

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

MATTHEW M. TAAMU,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,
Local 646, AFL-CIO; DAYTON
NAKANELUA, State Director, United Public
Workers, AFSCME, Local 646, AFL-CIO;
and EDDIE AKAU, Business Agent, United
Public Workers, AFSCME, Local 646,
AFL-CIO,

Respondents.

CASE NO. CU-01-282

ORDER NO. 2677

ORDER GRANTING IN PART AND
DENYING IN PART UPW'S MOTION
TO DISMISS COMPLAINT AND/OR
FOR SUMMARY JUDGMENT, AND
DENYING MOTION TO DISMISS
FOR LACK OF PROSECUTION; AND
NOTICE OF SECOND PREHEARING/
SETTLEMENT CONFERENCE

ORDER GRANTING IN PART AND DENYING IN PART UPW'S MOTION
TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT
AND DENYING MOTION TO DISMISS FOR LACK OF PROSECUTION;
AND NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

On October 20, 2009, Complainant WILLIAM M. TAAMU (Complainant), pro se, filed a prohibited practice complaint in Case No. CU-01-282 (Complaint) against Respondents UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union), DAYTON NAKANELUA, State Director of UPW (Nakanelua), and EDDIE AKAU, Business Agent of UPW.

The Complaint alleges, inter alia, that Respondents engaged in prohibited practices by violating Hawaii Revised Statutes (HRS) §§ 377-8; 378-51; 89-8; 89-13(b)(1); 89-13(b)(3); and 89-13(b)(4), and breached the Duty of Fair Representation by (1) arbitrarily refusing to take Complainant's meritorious case to arbitration without reason; (2) failing to investigate/discuss the grievance and make an informed and timely decision regarding the arbitration process; (3) failure to notify Complainant of a decision not to arbitrate in time for Complainant to pursue other available remedies as requested by Complainant; (4) not responding to Complainant when Complainant attempted to contact respondents by phone and certified mail before, during, and after the grievance process exhibiting unreasonable negligence on the part of Respondents; (5) acting in a perfunctory manner during the grievance procedure by not answering Complainant's phone calls, not keeping Complainant informed, not showing up and being late to grievance hearings with no valid reason, not investigating the grievance and leads

provided by Complainant therefore preventing certain factual proofs of Complainant's position; (6) arbitrarily refusing to provide copies of forms or records pertaining to grievance formally requested by Complainant verbally and in writing or providing valid reasons of action as also requested by Complainant; (7) discriminating against Complainant for previous Complaint against respondent for similar irrational behavior regarding Breach of Duty of Fair Representation; (8) failing to perform ministerial acts on Complainant's behalf and any other statute violations found in the course of investigation.

On October 27, 2009, Respondents filed a Motion to Dismiss Complaint and/or for Summary Judgment, asserting lack of jurisdiction and failure to state a claim for relief under HRS § 89-13(a) and (b)(1) through (5). Also on October 27, 2009, Respondents filed their Answer to the Complaint.

On November 11, 2009, the Board sent out its Notice of Prehearing/Settlement Conference and Hearing on Respondents' Motion to Dismiss and in the Alternative for Summary Judgment [sic] Filed on November 4, 2009 [sic].¹ The Notice stated that the Board would conduct a prehearing/settlement conference on November 24, 2009, and that the parties shall file a Prehearing Statement two days prior to the prehearing conference. The Notice also stated that the Board would conduct a hearing on Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment [sic] on December 7, 2009.

On November 13, 2009, Respondents filed their Motion to Dismiss for Lack of Prosecution, asserting that Complainant failed to file a response or opposition to Respondents' Motion to Dismiss and/or for Summary Judgment.

On November 13, 2009, Respondents filed their Prehearing Statement.

On November 24, 2009, the Board held a prehearing/settlement conference. Complainant appeared at the prehearing/settlement conference. The Board stated that it would hear arguments on the motions to dismiss on December 7, 2009.

On December 7, 2009, at 9:30 a.m., the Board heard oral argument on the UPW's Motion to Dismiss and/or for Summary Judgment and Motion to Dismiss for Lack of Prosecution pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). Complainant appeared at the hearing.

