Volume 2, Issue 2

June 2004

Human Resources Digest

Edu-Law Education H.R. Digest

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Human Resources Digest —
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Freedom of Expression

Teachers free to express political message in school

An arbitration board was constituted to hear a grievance between the employers' association responsible for bargaining on behalf of British Columbia school boards and for the British Columbia Teachers' Federation. The parties submitted a Statement of Case in which they requested the panel to review the decision of several school boards not to permit teachers in schools to post flyers on specific bulletin boards accessible to students and the public and not to permit teachers to distribute information cards to parents during parent-teacher interviews.

The flyers and cards in question discussed issues regarding recent amendments to the *School Act*, particularly changes that removed class size and class composition clauses from the ambit of collective bargaining.

The position of the Union was that the actions of the school boards were contrary to the freedom of expression rights delineated in subsection 2(b) of the Charter of Rights and Freedoms. The School Boards' Association argued that the Charter did not apply to school boards in B.C. In the alternative, if the Charter did apply, the actions of the school boards did not violate subsection 2(b) of the Charter, but that if their actions did violate subsection 2(b), the school boards' actions were saved by section 1 of the Charter.

The issue of the application of the Charter to school boards in British Columbia had not previously been decided. The recent decision of the Supreme Court of Canada in **Chamberlain v. Surrey School Board, [2002] S.C. R. 710**, where specific books about same-sex families were not permitted to be used as resource tools in schools, was determined by the Court to have violated section 76 of the *School Act*. Thus, the Supreme Court did not address the issue of whether the Charter applied to school boards. The panel noted however, that there have been lower court decisions in Canada that have simply assumed that the Charter is applicable to publicly-funded school boards.

The panel in the present case reviewed previous decisions of the Supreme Court setting out the test to be applied in a determination of whether the Charter is applicable. The panel held that the case law extends subsection 32(1) of the Constitution to "*all entities that are essentially governmental in nature (not just to those that are formally part of the structure of the federal or provincial governments) as evidence either by the degree of governmental control exercised over them or by the governmental quality of the functions they perform or, presumably, a combination of the two*". (p. 10)

The panel found that school boards provided governmental functions rather than public functions, and that it was reasonable to presume that if the legislature had not conferred on school boards the powers set out in the *School Act*, those powers would be exercised directly by the provincial government to provide services. Thus, the panel held that because the school boards were governmental in nature and that the provincial government exercised governmental control of them, they are subject to the Charter.

Given the application of the Charter to school boards, the panel proceeded to determine whether there had been a section 2(b) Charter breach of the teachers' freedom of expression rights by the school boards.

The panel determined that the flyers and cards were within the sphere of conduct protected by section 2(b) of the Charter. It stated: "*The bulletins or flyers, the cards and any ensuing discussion with parents about class size or class composition or other learning conditions, either as collective bargaining matters or in the context of the provincial government's legislative intervention, were attempts to convey meaning and thus have expressive content*".

The School Boards' Association argued that:

"*the question is whether the purpose of the alleged prohibition of these activities on working time, school property and in parent-teacher interviews, had the purpose of restricting expression or its consequences. The alleged actions did not in any way restrict the freedom of teachers or the union to express their views in a public forum. Rather, they were directed at preventing the consequence of the school walls and parent-teacher meetings being used for extraneous purposes.*

A similar prohibition would properly arise if one or more teachers tried to use school walls and bulletin boards or parent-teacher interviews to express their political or religious beliefs, sell merchandise, or campaign for a candidate for public office.

The prohibition was simply a manner of where and when the expression took place, not an attempt to control the ability of the teachers or their union to express their views. Their ability to do so in various public ways on their own time was unaffected".

The panel disagreed with the argument put forward by the School Boards' Association and found that, although the restriction imposed by school boards was as to time and place, it was tied to content. They found that the purpose of the school boards was to restrict the content of expression and to control the ability of the teachers to convey expressive meaning. Further, they held that an analysis regarding the justification of the prohibition by school boards should take place pursuant to a section-1 analysis, which provides that the rights and freedoms set out in the Charter are subject to "*such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*".

