SUPREME COURT OF KENTUCKY
2010-SC-000782

JAMES E. NEWTON, JR. — **APPELLANT**

v. — **APPELLANT'S BRIEF**

UNIVERSITY OF LOUISVILLE — **APPELLEE**

APPEAL FROM COURT OF APPEALS OF KENTUCKY
2009-CA-002197

Submitted by:

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed this 9th day of January 2012 to Donna King Perry and Jeremy Stuart Rogers, Dinsmore & Shohl LLP, 110 S. Fifth Street, Ste. 2500, Louisville, KY 40202; Hon. Olu Stevens, Jefferson Circuit Court, Division 6, 700 West Jefferson Street, Louisville, KY 40202; and Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. I further certify that the record on appeal was not withdrawn by the party filing this brief.

Counsel for Appellant

I. INTRODUTION

This is a wrongful termination case in which the trial court sustained, and the Court of Appeals upheld a motion for summary judgment by the Appellee, University of Louisville. The particular issue on appeal is whether the University's policies and procedures, "The Redbook," published in hard copy and online forms a sufficient contract for purposes of waiver of governmental immunity under KRS 45A.245(1), the Kentucky Model Procurement Code.[1]

[1] See Jefferson Circuit Court Opinion and Order granting summary judgment entered on September 22, 2009 and Opinion and Order entered November 3, 2009 denying Appellant's motion to alter, amend, or vacate the Circuit Court's September 22, 2009 Order and the Court of Appeals Opinion entered November 5, 2010 attached hereto as Exhibits 1, 2, and 3.

II. STATEMENT CONCERNING ORAL ARGUMENT

This is a case of first impression in the Commonwealth. As such, Appellant, James E. Newton, Jr., believes that oral argument is important for the Court to fully appreciate the arguments as to the sufficiency of his contract with the University of Louisville in terms of abrogating governmental immunity pursuant to KRS 45A.245(1), the Kentucky Model Procurement Code.

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IV. STATEMENT OF THE CASE

The singular issue throughout the life of this wrongful termination/breach of employment contract case has been whether James E. Newton, Jr. had a written employment contract with the University of Louisville sufficient to overcome the University's governmental immunity under the provisions of KRS 45A.245. In rendering its decision below, the Court of Appeals held that Mr. Newton had a lawfully authorized, written contract, but his lawfully authorized, written contract was not the type of lawfully authorized, written contract contemplated by KRS 45A.245. Slip Opinion at 7-8. However, KRS 45A.245 merely requires a lawfully authorized, written contract in order for governmental immunity to be waived and suit to be brought against the Commonwealth or its entities such as the University of Louisville.

A. PROCEDURAL BACKGROUND

Mr. Newton first filed suit in this matter on January 23, 2007. The University of Louisville filed a motion to dismiss on March 2, 2007. The parties briefed their respective positions, and the trial court heard oral arguments on June 8, 2007. The trial court then denied the University's motion to dismiss on April 30, 2008, and the case proceeded through discovery. The University then filed a motion for summary judgment on July 15, 2009, Mr. Newton filed a response on July 21, 2009, and the University filed a reply on August 3, 2009. The trial court sustained the University's motion for summary judgment on September 22, 2009. Mr. Newton filed a motion to alter, amend, or vacate the trial court's judgment on September 28, 2009, which was overruled on November 16, 2009. Mr. Newton then appealed to the Court of Appeals, the parties filed written briefs, and the court heard oral arguments from the parties on October 13, 2010, and rendered its

opinion affirming the judgment of the Jefferson Circuit Court on November 5, 2010. Mr. Newton filed his motion for discretionary review on December 2, 2010, and this Court granted discretionary review on November 16, 2011.

B. MATERIAL FACTS

Mr. Newton worked for the University as a groundskeeper from May 10, 2004 until his wrongful termination by the University on May 10, 2006. Although Mr. Newton was actually terminated on June 15, 2006, the University made the termination retroactive to May 10, 2006 effectively cutting off any appeal rights Mr. Newton had pursuant to his written contract with the University.

