

CENTRAL ADMINISTRATIVE TRIBUNAL

GULESTAN BLDG. NO. 6, 3RD/4TH FLOOR,

PRESCOT ROAD, FORT, BOMBAY - 400 001

R.P. NO. 112/95 AND M.P. No. 893/95

IN

ORIGINAL APPLICATION NO.: 1002/95.

Mrs. Anju Das Gupta ... Applicant

Versus

Union Of India & 13 Others ... Respondents.

CORAM :

Hon'ble Shri B. S. Hegde, Member (J).

Hon'ble Shri M. R. Kolhatkar, Member (A).

APPEARANCE :

1. Shri M. S. Ramamurthy,
Counsel for the applicant.
2. Shri P. M. Pradhan,
Counsel for the official respondents.
3. Shri G. K. Masand,
Counsel for the review petitioner
(Original Respondent No. 13).

TRIBUNAL'S ORDER:

DATED : JANUARY 16, 1996.

1. Heard Shri M.S. Ramamurthy, Counsel for the applicant, Shri P. M. Pradhan, Counsel for the official respondents and Shri G.K. Masand, Counsel for the Review Petitioner. The Learned Counsel for the original applicant, Shri M.S. Ramamurthy, submitted that since the respondents have filed a S.L.P. against the interim order passed by the Tribunal vide dated 15.09.1995 which has been dismissed by

the Supreme Court on 04.01.1996 both the R.P. and M.P. will not survive and the same requires to be dismissed. As against this, the Learned Counsel for the Review Petitioner, Shri Masand submitted that it is incorrect to state that just because the S.L.P. filed by the respondents has been dismissed by the Supreme Court, the Review Petition filed by the Review Applicant cannot be sustained. It is open to the Review Applicant to seek for review of the order passed by the Tribunal if he or she is otherwise aggrieved by the said order and if she has not been heard when the Tribunal passed the order. Shri Pradhan, Learned Counsel for the official respondents, filed an M.P. No. 893/95 for modification of the interim order passed by the Tribunal stating that one more vacancy will be kept vacant so as to enable the original applicant to accomodate in case she succeeds in the O.A. and allow the panel to operate, etc.

2. The Tribunal passed the interim order after hearing the Learned Counsel for the applicant as well as official respondents and on going through the pleadings of the parties, directed the respondents not to appoint anyone including the present Review Petitioner till the disposal of the O.A. Since the subject matter is a very controversial one and the interim order was allowed to operate till now, in the facts and circumstances of the case, with the consent of the parties, the subject matter is fixed for final hearing on 12.03.1996 ultimately so as to arrive at a reasonable

conclusion. Accordingly, both the Review Petition as well as Miscellaneous Petition are fixed for hearing alongwith the O.A. on 12th March, 1996.

M R Kolhatkar

(M. R. KOLHATKAR)
MEMBER (A).

B S Hegde

(B. S. HEGDE)
MEMBER (J).

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CENTRAL ADMINISTRATIVE TRIBUNAL
BENCH AT MUMBAI

ORIGINAL APPLICATION No. 1002 / 199 5

Date of Decision: 2-8-96

Mrs. Anju Dasgupta.

Petitioner/s

Shri M.S. Ramamurthy.

Advocate for the
Petitioner/s

V/s.

Union of India & Ors.

Respondent/s

Official Respondents i.e. R-1 to 5
by Shri P.M. Pradhan and R-13 by
Shri G.K. Masand.

Advocate for the
Respondent/s

CORAM:

Hon'ble Shri B.S. Hegde, Member(J)

Hon'ble Shri P.P. Srivastava, Member(A).

- (1) To be referred to the Reporter or not ? ✓
- (2) Whether it needs to be circulated to
other Benches of the Tribunal ?


(B.S. HEGDE)
MEMBER(J).

CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

Original Application No. 1002/95.

Presented and this the day of August 1996.

Shri B.S.Hegde, Member(J),
Shri P.P.Srivastava, Member(A).