The panel found that the postings and the handing out of cards at parent-teacher interviews would not interfere with the effective and efficient operation of a school. While the panel recognized that the purpose for handing out cards was to spur discussion between teachers and parents, interestingly, the panel did not comment on whether the expected ensuing discussion during the parent-teacher interviews about political issues, rather than the parent's particular child, would interfere with the effective and efficient operation of a school.

Further, the panel stated that if the communications at issue would not be considered a breach of the duty of fidelity and loyalty owed by employees to their employer if distributed in public or quasi-public (presumably in contrast to a school which would be neither public nor quasi-public), the panel stated: "*[it] could not see how the duty of fidelity becomes a reasonable limit prescribed by law justifying the prohibition of the exact same communications on a teachers' bulletin board or in the privacy of a parent-teacher interview*". The panel found that "*to the extent the expressive content of the materials intended by the teachers to be posted or otherwise communicated was aimed at the provincial government, the duty of loyalty or fidelity has no application.* It was not clear from the decision whether consideration was given by the panel to the fact that parents might deem the statements to be supported by the school boards if posted in schools and discussed during school board events.

The panel held the Charter applied to the actions of the school boards, that the communications were protected by section 2(b) freedom of expression rights and that the actions of the school boards were not saved by section 1 of the Charter.

British Columbia Public School Employers' Assc. And British Columbia Teachers' Federation March, 2004 (arbitrators D. Munroe, R.A. Francis, J. Lamont, J. Rogers and K. Child)

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SCHOOL BOARDS: EMPLOYEES

Damages

Damages awarded in lieu of reinstatement

The Supreme Court of Canada recently reviewed a decision of an arbitration panel to award damages in lieu of reinstatement.

The employer, the Board of Governors of the Lethbridge Community College, hired the grievor, Sylvia Babin, as a Scheduling Co-ordinator, but dismissed her on the grounds that her work performance was unsatisfactory. The grievor and the union grieved the dismissal alleging that the dismissal was without just cause in contravention of the collective agreement. The arbitration panel found that the employer had failed to comply with the requirements of a dismissal of an employee on the grounds of non-culpable deficiency. In lieu of reinstatement, the arbitration panel awarded the grievor damages, concluding that reinstatement was inappropriate in the circumstances.

In fashioning the remedy, the arbitration panel concluded that it could substitute a financial award under subsection 142(2) of the Alberta *Labour Relations Code* and awarded the grievor damages in lieu of reinstatement, since reinstatement was inappropriate because of the bona fide reorganization of the workplace and the fact that the grievor's previous position no longer existed. The arbitration panel rejected the possibility of ordering the employer to make efforts to find another position because that would neither guarantee the grievor employment nor provide a lasting solution. The arbitration panel awarded the grievor damages in the amount of four months salary, taking into consideration common law principles such as age, length of service, and the nature of her position.

The Alberta Court of Queen's Bench dismissed the grievor's application for judicial review on the preliminary argument that she was precluded from seeking judicial review of the arbitration panel's decision, having accepted payment of the arbitration award. The acceptance of the award was inconsistent with the asserted right of reinstatement. The application was also dismissed on its merits. The arbitration panel's interpretation of subsection 142(2) to include any form of discharge, whether culpable or not, was reasonable in light of the wording of the section. It was further reasonable for the arbitration panel to substitute another remedy for reinstatement, on the basis of broad-remedial authority where special circumstances existed.

On further appeal, the Alberta Court of Appeal found that subsection 142(2) did not apply to non-culpable dismissals and that the usual and expected remedy was reinstatement. The Court held that the arbitration panel could vary the usual remedy of reinstatement only where exceptional circumstances existed. The court ordered the grievor to be reinstated and referred the quantum of back-pay to the arbitration panel for determination.

There were two issues raised in the appeal before the Supreme Court. The first dealt with the scope of the arbitration panel's jurisdiction under subsection 142(2) of the *Code*, and the second concerned the exercise of the panel's remedial power in light of that jurisdiction.

The Supreme Court held that the panel had ample reasons to adopt a broader but equally reasonable interpretation to conclude that the provision applied to both culpable and non-culpable dismissals. The court commented that the position that the arbitrator is required to reinstate the employee on the basis that the employer had not established cause for the employee's dismissal or discipline was a very narrow and mechanistic approach to employee conduct and arbitral authority, which did not take into account the arbitrator's dispute resolution mandate nor adequately consider the myriad of employment circumstances that employees and employers confront.