Mr. Newton sustained a work-related injury on January 19, 2005 and was unable to work because of this injury from February 15, 2005 until June 10, 2005. During the time that Mr. Newton was unable to work because of his work-related injury, he exhausted all of his leave time and used additional time from the University's shared leave pool. Mr. Newton returned to light-duty work from approximately June 10, 2005 until July 10, 2005. Mr. Newton then resumed regular duties from July 10, 2005 until September 13, 2005. Mr. Newton was unable to continue working because of excruciating pain associated with his work-related injury.

Because of the severe pain he experienced, Mr. Newton sought treatment from Dr. Kenneth Calhoun who, based upon his examination and a diagnostic MRI, advised Mr. Newton that he should not return to work. Dr. Calhoun then referred Mr. Newton to Dr. David Petruska, a neurosurgeon. Mr. Newton applied for workers compensation benefits on or about September 13, 2005, which were subsequently granted based upon his on-the-job injury.

Mr. Newton first saw Dr. Petruska on or about November 1, 2005 at which time Dr. Petruska diagnosed Mr. Newton's condition as herniated/bulging discs at C5-C7. On or about January 4, 2006 Dr. Petruska performed a cervical decompression surgery on Mr. Newton in an attempt to alleviate his pain and address his underlying condition. The surgery failed to alleviate Mr. Newton's severe pain and disability resulting therefrom.

On or about June 14, 2006, Mr. Newton completed the required paperwork for application for long-term disability benefits pursuant to his employment contract with the University. Mr. Newton submitted the application for long-term disability benefits to his direct supervisor Greg Giddings on this same date.

Rather than meet its duties pursuant to its contract with Mr. Newton, the University failed to complete the application process for Mr. Newton's long-term disability benefits. Instead, by letter dated June 15, 2006 the University terminated Mr. Newton's employment retroactive to May 10, 2006.

During the entire course of his employment with the University, Mr. Newton had worked under the terms of the "Redbook," the University's policies and procedures pertaining to employment, discipline, privileges, and other rights and responsibilities of employees. The University also posted the same rules and regulations on its website, and the website was freely available to everyone not only in the University community, but in the outside world as well. Neither the Redbook nor the University's website contained any disclaimer stating that the provisions therein did not change the at-will nature of University employees. Furthermore, the contents of the Redbook and the University's website contained specific policies and procedures, whose terms were not precatory, but rather, were explicit.

V. ARGUMENT

A. THE COURT OF APPEALS ERRED IN HOLDING THAT MR. NEWTON DID NOT HAVE A WRITTEN CONTRACT SUFFICIENT TO OVERCOME THE UNIVERSITY'S GOVERNMENTAL IMMUNITY.

In reaching its decision pertaining to Mr. Newton's appeal, the Court of Appeals found that Mr. Newton had a lawfully authorized, written contract with the University. However, the Court of Appeals went on to determine that even though Mr. Newton had a lawfully authorized, written contract with the University, his contract was not the type of contract contemplated by the Kentucky Model Procurement Code.

In its analysis, the Court of Appeals engaged in statutory construction that was not necessary because the language of KRS 45A.245 is clear. Thus, the Court of Appeals violated the most commonly stated rule in statutory construction, i.e., "the 'plain meaning' of the statute controls." *Wheeler & Clevenger Oil Company, Inc. v. Washburn*, 127 S.W.3d 609, 614 (Ky. 2004) (citations omitted). Only when the application of the plain meaning of the statute would lead to an absurd result may a court resort to further interpretation beyond application of the plain meaning of the statute. *Id.* Yet the Court of Appeals looked to other jurisdictions and concluded that KRS 45A.245 applied only to express contracts for hardware and services subject to bidding procedures. Slip Opinion at 11.