Mrs.Anju Dasgupta,
Director Postal Services (City)
Office of the Chief Post
Master General, Maharashtra
Circle, Bombay - 400 001.

... Applicant.

(By Advocate Shri M.S.Ramamurthy)

V/s.

1. Union of India through
the Secretary,
Department of Posts,
Government of India,
Dak Bhavan,
Sansad Marg,
New Delhi - 110 001.
2. The Secretary,
Department of Posts,
Government of India,
Dak Bhavan, Sansad Marg,
New Delhi - 110 001.
3. The Secretary,
Union Public Service
Commission, Dholpur House,
Shahjahan Road,
New Delhi - 110 001.
4. The Chief Post Master General,
Maharashtra Circle,
Bombay - 400 001.
5. The Secretary,
Department of Personnel and
Training, Ministry of
Personnel, Pension and Public
Grievances, Government of India,
New Delhi - 110 001.
6. D.Kailasa Prasad,
(IPS-71)
On deputation.
7. Smt.K.Noorjahan,
(IPS - 71)
Post Master General,
Raipur.
8. S.C.Sarma,
(IPS - 71)
Post Master General,
Dibrugarh,
Assam.

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9. V.K.Khanna,
(IPS - 72)
Chief Post Master General,
Jammu & Kashmir Circle,
Srinagar.
10. P.K.Chatterjee,
(IPS - 73),
Post Master General,
Mail Management,
Calcutta.
11. Smt. Tapati Neogi,
(IPS - 73),
General Manager,
PLI,
New Delhi.
12. Ms.Meera Datta,
(IPS - 73),
Post Master General,
Cochin.
13. Ms.Radhika Doraiswamy,
Director of Postal Services,
Office of Chief Post Master
General,
Hyderabad.
14. Mr. Zasanga,
Secretary,
State Legislative Assembly,
Mizoram,
AIZAWL.

.... Respondents.

(Official Respondents i.e. Respondents
Nos.1 to 5 by Advocate Shri P.M.Pradhan,
C.G.S.C. and Respondent No.13 by
Advocate Shri G.K.Masand).

O R D E R

(Shri B.S.Hegde, Member(J))

By this Original Application the applicant challenges the selections held on 3.8.1994 by which the Respondents No.6 to 14 have been selected for promotion to the Senior Administrative Grade, though the applicant was at Sl.No.4 in the seniority amongst Officers considered for promotion to Senior Administrative Grade she is not included in the list, accordingly she prays for the following reliefs :

- (a) That it be declared that the proceedings of the DPC meeting held on 3.8.1994 are bad in law and that the DPC acted improperly in adjudging the suitability of the applicant on the basis of Rules still under review/amendment and notified only on 1.10.1994 with clear provision for prospective effect.
- (b) That it be held and declared that the

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DPC which met on 3.8.1994 should have based its recommendations on the notified and legally valid Indian Postal Service (Group 'A') Rules of 1987 and pursuant thereto the DPC should have taken into account only the ACRs of the preceding five years and not 8 years. Accordingly, DPC panel is to be quashed and set aside.

2. When the matter came up for admission and interim relief on 21.8.1995 the Tribunal on the basis of the submissions made by the applicant passed an order of "status quo" as on that day in respect of the appointments of Respondents No.13 and 14 and Dasti notice was issued. The matter was heard on 8.9.1995 and the order on interim relief was passed on 15.9.1995.

3. As stated above, the applicant is mainly challenging the decision of the DPC convened on 3.8.1994 on the ground that the promotion was to be considered in accordance with the existing rules, 1987, whereas, the DPC had taken into consideration, the proposed Rules of the Department in 1994. The Supreme Court in the case of P.Mahendran v. State of Karnataka (A.I.R. 1990 S.C. 405) has held that if a candidate applies for a post in response to advertisement in accordance with recruitment Rules he acquires right to be considered for selection in accordance with the then existing Rules. Such a right cannot be affected by amendment of any Rule unless the amending Rule is retrospective in nature. In view of this, in the instant case the DPC selection should have been made under the existing Rules 1987 but not under the proposed amended Rules. The factual averments have not been disputed by the Respondents. It has been stated that the DPC had taken into consideration the proposed draft rules under consideration and accordingly 8 years ACRs have been taken into account for selection to the

post of Senior Administrative Grade.