With respect to the arbitration panel's use of the remedial power, the Supreme Court found that the panel did not act in an unreasonable manner by substituting an award for reinstatement. It properly considered the whole of the circumstances and reached a reasonable conclusion as to the continued viability of the employment relationship. The Supreme Court held that the panel's decision fell well within the bounds of arbitral jurisprudence requiring a finding of exceptional circumstances prior to substitution of remedy.

Alberta Union of Public Employees v. Lethbridge Community College, [2004] S.C.J. No. 24

SCHOOL BOARDS: TEACHERS

Duties

Arbitrator confirms reporting requirements

In a recent case involving the Ottawa-Carleton District School Board, an arbitrator found that principals have the authority to institute interim report cards as a mandatory reporting vehicle, provided that the specific directive is reasonable and fair to the teachers.

The Federation filed a grievance after the principal of J. H. Putman Elementary School (the "school") directed all teachers of grade 7 and 8 students to complete an interim report card to be sent home with all students. While the Federation conceded that teachers have an affirmative duty to report on the progress of students, and that the principal has the capacity to monitor teacher communications with parents and be satisfied that effective communication is taking place, they argued that the principal had no authority to impose a universal form of reporting beyond that prescribed by provincially-regulated report cards.

The school's grade 7 and 8 teachers had been notified during a staff meeting on October 22nd of the requirement for interim report cards. Some of the teachers made objections at that time, and the Federation was contacted. The Federation informed the teachers that the interim report cards should be optional, but to complete them under protest and that a grievance would be filed.

The arbitrator reviewed section 20 of Ontario Regulation 298, establishing a duty on teachers to supply the principal with such information related to the instructional program as the principal may require and to assist the principal in maintaining close co-operation with the community.

The arbitrator also relied on the Supreme Court of Canada decision in **Winnipeg Teachers' Association No. 1 of the Manitoba Teachers' Society v. Winnipeg School Division No. 1 (1975), 59 D.L.R. (3d) 228** (the "Winnipeg Teachers' case") and, notably, on the opinion of Laskin, C.J.C. The Chief Justice had recognized that there are two situations whereby teachers might find themselves obliged to perform activities not expressly provided for by statute or under contract. These are where they are "*related to the enterprise and … seen as fair to the employees and in furtherance of the principal duties to which he is expressly committed*".

The arbitrator was satisfied that the requirement of interim report cards was related to the school's enterprise, and that completion of the interim report cards was not unduly onerous on the teachers, nor did it represent an unfair additional burden on their workload.

The arbitrator found that, while the expectations of the community could not drive the process of communication, the expectations of the community were relevant. In this case, interim report cards had been in place at the school for over a decade, and it was reasonable for the principal to continue that practice.

The arbitrator concluded that a principal has the authority to institute interim report cards as a mandatory reporting vehicle so long as they are reasonable and fair, and that timing and content were critical in such an assessment. The original format of the interim report cards, and time-frame intended for the completion and release met those standards. However, once the time-frame had extended to lessen the value of the interim report cards and related computer problems occurred, the interim report cards became deficient in such respects and were no longer considered reasonable.

Ottawa-Carleton District School Board. v. Elementary Teachers' Federation of Ontario (Ottawa-Carleton Teacher's Local) (Report Cards Grievance), [2004] O.L.A.A. No. 28

SCHOOL BOARDS: TEACHERS

Professional Misconduct

Off-duty article cited as professional misconduct

The appellant teacher was a secondary school teacher and counsellor employed by the Quesnel School District in Quesnel, British Columbia. A member of the British Columbia College of Teachers since 1980, he had a long and unblemished teaching career and a notable record of community service. He was also qualified as a registered clinical counsellor. In a small community such as Quesnel, he was one of only four secondary school counsellors in Quesnel's two public secondary schools, and an active participant in community services, making him well-known in the community. Between 1997 and 2000, the teacher wrote and published in a local newspaper, The Quesnel Caribou Observer, an article and a series of letters to the editor expressing his views on homosexuals. The writings drew ire from readers, some of whom wrote letters to the newspaper calling his statements discriminatory.