¹Respondents' Motion to Dismiss and/or for Summary Judgment was filed on October 27, 2009.

For the reasons discussed below, the Board grants in part and denies in part Respondents' Motion to Dismiss and/or for Summary Judgment, and denies Respondents' Motion to Dismiss for Lack or Prosecution.

FINDINGS OF FACT

1. At all relevant times, the UPW was or is an employee organization² and the exclusive bargaining representative, within the meaning of HRS § 89-2, of employees included in bargaining unit (Unit or BU) 01, composed of nonsupervisory employees in blue collar positions. See HRS § 89-6(1).
2. At all relevant times, Nakanelua, was or is the State Director of the UPW.
3. At all relevant times, Akau was or is a Business Agent of the UPW.
4. At all relevant times, Complainant was or is a public employee of the Board of Water Supply (BWS), City and County of Honolulu.
5. On October 20, 2009, Complainant filed the instant Complaint. The Complaint alleges, *inter alia*, that Respondents engaged in prohibited practices by violating HRS §§ 377-8; 378-51; 89-8; 89-13(b)(1); 89-13(b)(3); and 89-13(b)(4), and breached the Duty of Fair Representation by (1) arbitrarily refusing to take Complainant's meritorious case to arbitration without reason; (2) failing to investigate/discuss the grievance and make an informed and timely decision regarding the arbitration process; (3) failure to notify Complainant of a decision not to arbitrate in time for Complainant to pursue other available remedies as requested by Complainant; (4) not responding to Complainant when Complainant attempted to contact respondents by phone and certified mail before, during, and after the grievance process exhibiting unreasonable negligence on the part of Respondents; (5) acting in a perfunctory manner during the grievance procedure by not answering Complainant's phone calls, not keeping Complainant informed, not showing up and being late to grievance

²HRS § 89-2 provides in relevant part:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

hearings with no valid reason, not investigating the grievance and leads provided by Complainant therefore preventing certain factual proofs of Complainant's position; (6) arbitrarily refusing to provide copies of forms or records pertaining to grievance formally requested by Complainant verbally and in writing or providing valid reasons of action as also requested by Complainant; (7) discriminating against Complainant for previous Complaint against respondent for similar irrational behavior regarding Breach of Duty of Fair Representation; and (8) failing to perform ministerial acts on Complainant's behalf and any other statute violations found in the course of investigation.

6. The Complaint further alleges that the investigation into Complainant's alleged wrong doing was conducted improperly; that he had a strong case factually; and that although one of the two alleged misconduct against him was dropped (the alleged violation of Workplace Violence Policy), his suspension was reduced by only one day out of a 15-day suspension. The Complaint further details Complainant's and Respondents' actions throughout the grievance process.
7. On February 12, 2009, the UPW filed a grievance contesting the 15-day suspension of Complainant who was accused of purposely endangering the safety of fellow employees by knocking down cones that demarcated the work zone and for creating a hostile work environment by calling another employee inappropriate names.
8. On April 30, 2009, the Manager and Chief Engineer of the BWS provided a Step 1 response to the grievance and proposed to reduce the suspension by one day.
9. On May 5, 2009, the UPW appealed the grievance to Step 2.
10. On June 12, 2009, the grievance was denied at Step 2.
11. On July 7, 2009, the UPW requested an extension of time deadline regarding notice of intent to arbitrate.
12. On July 21, 2009, the UPW decided to accept the Step 1 remedy as resolution of the grievance.
13. In the Complaint and at the hearing on the motions, Complainant stated that he received the letter from the UPW informing him of the resolution of his grievance on July 27, 2009, although the letter was dated July 21, 2009, and post-marked July 24, 2009.