4. The admitted facts are that the DPC was convened on 3.8.1994 in order to consider the filling up of vacancies of P.M.G. in the grade of Rs.5900-6700. The DPC had gone by 8 years' service instead of 5 years' service under the existing Rules, 1987. The Indian Postal Services Group 'A' Amendment Rules 1994 came into force w.e.f. 1.10.1994. Whereas, the DPC was convened on 3.8.1994, therefore, the contention of the applicant is that the DPC should be governed by the existing rules notified in 1987, whereas the contention of the official Respondents is that prior to the recommendations of the IVth Pay Commission that the 1987 were applicable only till the merger of the SAG Level I & II as recommended by the IVth Pay Commission and two levels in the Senior Administrative Grade are merged from the post of Junior Administrative Grade and the persons were entitled to be promoted to the post of Senior Administrative Grade in the scale of Rs.5900-6700. The respondents conceded, that insofar as promotion is concerned, there were rules known as Indian Postal Services (Group 'A') Rules, 1987 which came to be framed in exercise of powers conferred by the proviso of Article 309 of the Constitution of India. The 1987 Rules were notified in June, 1987 while the recommendations of the IVth Pay Commission had already been notified in September, 1986 and the order of merger of SAG Level I & II in March, 1987, both orders were effective from 1.1.1986. It is well settled

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that the norms regarding promotion of Officers belonging to the Indian Postal Services Group 'A' can be laid down either by a law made by the appropriate legislation or by rules made under the proviso to Article 309 of the Constitution or by means of Executive instructions issued under Article 13 of the Constitution of India. If there is a conflict between the executive instructions and the Rules made under the proviso to Article 309 of the Constitution, the Rules made under proviso to Article 309 would prevail. In the instant case, the Rules made in 1987 were applicable till the merger of the two posts i.e. Senior Administrative Grade I and II. However, the Respondents contend that because of the merger of the two scales, the rules of 1987 ceased to apply by virtue of the merger of the two grades and therefore, there were no other rules except the fact that the rules coming into force on 8.9.1994 were in the draft form and the amendment of the Recruitment Rules was approved by the Department of Personnel and Training and the Union Public Service Commission and they were seeking right to fill up the existing number of vacancies to be filled in accordance with the draft rules. It is also urged that in the absence of any Recruitment Rules, as contemplated under the proviso to Article 309 of the Constitution (and by virtue of the fact that the rules of 1987 had ceased to apply, the matters could only be governed by executive instructions. It is further stated that in the

year 1993-94 eight vacancies were notified. The applicant has also been considered insofar as the Senior Administrative Grade is concerned, however, her name has not figured in the panel. Though as per the DPC recommendations, 9 names for 8 vacancies were notified. However, in the facts and circumstances of the case, only 6 existing vacancies were available for the purpose of promotion to the post of Senior Administrative Grade. Accordingly, they caused promotion order on 27.4.1995 promoting 7 persons to the post of Senior Administrative Grade.

5. The contentions of the Respondents stating that the 1987 rules ceased to apply has not been accepted by the applicant. Insofar as DPC convened on 3.8.1994 is concerned only the 1987 rules which was notified by the department existed and further the proposed amendment is not in supersession of the earlier rules, it is only amendment to the existing rules; therefore, the contention of the respondents that 1987 Rules ceased to apply is not based on any material. Pursuant to the IVth Pay Commission, both Senior Administrative Grade I and II were merged in 1987 though the effect was given w.e.f. 1.1.1986. The Recruitment Rules of 1987 were notified with full knowledge of merger of S.A.G. Level I and II. Insofar as DPC is concerned, they are governed by D.O.P. circular dt. 10.4.1989 and under no circumstances, the proposed amendment rules can be applied to the facts of this case. Therefore, under the existing rules only 5 years service is required to be considered and not 8 years as per the proposed rules.