In May of 2001, the College issued a citation and charged the teacher with professional misconduct and conduct unbecoming a College member on the grounds that he made discriminatory and derogatory statements against homosexuals. The citation was issued as part of an investigation by the College into the teacher's public writings to the newspaper. The investigation was prompted by a complaint from a member of the public against the teacher. During the investigation, the teacher voluntarily produced other writings he had written on the topic of homosexuality not previously known to the College. These other writings included two essays published for free distribution, private correspondence to city councillors and the director of instruction, and a private memorandum to the director and various secondary school principals.

A hearing was held on charges of professional misconduct and other conduct unbecoming a College member in April of 2002 before a hearing panel of the disciplinary committee of the College. The evidence consisted of the teacher's writings as well as written responses to his writings from members of the community. Based on the evidence, the panel made specific findings of fact and found the teacher's writings to be discriminatory and demonstrative of the fact that he was not prepared to take into account the educational system's core values. The panel found that the appellant's freedom of expression did not entitle him to act on his beliefs while a College member. The panel also found that, despite the teacher's conduct occurring off-duty, and the lack of direct evidence of a poisoned school environment, an inference could be drawn as to the reasonable and probable consequences of his published writings.

The panel found the appellant guilty of conduct unbecoming a member and recommended a one-month suspension of the appellant's teaching certificate and other sanctions, including notification to various licensing authorities and publication of the appellant's name and a summary of the case to College members and the public. The penalty was adopted by the College Council and the teacher appealed both the panel's findings of conduct unbecoming and the penalty decision on the issue of suspension only.

The court rejected the teacher's argument that procedural fairness had been violated for the reason that the hearing panel had given inadequate reasons for it determination and had relied on his private correspondence.

The court was satisfied that the panel's reasons sufficiently indicated the evidence and the reasoning on which the decision was based. The court also noted that administrative tribunals are not strictly bound by the rules of evidence. The fact that the appellant's private correspondence was presented to the hearing panel did not itself lead to a finding of procedural unfairness. The court commented that the danger of procedural unfairness would have arose only if any use was made by the panel of the teacher's private correspondence. In finding the appellant guilty of conduct unbecoming a College member, the panel quoted exclusively from and relied upon documents published in the local newspaper. The panel did not appear to rely upon or assess the value and content of the private documents in any way. There was also no evidence that the panel gave any weight to the appellant's private correspondence in its subsequent decision on recommendations for a penalty. The only change with respect to the panel's use of evidence at the penalty stage was its reliance on the two essays marked for free distribution. The court found that the use of the private correspondence by the panel at this stage was not inappropriate as the panel was no longer assessing the merits of the citation, but rather looking at the appellant's public conduct in a broader context, as well as other factors relevant to sentencing.

The court also considered the issue of public protection and found that the teacher did not appreciate the extent of the harm that had been done to the general student body, homosexual students, the school system, and the teaching profession by publishing his discriminatory writings as a public school teacher and counsellor. The fact that there were specific complaints made was not determinative.

Finally, the court found that there was no infringement of the teacher's Charter rights under sections 2(a), 2(b), 7 or 15. What the teacher had been sanctioned for was not the expression of any particular view per se. The purpose and effect of the disciplinary action taken was to sanction the teacher for his off-duty expression of personally-held discriminatory views purportedly within the authority of or in the capacity of a public secondary school teacher and counsellor, which resulted in harm to the school system. The right to practice as a teacher did not rise to the level of a fundamental personal choice as contemplated by the teacher's section-2 arguments. The appellant had neither alleged nor provided any evidence of differential treatment when compared to other teachers and, as a result, the section 7 and 15 claims were dismissed by the court. Further, the court commented that, had the teacher's Charter rights been infringed, the actions taken by the College would have been justified under section 1 of the Charter.

Kempling v. British Columbia College of Teachers, [2004] B.C.J. No. 173

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SCHOOL BOARDS: TEACHERS

Re-assignment

Grade re-assignment is not a new position

An Arbitrator has held that the re-assignment of a teacher from a grade 8 class to a grade 4/5 split class following her maternity leave did not violate either the *Employment Standards Act*, S.O. 2000, c. 41, nor the collective agreement. This decision was consistent with the 2003 decision in **Toronto District School Board v. E.T.F.O. (Vuong Grievance), [2003] O.L.A.A. No. 141**, which found that the Toronto District School Board had not acted inappropriately when re-assigning a teacher from French to Science after she returned from maternity leave.

