

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT

W.P.No.4203/2017

Dr. Ali Bat Khan

Versus

Federation of Pakistan through its Secretary, Establishment
Division and others

Date of Hearing: 28.03.2019

Petitioner by: Mr. Mazhar Iqbal, Advocate

Respondents by: Mr. Shumayl Aziz, learned Assistant
Attorney-General with Mahmood Khan
Lakho Section Officer Establishment
Division and Mr. Niaz Ali Khan Section
Officer Ministry of Planning, Development
and Reform
Respondent No.2 in person

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Dr. Ali Bat Khan, impugns the appointment of respondent No.2 (Muhammad Asif Sheikh) as Advisor/Consultant on Development Budget (Operation) in the project titled "Institutional Strengthening and Efficiency Enhancement of Planning Commission" in the Ministry of Planning, Development and Reform, Government of Pakistan.

2. Learned counsel for the petitioner submitted that the maximum age for re-employment of retired civil servants in the public sector is 65 years; that respondent No.2 retired from Government service on 08.03.2008, and is presently more than 70 years of age; that the Auditor General of Pakistan had also observed that respondent No.2's employment after attaining the age of 65 years was unlawful; that respondent No.2's re-employment immediately after his retirement was without lawful authority; that the advertisement for recruitment against the post of Advisor/Consultant shows that the appointment was to be made on contract basis for a period of one year, but respondent No.2 was appointed for two years, and thereafter he has unlawfully been granted several extensions; and that beyond 07.03.2011, the extension in respondent No.2's contract period had not been approved by the Prime Minister.

3. Furthermore, it was submitted that respondent No.2 has worked on three different projects; that initially, respondent No.2 had been employed in a project called *“Institutional Strengthening and Efficiency Enhancement of Planning Commission”*; that respondent No.2 was also given the additional charge of Project Director; that a full time Project Director has not been appointed due to the additional charge being enjoyed by respondent No.2; that the petitioner has been the cause of the project cost being raised from Rupees 39.9 million to 350 million over the last ten years; and that the salary and other benefits being enjoyed by respondent No.2 are unlawful since they have not been approved by the competent authority. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

4. Respondent No.2 appeared in person and submitted that he was not *“re-employed”* after retirement, but was given contractual employment after participating in a competitive process; that the law does not prescribe an age limit for contractual employment in the public sector; that respondent No.2’s employment was in accordance with the Establishment Division’s Office Memorandum (“O.M.”) dated 28.01.2008, which sets out the procedure for contractual appointments against project posts; that respondent No.2’s contract appointment had been extended on yearly basis in accordance with the applicable rules and in particular the above-mentioned O.M.; that the said O.M. provides a waiver from framing of recruitment rules for Project Directors; that the Secretary of the Division concerned is authorized to approve the appointment when the salary package is equivalent to MP-III and also grant extensions under the Establishment Division’s O.M. dated 17.08.2010; that the circular dated 09.10.2007 does not apply to appointments against project posts; that respondent No.2 had resigned, but had not been relieved due to the shortage of experienced personnel; and that a permanent/independent Project Director can only be appointed

where the cost of the project is over Rs.3 billion. Respondent No.2 prayed for the writ petition to be dismissed.

5. The learned Assistant Attorney-General referred to the O.M. dated 28.01.2008 and submitted that respondent No.2's appointment could have been extended on year-to-year basis on the recommendation of the Evaluation Committee constituted pursuant to the Finance Division's O.M. dated 11.04.2007. He further submitted that respondent No.2 has not been re-employed after retirement, but rather was appointed on contract basis against a project post after a competitive process; that the tenure of respondent No.2's contract appointment was extended from time to time by the competent authority in exercise of the powers under the Establishment Division's O.M. dated 28.01.2008; and that the documents on the basis of which extensions in respondent No.2's employment contract were granted show that his performance had been up to the mark. Learned Assistant Attorney-General prayed for the writ petition to be dismissed.

6. I have heard the contentions of the learned counsel for the petitioner as well as the learned Assistant Attorney-General, and perused the record with their able assistance. The contentions of respondent No.2 have also been noted.