1. Mr. Newton Clearly Had a Written Contract With the University.

In Kentucky an employee handbook, or statement of personnel policy, may confer upon the employee contractual rights. *Kentucky Unemployment Insurance Commission v. Goode,* 631 S.W.2d 28 (Ky.App. 1982) (a provision in the employee handbook is part of

the employment contract). "An express personnel policy can become a binding contract 'once it is accepted by the employee through his continuing to work when he is not required to do so.'" *Parts Depot, Inc., et al. v. Beiswenger, et al.* and *Housing Authority of Middlesborough v. Smith, et al.*, 170 S.W.3d 354, 362 (Ky. 2005) (quoting *Hoffman-LaRoche, Inc. v. Campbell*, 512 So.2d 725, 733 (Ala. 1987)). The *Parts Depot* Court also cited to the case of *Dahl v. Brunswick Corp.*, 356 A.2d 221, 224 (Md. 1976) which stated: "[T]here is abundant support for the proposition that employer policy directives regarding aspects of the employment relation become contractual obligations when, with knowledge of their existence, employees start or continue to work for the employer." *Id.* Moreover, an employee personnel policy statement "... may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements." *Id.* (quoting *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 895 (Mich. 1980)).

Where an employee handbook contains a promise of job security and is distributed by the employer to its employees, the promise of job security becomes a contract, which is binding and enforceable when the employee continues to work while under no obligation to do so. *Id.* (quoting *Cook v. Heck's, Inc.*, 342 S.E.2d 453, 459 (W.Va. 1986)). In addition, there need not be evidence that the parties mutually agreed that policy statements create contractual rights:

> [E]mployer statements of policy ... can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy

> statement in preemployment interviews and the employee does not learn of its existence until after his hiring.

Id. at 363 (Quoting *Toussaint*, 292 N.W.2d at 892).

There are only two exceptions to the rule that employer policy statements may be construed to confer contractual rights upon an employee. Only when the language in the policy is precatory or when there is a clear and unequivocal disclaimer stating that the policies do not alter the at-will nature of the employment will the policy statements not be construed to confer contractual rights upon the employee. *Id.* at 363, 364.

The University's personnel policies published on its website and in the University's Redbook clearly confer contractual rights upon Mr. Newton.[2] First, Mr. Newton was a regular status employee pursuant to the definitions published in the employee handbook, which state that regular status is attained when an employee satisfactorily completes the provisional employment period defined in the same section as "[a] six-month period of employment beginning with the first day of regular employment designed to provide the University with a period to determine whether an employee is suitable for and competent to perform the work for which he or she is hired." Moreover, Mr. Newton was employed in a classified position with an established set of duties and rate of pay.

Under the handbook's Employee Benefit section, Mr. Newton was entitled to long-term disability benefits. Mr. Newton was provided benefits pursuant to the University's Family and Medical Leave Policy PER-4.17 adopted on January 4, 2001. Moreover, Mr. Newton was entitled to restoration to an equivalent position within the University pursuant to this policy, but the University chose instead to wrongfully

[2] The relevant policies in the Redbook may be found beginning at Record p. 35.

terminate his employment after Mr. Newton filed his application for long-term disability benefits. Additionally, the University did not provide Mr. Newton with the due process guaranteed him under his contract.

Mr. Newton was wrongfully dismissed from his employment from the University in contravention of Personnel Policy PER-4.14 adopted April 22, 1993. Subsection 1.D of this policy section is particularly instructive in the case *sub judice*. This policy section declares: "A regular status employee may be dismissed only for cause...." Pursuant to Personnel Policy PER-5.01 adopted on February 3, 1993, disciplinary action could lead to termination, but only for the listed offenses under Subsection II. Mr. Newton committed none of the listed offenses. His only offense was to suffer a debilitating injury on-the-job and to apply for long-term disability benefits.

Additionally, there are no disclaimers as to the effect of the University's policy statements in either the Redbook or in the University's online version of the Redbook, nor is there any mention at all of "at-will employees" or "at-will employment" anywhere on the University's website. Thus, there is no disclaimer that the policies in the Redbook do not affect the at-will nature of the employment relationship, and accordingly, Mr. Newton had contractual rights pursuant to these policy statements.