The teacher had been a grade 8 teacher prior to her pregnancy leave and, when she returned, was assigned to a grade 4/5 split class at the same school. She commenced teaching in 2001-2002 and taught grades 7 and 8, and had a grade 7 homeroom. In the 2002-2003 school year, she was assigned to a grade 8 homeroom and continued to teach grades 7 and 8. She had had prior experience teaching grades 5 and 6 and was qualified to teach grades 4 through 10, but was predominantly interested in teaching older children. She commenced her maternity leave in 2002 and, when she returned just under a year later, she was re-assigned to teach a grade 4/5 split class for that year. Upon learning of the assignment, she expressed concern to the principal about her ability to effectively teach a split

classroom. The principal was willing to provide assistance to facilitate a transfer to a different school, however, the teacher decided that, given her comfort with her colleagues at the school, she would remain there.

According to the principal, the teacher's re-assignment to the grade 4/5 split class was based on her skills with a computer literacy program and the need to implement this program in the lower grades. In addition, eight other teachers were re-assigned for the 2003 school year.

The Federation argued that the *Employment Standards Act* conferred a benefit under subsection 53(1) which provides that, following leave, an employee shall be reinstated "*... to the position most recently held with the employer, if it still exists, or a comparable position, if it does not*". The Federation argued that this provision should be interpreted generously and that any restrictions should be construed narrowly. It contended that the teacher's duties differed significantly between the two assignments and that she was entitled under the collective agreement and the *Employment Standards Act* to return to her previous position because changing class assignments caused her stress and required her to interrupt her leave in July 2003 to change classrooms. Finally, the Federation contended that the provisions in the *Employment Standards Act* amend any discretion that the principal had to assign positions under the *Education Act*.

The Board submitted that the issue turned on the interpretation of the word "position". The Board agreed that the *Employment Standards Act* is remedial; however, it contended that it must be construed along side the *Education Act* in a manner that allows both to operate effectively. The Board also argued that, pursuant to the *Employment Standards Act*, the teacher was entitled to return to her position as a classroom teacher, but was not entitled to the same work assignment. All teachers were subject to changes in assignment, and the teacher in this case was no different.

The arbitrator reviewed the case law, which suggested that the terms "position" and "assignment" required flexible interpretation depending on the context. The Regulations of the *Education Act* that empower a principal to assign teachers did not make distinctions with respect to assignments — the only restriction was the division that a teacher was entitled to teach under his or her teaching certificate. According to the arbitrator, this suggested that teachers do not have proprietary interests in particular assignments, and that such assignments are inter-changeable. He stated that it was reasonable to infer that all assignments fall under the generic classification of "position".

Nowhere in the collective agreement did it suggest that a specific grade assignment was a separate and distinct position from other grade assignments. That there was a generalized category of teacher, independent of assignment, was confirmed in the part of the collective agreement that addressed salaries. Salaries were not based on teaching assignments, but on skill and personal experience; therefore, while a split grade was a different teaching environment and the type of teaching depended on the age of the children, these differences were insufficient to convert this work assignment into an entirely different "position".

Based on the arbitrator's review of the Regulations and the collective agreement, he held that it was reasonable to infer that there was only one "position" of teacher, and that within that generalized category, there are separate assignments. In addition, all teaching positions were subject to automatic review and potential re-assignment every Spring, and the teacher should not be placed in a better position than she would have been had she not taken pregnancy leave. Had she not taken pregnancy leave, she would have possibly been subject to the same re-assignment to the split class.

In conclusion, the provisions of the collective agreement and the relevant statutes did not distinguish teaching positions based on assignments. The Federation failed to meet the onus of establishing that the grievor was returned to a different position from the one that she had held prior to her leave and, therefore, there was no violation of the *Employment Standards Act* or the collective agreement.

Niagara District School Board v. The Elementary Teachers' Federation of Ontario (E.T.F.O.)

