of good moral character.

(c) The conditions under which the license was issued have changed or no longer exist.

(d) The licensee has made any material misrepresentation or false statement in his or her application for a license.

20. While complainant may intend to rely on evidence pertaining to these criteria at the hearing of its Statement of Issues, she has introduced no evidence that the Commissioner considered facts pertaining to any of these criteria, or any other criteria, in denying respondent a provisional license when the last of 20 sequential provisional licenses expired.

21. Respondent argues the Commissioner, having issued 20 sequential provisional licenses to respondent, is collaterally estopped to deny respondent an additional provisional license. The doctrine of equitable estoppel generally requires the establishment of four elements: (1) the party being estopped must be apprised of the facts; (2) the party must intend or reasonably believe that its conduct will be acted upon; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must actually rely upon the other party's conduct to their detriment. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) When applying equitable estoppel against the government, an additional factor must be considered that requires balancing the government's responsibilities and the injustice that will occur if the government is not estopped. (*Id.* at pp. 493, 496-497.)

22. The Commissioner is not collaterally estopped in this case. Among other things, the Commissioner may possess evidence supporting her exercise of discretion

to deny respondent an additional provisional license. She has, however, failed to disclose or introduce any such evidence in this proceeding.

23. Complainant argues that, if OAH decides a provisional license must be issued, the provisional license must be limited in time under 1700.14 to a maximum of 90 days, and the Commissioner may suspend or revoke it or refuse to issue subsequent provisional licenses, all in accordance with section 1700.14.

24. Given the limits to the scope of this proceeding under the Superior Court's alternative writ, OAH cannot hereby direct the Commissioner to issue subsequent provisional licenses to respondent after the expiration of the ordered 90-day provisional license. If the Statement of Issues has not been fully adjudicated and decided at the expiration of the 90-day provisional license, respondent may request another provisional license pending the decision. The Commissioner must then exercise her discretion in considering that application, and any subsequent provisional license applications, subject to legal constraints against an abuse of discretion.

25. But, if the Commissioner is not prepared to offer testimony or other admissible evidence in support of a decision to exercise her discretion to refuse to issue further provisional licenses to respondent, the Commissioner will be obligated to exercise her discretion under section 1700.14 to continue to issue sequential provisional licenses to respondent until a final decision issues after hearing on the Statement of Issues.

26. Although the Commissioner's exercise of discretion may be broader in granting or denying a provisional license than it is in granting or denying a license renewal, that discretion may still be abused. Issued without any factual basis, and while a Statement of Issues is pending a hearing that will, presumably, yield substantive

findings in support of a decision, the Commissioner's denial without supporting evidence of a provisional license or a series of provisional licenses extending until a decision on the Statement of Issues case issues is and will continue to be an abuse of discretion.

ORDER

The non-issuance in April 2021 of a provisional talent agency license to respondent Direct Models, Inc. was an abuse of discretion. The Commissioner shall immediately issue to respondent a provisional 90-day talent agency license, to be effective on the date issued.

DATE: 09/22/2021


Howard W. Cohen (Sep 22, 2021 09:59 PDT)
HOWARD W. COHEN

Administrative Law Judge

Office of Administrative Hearings

PROOF OF SERVICE
(C.C.P. 1013)

CASE NAME: *In the Matter of the Appeal from Non-Issuance of Provisional License: Direct Models, Inc*
OAH CASE NO.: 2021060699 (Related OAH Case No.: 2019070942; DLSE CASE NO: SC 6641; Talent Agency License No.: TA 000227393)

I, Claudia Vizuet, hereby certify that I am employed in the County of Sacramento, over 18 years of age, not a party to the within action, and that I am employed at and my business address is: DIVISION OF LABOR STANDARDS ENFORCEMENT, Legal Unit, 2031 Howe Avenue, Suite 100, Sacramento, California 95825.

On November 22, 2021, I served the following document:

PROPOSED DECISION

A. First Class Mail - I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. mail in Sacramento, California, for collection and mailing to the office of the addressee on the date shown below following ordinary business practices.

B. By Electronic Service - I caused a true copy thereof to be transmitted on the date shown below from email address bjacka@dir.ca.gov to the email address published for the addressee.

C. By Overnight Delivery - I caused each document identified herein to be picked up and delivered by Federal Express (FedEx), for collection and delivery to the addressee on the date shown below following ordinary business practices.

D. By Personal Service - I caused, by personally delivering, or causing to be delivered, a true copy thereof to the person(s) and at the address(es) set forth below.

E. By Certified Mail - I caused each such envelope, with fully prepaid postage thereon for certified mail, to be deposited in a recognized place of deposit of the U.S. mail in Sacramento, California, for collection and mailing to the office of the addressee on the date shown below following ordinary business practices.


Type of Service

Addressee

A

Richard Freeman
703 Second Street, Suite 350
Santa Rosa, CA 95404
E-mail: rfreemanattorney@sonic.net

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 22, 2021, at Sacramento, California.



Claudia Vizuet
Legal Secretary, Division of Labor Standards
Enforcement, Department of Industrial
Relations, State of California