14. From the allegations in the Complaint, the actions of Nakanelua and Akau were within the scope of their agency with the UPW, as the UPW's State Director and Business Agent, respectively.
15. On October 27, 2009, Respondents filed a Motion to Dismiss Complaint and/or for Summary Judgment, asserting lack of jurisdiction and failure to state a claim for relief under HRS §§ 89-13(a) and (b)(1) through (5). Also on October 27, 2009, Respondents filed their Answer to the Complaint.
16. On November 11, 2009, the Board sent out its Notice of Prehearing/Settlement Conference and Hearing on Respondents' Motion to Dismiss and in the Alternative for Summary Judgment [sic] Filed on November 4, 2009 [sic]. The Notice stated that the Board would conduct a prehearing/settlement conference on November 24, 2009, and that the parties shall file a Prehearing Statement two days prior to the prehearing conference. The Notice also stated that the Board would conduct a hearing on Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment [sic] on December 7, 2009.
17. On November 13, 2009, Respondents filed their Motion to Dismiss for Lack of Prosecution, asserting that Complainant failed to file a response or opposition to Respondents' Motion to Dismiss and/or for Summary Judgment.
18. On November 13, 2009, Respondents filed their Prehearing Statement.
19. On November 24, 2009, the Board held a prehearing/settlement conference. Complainant appeared at the prehearing/settlement conference. The Board stated that it would hear arguments on the motions to dismiss on December 7, 2009.
20. On December 7, 2009, at 9:30 a.m., the Board heard oral argument on the UPW's Motion to Dismiss and/or for Summary Judgment and Motion to Dismiss for Lack of Prosecution pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). Complainant appeared at the hearing.
21. The Board finds that the Complaint is timely.
22. The Board finds that the allegations of breach of duty of fair representation against Nakanelua and Akau are within the scopes of their official duties as the UPW's State Director and Business Agent, respectively.

23. The Board finds that Complainant has not failed to prosecute his complaint.
24. The Board finds that the Complaint alleges sufficient facts such that the UPW's Motion to Dismiss and/or for Summary Judgment must be denied.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over prohibited practice complaints pursuant to HRS §§ 89-5³ and 89-14⁴.
2. The Complaint alleges prohibited practices pursuant to HRS §§ 377-8; 378-51; 89-8; 89-13(b)(1); 89-13(b)(3); and 89-13(b)(4).
3. HRS § 377-8, governing unfair labor practices of any person, provides:

It shall be an unfair labor practice for any person to do or cause to be done, on behalf or in the interest of employers or employees, or in connection with or to influence the outcome

³HRS § 89-5 provides in relevant part:

(i) In addition to the powers and functions provided in other sections of this chapter, the board shall:

* * *

(5) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper[.]

⁴HRS § 89-14 provides:

Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

of any controversy as to employment relations, any act prohibited by sections 377-6 and 377-7.

4. HRS § 378-5, governing action against labor organization, limitation, provides:

Any complaint, whether founded upon any contract obligation or for the recovery of damage or injury to persons or property, by an employee against a labor organization for its alleged failure to fairly represent the employee in an action against an employer shall be filed within ninety days after the cause of action accrues, and not thereafter.

Where the alleged failure to fairly represent an employee arises from a grievance, the cause of action shall be deemed to accrue when an employee receives actual notice that a labor organization either refuses or has ceased to represent the employee in a grievance against an employer. Where the alleged failure is related to negotiations or collective bargaining, the cause of action shall be deemed to accrue when the applicable collective bargaining agreement or amendment thereto is executed.

5. HRS § 89-8, governing recognition and representation; employee participation, provides:

- (a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. Any other provision herein to the contrary notwithstanding, whenever two or more employee organizations which have been duly certified by the board as the exclusive representatives of employees in bargaining units merge, combine, or amalgamate or enter into an agreement for common

administration or operation of their affairs, all rights and duties of such employee organizations as exclusive representatives of employees in such units shall inure to and shall be discharged by the organization resulting from such merger, combination, amalgamation, or agreement, either alone or with such employee organizations. Election by the employees in the unit involved, and certification by the board of such resulting employee organization shall not be required.