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SCHOOL BOARDS: TEACHERS

Experience

Arbitrator holds prior experience recognition discretionary

In February of 2002, an arbitrator was appointed to hear and determine an individual grievance in which the grievor, a teacher, claimed that there was a violation of the collective agreement by denying recognition of her directly-related employment experience for the purposes of grid placement. The teacher had been employed by the school board as a teacher of Italian and French languages since the Fall term of 2001, at which time she was placed on the wage grid at A3 with no years of increment for related experience. Prior to being hired by the school board, she had been employed with the RCMP for 13 years as a Communications Operator—Training, which she argued was experience in the nature of teaching because it included a substantial element of the key duties of a teacher. In her position with the RCMP, the teacher provided support to investigators and was involved in communications such as contingency plans, emergency operations, warrants and border alerts, where she would delegate information to those responsible.

The teacher's training functions with the RCMP started in 1992 with activities involving civilian and temporary employees who were put on a six-month training program. In her previous employment, the teacher worked with one trainee at a time and said that

between 50% to 70% of her time was involved with training. As well, she continued with her regular duties as Communications Operator. The teacher had not received any formal training for these training tasks, but successfully took on the responsibilities with her knowledge and expertise to train a civilian employee. The trainees in the RCMP course were required to be able to speak in both official languages, but it was not the teacher's job to bring them to requisite levels, she was training them to be Communications Officers.

The parties were governed by a collective agreement which indicated that the crediting of directly-related experience was the sole discretion of the superintendent of human resources. The teacher argued that her experience as a trainer with the RCMP gave her pedagogical experience in the activity of teaching, which was directly related to her current assignment with the school board. She claimed that the school board violated the collective agreement by not recognizing her experience as a trainer with the RCMP as directly-related work experience and that, to the extent the superintendent of human resources exercised his discretion, it was inconsistent with the provisions of the collective agreement or was exercised in an arbitrary and unreasonable manner. The grievor sought an order that the school board recognize her experience as a trainer on a one-to-one basis (7 full years) or, in the alternative, on a pro-rated basis.

The school board argued that the crediting of related experience gave the superintendent of human resources sole discretion, and that the issue of what would be considered "directly-related experience" had been dealt with in a prior arbitration decision. In addition, the school board argued that the collective agreement was clear that directly-related experience must apply to the teacher's professional assignment. As the teacher was hired by the school board to teach French and Italian languages, whatever her previous experience, it had nothing to do with teaching these courses. The teacher's work at the RCMP was not as a teacher of such languages, but as a staff member in a busy department using various equipment for knowledge of police procedures and protocol in conjunction with on-the-job training responsibilities for other employees. Further, it was difficult to identify the training part of her job, which was incidental to her job as Communications Operator. These factors were taken into account when the superintendent made his decision to deny the teacher's claim.

Both parties referred to an award in **Re Elementary Branch Affiliate of Ontario English Catholic Teachers' Association and London and Middlesex County Roman Catholic School Board (unreported, June 16, 1992)**, in which the arbitrator found that the decision of the superintendent with respect to related employment experience would be subject to arbitral review only if the superintendent based his decision on discriminatory criteria. The arbitrator had concluded that there was no scope to review the superintendent's decision on directly-related experience on the grounds of reasonableness.

In this case, the arbitrator found that the grievor's training responsibilities could be likened to those of a teacher, although not in a classroom setting, and her training assignment did not include the teaching of French or Italian languages to trainees who were bilingual. The discretion to make a final determination of the crediting of directly-related experience by the superintendent under the collective agreement was reviewable on the basis of whether his discretion to do so was exercised in good faith and not in an arbitrary or discriminatory manner. The arbitrator found that the superintendent gave consideration to the details of the teacher's experience as a Communications Officer and trainer at the RCMP, and he did not enter into consideration of irrelevant matters or add requirements outside the terms of the collective agreement. The decision as to whether the teacher's past experience with the RCMP constituted experience in the nature of teaching as required by the collective agreement was a decision within the discretionary authority of the superintendent of human resources, and the union did not establish a proper basis for its review.

London District Catholic School Board v. Ontario English Teachers' Association (Gordon Grievance), [2003] O.L.A.A. No. 563

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