7. The record shows that on 08.03.2008, respondent No.2 retired from Government service on attaining the age of superannuation. Prior to his retirement, respondent No.2 was serving as Joint Chief Economist (BS-21) in the Ministry of Planning and Development Division, Government of Pakistan.

8. Through advertisement dated 21.09.2007, the Public Investment Program Section of the Planning Commission, Planning and Development Division ("Planning Commission"), invited applications for appointment against a temporary post of Consultant/Advisor in the project called "*Institutional Strengthening and Efficiency Enhancement of Planning Commission*" on contract basis for a period of one year, which was extendable. Out of the six applicants, who submitted their

applications in response to the said advertisement, three candidates, including respondent No.2, were found to be eligible and were called for an interview. One of the three candidates did not appear in the interview and out of the remaining two, respondent No.2 scored the highest marks. The Selection Board, in its meeting dated 17.12.2007, decided to offer contract appointment to respondent No.2 against the said post for an initial period of two years (extendable). The said appointment was to carry emoluments of MP-III scale.

9. The Planning Commission's letter dated 30.01.2008 contained the terms and conditions on which employment against the said post was offered to respondent No.2. In the said letter, it was clearly mentioned that the period of contract was initially to be for a period of two years (extendable). Respondent No.2 accepted the said offer. Consequently, vide Planning Commission's office order dated 08.03.2008, respondent No.2 was appointed as Advisor/Consultant on Development Budget (Operation) in the said project. His salary package was clearly stated to be that of Government pay scale MP-III. It must be borne in mind that respondent No.2 had not competed for appointment as Project Director and had not been so appointed, but nevertheless after his appointment as Advisor/Consultant on Development Budget (Operation), he was given the additional charge of Project Director.

10. On 28.01.2008, the Establishment Division had issued an O.M. with the caption, "*Waiver of framing of recruitment rules for projects posts in Ministries/Divisions*". The said O.M. embodied the decisions taken with the approval of the Prime Minister for timely appointment of project staff and implementation of development projects. Respondent No.2 as well as the learned Assistant Attorney-General attempted to defend respondent No.2's initial contract appointment for two years on the basis of the said O.M., paragraph (vii) whereof provided *inter alia* that "[i]nitially, contract appointment to project posts shall be made for two years ...".

11. The decision to offer employment on contract basis for an initial period of two years to respondent No.2 was made by the Selection Board in its meeting dated 17.12.2007, i.e. prior to the issuance of the said O.M. dated 28.01.2008. The Selection Board could obviously not have predicted the future and decided to offer a two-year contractual employment to respondent No.2 in anticipation of the issuance of said O.M. Respondent No.2's initial appointment for a period of two years was in stark deviation of the advertisement dated 21.09.2007 which clearly provided for the appointment to be initially for a period of one year. The issuance of the said O.M. subsequent to the Selection Board's decision to offer a two-year contractual employment to respondent No.2 could not cure the said defect in respondent No.2's appointment as Advisor/Consultant on Development Budget (Operation).

12. Even if it is assumed that the said O.M. dated 28.01.2008 providing for the initial contract appointment to project post to be made for two years pre-dated the decision of the Selection Board to offer a two-year contract appointment to respondent No.2, it is my view that respondent No.2 could not have been appointed for two years given the fact that the advertisement dated 21.09.2007 clearly mentioned that the appointment for the post of Advisor/Consultant would be for one year, which was extendable. It must be borne in mind that if the advertisement dated 21.09.2007 had provided for a two-year employment contract for the post of Advisor/Consultant, the competitive arena may well have been altogether different in that more candidates would have applied for the said post. This leads me to form a view that right from the inception undue favour was extended to respondent No.2.

13. As regards the innumerable extensions granted to respondent No.2, the learned Assistant Attorney-General tried to justify such extensions by submitting that they were permissible under the said O.M. dated 28.01.2008. Indeed, another decision embodied in the said O.M. was that an extension in contract

appointment to posts carrying emoluments equivalent to MP-III and above shall be made on year-to-year basis on the recommendations of the Evaluation Committee constituted under the Finance Division's O.M. dated 11.04.2007. The learned Assistant Attorney-General was asked to bring on record the recommendations of the Evaluation Committee by virtue of which extensions were granted to respondent No.2. Through C.M. No.5042/2018, respondent No.4 brought on record documents which do not include the recommendations of the Evaluation Committee to extend respondent No.2's employment contract beyond 07.03.2011.