The court below agreed, finding that the Redbook and personnel policies contained specific contractual language and created contractual obligations on the part of the University. Moreover, the court below found that there was nothing in the record to show that the University had posted any disclaimer of contractual status in the Redbook or anywhere else in its personnel policies. Slip Opinion at 7-8.

2. The Redbook Meets the Requirement of a Written Contract Specified in KRS 45A.245.

In order to bring suit against the Commonwealth or one of its agencies, the party bringing suit must have a written contract with the Commonwealth or its agency as required by KRS 45A.245(1):

> Any person, firm or corporation, having a **lawfully authorized written contract** with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

(Emphasis added).

"Contract" is defined in KRS 45A.030(7):

> "Contract" means **all types of state agreements**, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other item. It includes awards; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; purchase orders; and insurance contracts except as provided in KRS 45A.022. It includes supplemental agreements with respect to any of the foregoing.

(Emphasis added).

> And, "writing" and/or "written" is defined in KRS 45A.030(29):
>
> "Writing" or "written" means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

Additionally, KRS 45A.135 provides: "Subject to the limitations of KRS 45A.125 and 45A.130, any type of contract which will promote the best interests of the Commonwealth may be used." KRS 45A.125 prohibits the use of cost plus contracts,

and KRS 45A.130 prohibits the use of cost reimbursement contracts. Otherwise, any type of contract may be employed under the provisions of the Model Procurement Code.

Pursuant to the doctrine of *in pari materia* statutes with a common purpose or relating to the same person or thing must be construed together. *Hardin County Fiscal Court v. Hardin County Board of Health*, 899 S.W.2d 859, 862 (Ky.App. 1995). Several sections of the Model Procurement Code, when read together, provide that written employment contacts, even if they are implied written employment contracts, are sufficient to meet the requirements of KRS 45A.245, which requires only a written contract in order for governmental immunity to be waived.

Not only does KRS 45A.245(1) require only a lawfully authorized written contract in order for a party to bring suit against the Commonwealth or its entities, but KRS 45A.030(7) defines a "contract" as all types of state agreements and list several examples. Further, KRS 45A.030(29) defines "writing" or "written" as letters, words, numbers, or their equivalent. And, KRS 45A.135 allows the use of any type of contract except cost plus and cost reimbursement contracts.

Clearly, Mr. Newton has a written contract sufficient to meet the requirements of KRS 45A.245(1). The University's Board of Trustees is authorized to promulgate the policies and procedures found in the Redbook. *See* KRS 164.830. Thus, Mr. Newton's contract with the University was lawfully authorized. The University's policies were written in two different media sufficient to meet the definition of written in KRS 45A.030(29), i.e., the traditional published Redbook and the online employee handbook. Further, the online version of the handbook is sufficient to meet the writing requirement of any statute. *See* KRS 369.01, *et seq*. Furthermore, Mr. Newton had an agreement to

provide services to the University within the definition of "contract" in KRS 45A.030(7). Finally, even if Mr. Newton's written contract with the University was an implied contract, KRS 45A.135 allows for the use of any type of contract to effectuate the purposes of the Model Procurement Code, and it certainly does not exclude the use of implied contracts.

The words in statutes are to be "... construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed according to such meaning." KRS 446.080(4). This Court has clearly indicated that the plain meaning of words in a statute must prevail:

> It is this Court's duty when interpreting statutes to give effect to the General Assembly's intent, but "no rule of interpretation... require[s] us to utterly ignore the plain ... meaning of words in a statute." In fact, "[t]he plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source." We "ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed." In other words, we assume that the "[Legislature] meant exactly what it said, and said exactly what it meant." Only "when [it] would produce an injustice or ridiculous result" should we ignore the plain meaning of a statute.

Revenue Cabinet v. O'Daniel, 153 S.W.3d 815, 819 (Ky. 2005) (citations omitted).