- (b) An individual employee may present a grievance at any time to the employee's employer and have the grievance heard without intervention of an employee organization; provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.
- (c) Employee participation in the collective bargaining process conducted by the exclusive representative of the appropriate bargaining unit shall be permitted during regular working hours without loss of regular salary or wages. The number of participants from each bargaining unit with over 2,500 members shall be limited to one member for each five hundred members of the bargaining unit. For bargaining units with less than 2,500 members, there shall be at least five participants, one of whom shall reside in each county; provided that there need not be a participant residing in each county for the bargaining unit established by section 89-6(a)(8). The bargaining unit shall select the participants from representative departments, divisions or sections to minimize interference with the normal operations and service of the departments, divisions or sections.

6. HRS § 89-13(b) provides in relevant part:

It shall be a prohibited practice for a public employee or for an employee organization or its designated agent

wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

- (3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11; [or]

- (4) Refuse or fail to comply with any provision of this chapter[.]

7. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. See Yamane v. Pohlson, 111 Hawai`i 74, 81 137 P.3d 980, 987 (2006). Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. Id.
8. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id., (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).
9. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai`i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai`i 118, 905 P.2d 624. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.

10. Pursuant to HAR § 12-42-8(g)(3), governing motions before the Board:

- (iii) Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties shall be filed with the [B]oard within five days after service of the motion papers, unless the [B]oard directs otherwise.

Accordingly, any answer or opposition to the UPW's motions to dismiss should have been filed and served on all parties within five days after service of the motion papers.

11. Pursuant to HAR § 12-42-47, governing prehearing conferences during prohibited practice complaint proceedings:

At least five days prior to the scheduled date for hearing, the board may hold a prehearing conference for the purpose of arriving at a settlement or clarification of the issues and, to the extent possible, an agreement on facts, matters, or procedures as may facilitate and expedite the hearing or adjudication of the issues.

12. The applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. HRS § 89-14 provides that "[a]ny controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9[.]" In turn, HRS § 377-9, dealing with the prevention of unfair labor practices, clearly provides that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." (HRS § 377-9(l)).

13. Similarly, the Board's Administrative Rules, HAR § 12-42-42 provides, in relevant part:

(a) A complaint that any public employer, public employee, or public organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

14. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This limitation is

jurisdictional and provided by statute; accordingly, it may not be waived by either the Board or the parties. TriCounty Tel. Ass'n., Inc. v. Wyoming Public Service Comm'n., 910 P.2d 1359, 1361 (Wyo. 1996) (holding that, "As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do"); see generally, HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) ("The law has long been clear that agencies may not nullify statutes").

15. The limitations period begins to run when "an aggrieved party knew or should have known that [the party's] statutory rights were violated." Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).
16. In the present case, the Complaint asserts that Complainant received the letter from the UPW notifying him of the grievance disposition on July 27, 2009. Because the Complaint was filed on October 20, 2009, the Board concludes that the Complaint is timely. Although the Complaint alleges certain actions by representatives of the UPW that occurred prior to July 27, 2009, the Board concludes that those actions occurred during the course of the grievance process, and Complainant properly exhausted his contractual remedies prior to bringing a prohibited practice complaint that involves issues of alleged contract violations.
17. HRS § 89-13(b) permits prohibited practice complaints to be brought against public employees, employee organizations, and the designated agents of employee organizations. In the present case, the allegations against Nakanelua and Akau for breach of duty of fair representation appear to involve actions taken in their capacities as State Director and Business Agent, respectively, and therefore as "designated agents" of the UPW. Accordingly, the Board concludes that Nakanelua and Akau were properly named; however, the Board also concludes that liability, if any, for alleged breach of duty of fair representation rests with the UPW, and not Nakanelua or Akau as individuals.
18. A claim of breach of duty of fair representation may only be brought against a union as an entity, and not individual employees of the union. See Carter v. Smith Food King, 765 F.2d 916 (9th Cir. 1985); Evangelista v. Inlandboatmen's Union of the Pacific, 777 F.2d 1390 (9th Cir. 1985). The Board concludes that it is the union as an entity that owes a duty of fair representation, and may be liable for breach of that duty, and not individual employees of the union.