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6. In this connection, the learned counsel Shri M.S.Ramamurthy drew our attention to the decision of the Supreme Court in Y.V. Rangaiah v. J.Sreenivasa Rao (A.I.R. 1983 S.C. 852) wherein the Supreme Court has held that "vacancies in the promotional posts occurred prior to the amended rules would be governed only by the old Rules and not by the new Rules. Keeping in view the ratio laid down in the aforesaid case, he urged that the panel prepared for filling up of the vacancies under the amended rules was not in accordance with the rules, the same is required to be quashed and set aside and the respondents be directed to prepare a fresh panel under the existing rules when the vacancies existed. Further, it is a well settled principle that 'Executive Instructions' cannot amend the statutory rules since 1987 rules have not been abrogated or superseded; therefore, the contention of the Respondents that in the absence of any rules, the matter could be governed by 'Executive Instructions' does not seem to be justified. Even assuming that the 'Executive Instructions' would apply, it has not been brought to our notice that there were any 'Executive Instructions' that were made applicable and by that time, the O.M. issued by the Department of Personnel on 10.4.1989 had come into force, which should be taken into consideration when the DPC met, wherein it envisages 5 years service condition and not 8 years was to be taken into account for the purpose of promotion. It is also urged before us, that the DPC has taken into consideration the ACRs for 8 years ending 31.3.1993. Since the DPC was convened on 3.8.1994, they ought

to have considered the AGRs upto 31.3.1994. However, the learned counsel for the official respondents Shri P.M.Pradhan clarified the point stating that for the purpose of consideration it is a Calendar Year and accordingly, the DPC took into consideration of AGRs upto December, 1993 for the purpose of selection.

7. In ~~the~~ facts and circumstances of the case, all the candidates considered by the DPC in August, 1994 are governed by the existing rules of 1987 and the manner and method in which the DPC promoted the officials does not seem to be in accordance with the existing rules. Since 7 of the respondents have already taken charge on 27.4.1995 against whom the applicant has no grievance because all are senior to her, but only when the appointment was to be made in respect of Respondent Nos.13 and 14 she urged that they are juniors to her and the method adopted by the DPC was not in accordance with the relevant rules. Accordingly, the Tribunal acceding to her request, had stayed the appointment of Respondent Nos.13 and 14.

8. It is true that in the seniority list of Officers in the feeder cadre the applicant's name is shown at Sl.No.107 and belongs to 1971 batch. Her further contention is that except Respondents Nos. 6 to 8 other people referred to therein have been promoted to Senior Administrative Grade on 27.4.1995 are juniors to her in the feeder cadre, but the promotion to the S.A.G. is by virtue of selection which depends upon the performance of the respective officers.

9. Against the interim order passed by the Tribunal the Respondents had filed an SLP in the Supreme Court which was dismissed by the Apex Court

on 4.1.1996. In the meanwhile, the Respondent No.13 who is aggrieved by the order of the Tribunal, filed a Review Petition before the Tribunal, when the matter came up for hearing on 16.1.1996 the official respondents also filed an M.P. for modification of the interim orders. Keeping in view the fact that SLP was dismissed by the Supreme Court, the learned counsel for the applicant Shri Ramamurthy urged that both the R.P. and M.P. do not survive and the same ~~are~~ required to be dismissed. On the other hand, the learned counsel Shri G.K.Masand appearing on behalf of the Review Petitioner (R-13) urged that it is incorrect to state that just because the S.L.P. filed by the Respondents has been dismissed by the Supreme Court, the Review Application cannot be sustained. It is open to the Review Applicant to seek for review of the order passed by the Tribunal if he or she is otherwise aggrieved by the said order and if she has not been heard when the Tribunal passed the order. As there is considerable merit in the submission of the Review Petitioner we had allowed the R.P. to be on record. The official Respondents have filed an M.P. seeking for modification of the interim order passed by the Tribunal stating that one 'more vacancy' will be kept vacant so as to enable the original applicant to accommodate in case she succeeds in the O.A. and allow the panel to operate. The said contention of the respondents has been rejected. However, after considering the rival contentions of the parties and considering the controversial nature of the case, the O.A. itself was fixed for early hearing. The matter was finally heard on 25.6.1996 and the interim order passed was allowed to continue.