No allegation has been raised at any point in this case that an injustice or ridiculous result would occur if the plain meaning of KRS 45A.245(1) were applied. Yet, the court below, after engaging in unnecessary and strained statutory construction, determined that Mr. Newton did not have the type of written contract contemplated by the Model Procurement Code. First, the Court of Appeals stated that "[a]n implied contract is by definition unwritten in whole or in part." Slip Opinion at 8. But when

viewing the contract between Mr. Newton and the University, there is not one single term of the contract that is unwritten. In fact, the contract between the University and Mr. Newton covers every aspect of the employment relationship and is so explicit that these terms cover numerous pages in the Redbook.

In its opinion, the Court of Appeals quoted from the case of *Victor's Executor v. Monson*, 283 S.W.2d 175, 176-177 (Ky. 1955): "A contract implied in fact... differs from an 'express contract' only in the mode of proof required." Here, the contract in question is entirely in writing, but since there are no signatures on the document, the mode of proof necessary to prove the existence of the contract is different from an express contract where signatures appear. The employer makes an offer via specific terms in the handbook or policies without any disclaimer, the employee accepts the offer by continuing to work under the terms of the handbook or policies, and a contract is formed.

The Court of Appeals further erred in its analysis when it stated: "Our General Assembly did not include the term 'implied contract' in the waiver provision although it was free to do so." Slip Opinion at 10. In fact, the General Assembly did not include any specific type of contract in its waiver provision found at KRS 45A.245(1). The only requirement to invoke the waiver of immunity was that the party seeking to charge the Commonwealth must have a lawfully authorized written contract. But, the General Assembly did state that any type of contract other than a cost plus or cost reimbursement contract is acceptable. KRS 45A.135.

Thus, the analysis of the Court of Appeals is clearly flawed. Moreover, the General Assembly specifically mentioned implied contracts in its definition of contract by listing purchase orders as a type of contract. *See* KRS 45A.030(7); *See also Simmons*

v. Atteberry, 310 S.W.2d 543 (Ky. 1958) (holding that where a purchase order was not confirmed by one party but services under the purchase order were provided, the party providing the services may recover a reasonable amount under an implied contract).

3. The Court of Appeals Erred in Holding That the Model Procurement Code is Limited to the Procurement of Items of Hardware and Services Subject to Bidding Procedures.

The Court of Appeals erred when it held that the Model Procurement Code is limited solely to the procurement of hardware and services subject to bidding procedures. If this interpretation is correct, then contracts stricken between, for example, the University of Kentucky Chandler Medical Center and its physicians would be illusory for the simple reason that the physicians could not bring suit to enforce their contractual rights or for damages for the breach of their contracts with the Medical Center. *See Restatement of Contracts 2d* § 77 (2007). Additionally, every professor who has tenure in the Commonwealth's higher education system would find that tenure was a hollow promise indeed if the Court of Appeals' holding pertaining to the limitation of the Model Procurement Code is upheld.

Public policy demands better, and there can be little doubt that the General Assembly did not intend for this state's employment contracts to be illusory. The better public policy is just the opposite.

In fact, this Court has addressed the very issue in the case of *Commonwealth of Kentucky, Tourism Development Cabinet, Department of Parks, et al. v. Whitworth, et al.*, 74 S.W.3d 695 (Ky. 2002). In *Whitworth* the plaintiffs were employees hired over a period of years performing various services for the Department of Parks under oral contracts. The employees contended that they were full-time state employees and were

qualified for Kentucky Retirement benefits. Their contention was based on the allegation that their oral employment contracts were ratified by writings sufficient to meet the requirements of KRS 45A.245, however, the Department of Parks contended that the employees were at-will, temporary employees. The circuit court granted summary judgment to the Department of Parks and subsequently this Court held that even if there were sufficient writings to meet the requirements of KRS 45A.245, such writings would be beyond the scope of the powers granted to the Commissioner of Parks, and therefore would not constitute lawfully authorized written contracts under KRS 45A.245.