19. As an analogy, HRS § 89-13(a) permits prohibited practice complaints to be brought against public employers and designated representatives of public employers. However, when public officials are named in their official capacities, the suit is no different from a suit against the government itself. See Will v. Michigan Dept. Of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304 (1989).
20. In the present case, Nakanelua and Akau were named in what is their “official capacities” as employees of the UPW; accordingly, the claim of breach of duty of fair representation is a suit against the UPW itself, despite the individuals named.
21. With respect to the UPW’s argument that the union’s decision to resolve the grievance does not give rise to a claim for breach of duty of fair representation; that the judgment made by the union does not present a claim for breach of the duty; and that Complainant fails to state a claim for relief for any alleged violation of the Unit 01 collective bargaining agreement, the Board concludes that it lacks sufficient facts to make those determinations on a Motion to Dismiss or Motion for Summary Judgment.
22. An employee may sue his or her employer, his or her union, or both. The case the employee must prove, however, is the same whether the employee sues one, the other, or both. To prevail on a claim of breach of duty of fair representation against the union, or claim of breach of contract against the employer, the employee must prove both that the union breached its duty and that the employer breached the contract. See DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164-65, 103 S. Ct. 2281, 2290-91 (1983). In the present case, Complainant states a claim against the UPW for breach of duty of fair representation and alleges breach of contract by the employer (the employer was not named as a respondent). The factual allegations in the Complaint prevent dismissal based on a failure to state a claim upon which relief can be granted or summary judgment.
23. With respect to the UPW’s Motion to Dismiss for Lack of Prosecution, the Board notes that Complainant did not file opposing affidavits or written argument in response to the motions to dismiss; however, Complainant did appear at the prehearing/settlement conference on November 24, 2009, and at the hearing on the motions to dismiss on December 7, 2009.
24. The Board concludes that dismissal is not warranted solely for Complainant’s failure to file written oppositions to the motions to dismiss. Complainant did not fail to prosecute his case where he appeared in person

at the prehearing/settlement conference on November 24, 2009, and at the motions hearing on December 7, 2009, where he presented oral argument in opposition to the motions. See Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993) (holding that if a non-moving party fails to oppose a motion, the court nevertheless may only grant the motion if the motion itself establishes that there is no genuine issue of material fact in dispute).

25. The Board, however, cautions parties who elect not to file written oppositions to motions. The Board rules governing motions, other than those made during a hearing, provide in relevant part:

The [B]oard may decide to hear oral argument or testimony thereon, in which case the [B]oard shall notify the parties of such fact and of the time and place of such argument or the taking of such testimony.

HAR § 12-42-8(g)(3)(iv) (emphasis added). It is within the Board's discretion whether or not to hold oral argument on a particular motion. Accordingly, a party may not always have the opportunity to present oral argument on a motion.

ORDER

For the reasons discussed above, the Board grants in part and denies in part Respondents' Motion to Dismiss and/or for Summary Judgment, and denies Respondents' Motion to Dismiss for Lack of Prosecution. The Motion to Dismiss and/or for Summary Judgment is granted to the extent that Complainant's claim of breach of duty of fair representation may only lie against the UPW as an entity, and not Nakanelua or Akau personally, and liability, if any, rests solely with the UPW; the Board concludes that to the extent Nakanelua and Akau were personally named, they were named in their "official capacities" which is a suit against the UPW itself.

NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

NOTICE IS HEREBY GIVEN that pursuant to HRS § 377-9 and/or §§ 89-5(i)(4) and (i)(5) and HAR § 12-42-47, the Board will conduct a second prehearing/settlement conference on **February 1, 2010 at 8:30 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

MATTHEW M. TAAMU v. and UNITED PUBLIC WORKERS, AFSCME, Local 646,
AFL-CIO; et al.
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DISMISS FOR LACK OF PROSECUTION; AND NOTICE OF SECOND PREHEARING/
SETTLEMENT CONFERENCE

DATED: Honolulu, Hawaii, January 12, 2010.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member

Copies sent to:

MATTHEW M. TAAMU
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