10. We have heard the learned counsel for the applicant Shri M.S.Ramamurthy, Shri P.M.Pradhan, counsel for the official respondents and Shri G.K.Masand for Respondent No.13. Shri G.K.Masand was not allowed to make his submission, but taken the Review Petition on record and perused the pleadings carefully. In the facts and circumstances of the case we are of the view, that D.O.P. instructions/guidelines of 1989 would squarely apply to the facts and circumstances of this case. In para 6.2.1 reads as follows :

"6.2.1. Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory. Hence -

a) The DPC should consider CRs for equal number of years in respect of all officers considered for promotion subject to (c) below.

b) The DPC should assess the suitability of the officers for promotion on the basis of their service record and with particular reference to the CRs for 5 preceding years. However, in cases where the required qualifying service is more than 5 years, the DPC should see the record with particular reference to the CRs for the years equal to the required qualifying service. (If more than one CR has been written for a particular year, all the CRs for the relevant year shall be considered together as the CR for one year).

c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account.

d) Where an officer is officiating in the next higher grade and has earned CRs in that grade, his CRs in that grade may be considered by the DPC in order to assess his work, conduct and performance, but no extra weightage may be given merely on the ground that he has been officiating in the higher grade.

e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own

assessment on the basis of the entries in the CRs because it has been noticed that some times the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

f) If the Reviewing authority or the Accepting authority as the case may be has over-ruled the Reporting Officer of the Reviewing Authority as the case may be, the remarks of the latter authority should be taken as the final remarks for the purposes of assessment provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the remarks of the Reporting Officer, Reviewing authority and Accepting authority are complementary to each other and one does not have the effect of over ruling the other, then the remarks should be read together and the final assessment made by the DPC."

11. Whereas, the DPC has referred to 8 years CR as per the amended rules which on the face of the record is not permissible. Nowhere it has mentioned the under the 1987 Rules, qualifying service/but referred to in the amended Rules of 1994. That being so, the DPC has to be guided dt. 10.4.1989 by the guidelines/issued by the D.O.P. in the matter. The contention of the applicant is that the DPC ought to have considered the CRs upto March, 1994, that the DPC have flouted the administrative guidelines of the D.O.P., vacancies have not been calculated according to the Calendar year, separate select panels have not been prepared for vacancies arising in 1993 & 1994 and ACRs for the requisite years have not been considered. However, that contention has been rejected by the Tribunal during the course of hearing. According to the applicant, the DPC should have taken into account the CRs from 1989 to 1994. However, they stopped considering the ACRs after March, 1993. In view of DOP O.M. dt. 10.4.1989, after 1989 the Bench Mark is 'very good' for the purpose of promotion to SAG. The applicant has also challenged the composition of the selection committee and further submission is that prior to

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10.4.1989 if the remarks in the ACR is 'good' cannot be barred for promotion, but it should be considered. The applicant relied upon the decision of the Principal Bench in S.D.Suchdeva v. Director General, Employees' State Insurance Corpn. And Others decided on 12.7.1988, wherein it was held that grading awarded by the DPC which an employee has got during three out of five years - For example if he has earned three 'Very Good' reports during the last five years, overall grading will also be 'Very Good'.

12. The main thrust of argument of the learned counsel for the Respondents is that in the absence of any Recruitment Rules 'Executive Instructions' prevailing on that date would apply and that the DPC held for the years 1993-94 and no Recruitment Rules were available at the relevant time. In that circumstances, he drew our attention to para 6.4.3 read with 6.2.1(b), accordingly the DPC has considered the CRs of the officials upto 1993 Calendar Year which is in accordance with the instructions. As per the guidelines the DPC has got the discretion to look into CRs of more than 5 years, therefore, since there is no discrimination of any individual and the DPC has considered the CRs for 8 years of the officials and made the selection accordingly.