The clear implication of the holding by this Court in *Whitworth* was that lawfully authorized written employment contracts would be enforceable against the Commonwealth pursuant to KRS 45A.245. At no point in its opinion does this Court hold that written employment contracts are unenforceable against the Commonwealth. In fact, Justice Keller, in dissent, affirmatively states that written employment agreements are enforceable against the Commonwealth pursuant to KRS 45A.245.

In reaching its conclusion that Mr. Newton's written contract with the University was insufficient to waive immunity, the Court of Appeals looked to other jurisdictions. The Court of Appeals wrongly relied upon *Federov v. Board of Regents for University of Georgia*, 194 F.Supp.2d 1378, 1394 (S.D.Ga. 2002). *Federov* is simply inapposite. It is a student discipline case arising out of the Medical College of Georgia in which a student was expelled. One of the arguments raised in his lawsuit against the Board of Regents was that he had an implied contract with the University. However, he failed to allege, nor did he point to any written contract, implied or otherwise. The holding in *Federov* does not state that contracts in Georgia must be express contracts in order to be sufficient

to overcome immunity, but rather, merely states that contracts have to be written in order to do so.

The Court of Appeals also wrongly relied upon *Financial Healthcare Associates, Inc. v. Public Health Trust of Miami-Dade County*, 488 F.Supp.2d 1231, 1236 (S.D.Fla. 2007). This case is likewise inapposite to the case at bar. Whereas Kentucky's waiver of governmental immunity is statutory within the Model Procurement Code, Florida's waiver of immunity is judicially created. This case simply does not apply where the Kentucky legislature has spoken on the issue.

The better approach is found in *Garcia v. Middle Rio Grande Conservancy District*, 918 P.2d 7 (N.M. 1996). In this case, the Supreme Court of New Mexico ruled that personnel policies and handbooks issued by the state government and/or its agencies, while implied contracts, constituted valid written contracts sufficient to waive sovereign immunity. *Garcia* is a case with facts quite similar to the case at bar and which took place in a legal environment quite similar to the environment in Kentucky.

At the time in the state of New Mexico, parties had to prove the existence of a written contract with the state in order to overcome the state's immunity from suit. Mr. Garcia, the plaintiff in the underlying suit, alleged that he had been demoted contrary to the published policies of his employer, the Middle Rio Grande Conservancy District, and his wages were significantly lower as a result of the demotion. He brought suit claiming breach of his contractual rights under the policies published by his employer, the Middle Rio Grande Conservancy District, a unit of the New Mexico state government. The New Mexico Supreme Court found in favor of Mr. Garcia, holding that the published policies were a written contract sufficient to overcome governmental immunity.

Additionally, *Garcia* identifies elements which should be considered in the analysis as to whether a contract is written, be it an implied contract or not, sufficient to overcome immunity. First, the *Garcia* court noted that the employer could not provide a legal or practical basis on which to except the implied but written employment contract from the requirement of a valid written contract. The same is true in this case where Mr. Newton had a valid written contract with the University based upon its detailed personnel policies in the Redbook and his acceptance of those terms. There simply is no legal or practical basis to except the implied but written contract between Mr. Newton and the University from the requirement of a valid legal contract, particularly where the same contract would provide a basis for Mr. Newton to file suit to enforce its terms or for damages for its breach if his employer was a private sector employer.

Second, the *Garcia* court determined that the policy statements in question controlled the employer-employee relationship by creating a reasonable expectation in the employees that the employer would follow the provisions within the policies. Certainly this is true in the extant case as well. Mr. Newton, without doubt, had a reasonable expectation that the University would abide by its own policies and procedures in its employer-employee relationship with him.

VI. CONCLUSION

Based upon the foregoing, this Court should reverse the holding of the Court of Appeals in which it found that Mr. Newton's written contract with the University was insufficient to overcome the University's governmental immunity and remand this matter to the Jefferson Circuit Court for trial on the merits.

Respectfully submitted,

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