13. The learned counsel for the applicant also drew our attention to the decision of this Bench in Krishna Davanba Nandgave v. Union of India & Others (1995) 30 ATC 10). On a perusal of the same, we find, that the said case was decided on the facts and circumstances of that particular case, the same is not applicable in this case. It is brought to our notice

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that 1989 O.M. came into effect after the merger of the Senior Administrative Grade I and II in June, 1987.

The applicant has made representation against the selection made by the DPC narrating various aspects of the case immediately after the DPC was held requesting for convening a Review DPC, but no reply has been given by the Respondents, whereby, the applicant was compelled to file this O.A.

14. In the light of the above, the only question to be seen here is whether the DPC was justified in considering the 8 years CRs of the officials for the purpose of promotion to the post of SAG. It is an admitted fact that at the relevant time only 1987 Rules were existing and the DPC cannot take into consideration the proposed Recruitment Rules for the purpose of selection, as stated earlier, the new Recruitment Rules is not in supersession of the earlier Recruitment Rules, but it is only an amendment to Recruitment Rules. Therefore, the DPC cannot by pass the same to consider the selection based on the proposed Recruitment Rules, which is clearly contrary to the statutory rules. Further, even in the O.M. of 1989 the DPC is required to consider only 5 years CR for the purpose of selection posts, whereas, in the instant case 8 years CRs have been taken into consideration. Therefore, the question to be seen is whether the procedure adopted by the DPC is in tune with the DOP guidelines or the existing Rules then available.

15. During the course of hearing we had directed the Respondents to produce the DPC records held on 3.8.1994 and ACRs of the applicant, the same

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was furnished for our perusal. On perusal of the DPC records, we find, that the DPC has recommended/selected for the post of SAG nine names and they have drawn the select panel on the basis of individual ranking and forwarded to the Government. However, the Appointment Committee of Cabinet (for short, ACC) has not accepted the recommendation of the DPC in the order in which it was recommended but modified the same, though approved the list ultimately in the modified manner. In our opinion, the action of the ACC does not appear to be in accordance with the Constitutional Scheme or in accordance with the rules, keeping in view the Apex Court's decision in Asha Kaul v. State of J&K (1993 SCC (L & S) 637) wherein it has held that government has no absolute discretion in the matter. It must act fairly. It cannot pick and choose or approve a part of it and reject the other part. In that event, they have to record reasons for disapproval. Once select list is sent in accordance with the requisition of the government, it must accord its sanction irrespective of the number of vacancies and vacancies can be filled as and when they arise during the period the list remains operative. The Government cannot pick and choose candidates out of the list. Of course, where in respect of any particular candidate any material is discovered disclosing his involvement in any criminal activity, the Government can always refuse to appoint such person but this would not be a case touching the select list prepared and recommended by the Commission. Applying the principles laid down by the Apex Court to the facts of this case, we find that the change made by the ACC regarding the panel


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list submitted by the DPC regarding ranks of the officials is found to be irregular. The ACC do not possess the power to change the ranks given by the DPC, though they have the power to accept or reject the list in entirety. The question is of filling the vacancies that occurred prior to the amended rules. Therefore, we have no hesitation that the posts which fell vacant prior to the amended Rules 1994 would be governed by the old Rules, 1987 and not by the new Rules.

16. In our considered opinion, the procedure adopted by the DPC is neither in accordance with the Recruitment Rules nor in compliance of the DOP guidelines.

17. In the result, we allow the O.A. and quash and set aside the selection made by the DPC on 3.8.1994. We further direct the respondents to convene a review DPC for the then existing vacancies under the then existing rules 1987 and consider the applicant along with others under the then existing rules and take appropriate action within a period of ^{Six}~~three~~ months from the date of receipt of this order. Pending R.P. and M.Ps stands disposed of along with the O.A. No order as to costs.


(P.P. SRIVASTAVA)
MEMBER(A)


(B.S. HEGDE)
MEMBER(J).

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