14. The Planning Commission's office order dated 02.03.2010 shows that respondent No.2's contract period was extended for one year with effect from 08.03.2010 to 07.03.2011. Prior to the issuance of the said office order, the Secretary, Planning and Development Division, requested the Finance Secretary and the Establishment Secretary to accord their concurrence for an extension in respondent No.2's contract period. The Finance Secretary, on 20.01.2010, "strongly recommended" such an extension. The Establishment Secretary also supported the said recommendation, but in his note dated 03.02.2010, it was observed that the Planning and Development Division "*may groom up the replacements*" of respondent No.2. On 15.02.2010, the Prime Minister approved the said recommendation. After respondent No.2's initial appointment for a period of two years, he was granted yearly extensions in the term of his employment contract on nine occasions. The details of these nine extensions are given herein below:-

Sr. No	Orders / Notifications of Planning Commission Division.	Period of Extension	Approving Authority
01.	No.4(25)PIP/PC/IS&EE/2006 dated 02.03.2010.	08.03.2010 to 07.03.2011	Prime Minister on recommendation of Evaluation Committee.
02.	No.4(25)PIP/PC/IS&EE/2006 dated 15.12.2010.	08.03.2011 to 07.03.2012	Secretary, Planning & Development Division.
03.	No.4(25)PIP/PC/IS&EE/2006 dated 16.12.2011.	Up to 07.03.2013	Secretary, Planning & Development Division.

04.	No.4(25)PIP/PC/IS&EE/2006 dated 22.03.2013.	08.03.2013 to 07.03.2014	Secretary, Planning & Development Division.
05.	No.5(165)Admn.-VII/PD/2014 dated 31.10.2014.	08.03.2014 to 31.07.2015	Secretary, M/O Planning, Development & Reform.
06.	No.5(129)Admn-VII/PD/2015 dated 06.08.2015.	01.08.2015 to 31.07.2016	Secretary, M/O Planning, Development & Reform.
07.	No.5(129)Admn-VII/PD/2015 dated 04.08.2016.	01.08.2016 to 31.07.2017	Minister, Planning, Development & Reform.
08.	No.5(129)Admn-VII/PD/2015 dated 31.07.2017.	01.08.2017 to 31.07.2018	Secretary, M/O Planning, Development & Reform.
09.	No.15(2)Imp-II/PD/2018 dated 02.08.2018.	01.08.2018 to 31.07.2019	Secretary, M/O Planning, Development & Reform.

15. The Finance Division's O.M. dated 11.04.2007 shows that the Prime Minister had approved the constitution of the Committee for performance evaluation of contract employees appointed in Management Positions Scales ("MP Scales"). The composition of the said Committee was as follows:-

- “(i) Finance Secretary (Chairman)*
- (ii) Establishment Secretary (Member)*
- (iii) Secretary of the respective Ministry/Division (Member)”*

16. The said Committee was required to look into the performance of the existing incumbents and evaluate their performance in the light of the targets assigned to them at the time of their contract appointment and recommend as to whether or not their contract should be continued. The same principle was also required to be applicable to new entrants in MP Scales, who were also required to be evaluated by the said Committee annually and in case their performance was not found to be satisfactory, their contracts were to be terminated. While evaluating the performance, the following points were required to be kept in view:-

- “(a) the job has been designed keeping in view the objectives and goals of the Organization;*
- (b) a clear job description has been made;*
- (c) the position has been advertised according to clear job specifications;*
- (d) clear targets have been assigned to the incumbent at the time of contract appointment;*

- (e) the performance of the incumbent will be evaluated on the basis of the aforesaid job description and job specifications;*
- (f) whether the targets assigned to the incumbent have been achieved in the light of job description and job specification in quantifiable terms.”*

17. It must be re-emphasized that the decisions embodied in the Establishment Division's O.M. dated 28.01.2008 and the Finance Division's O.M. dated 11.04.2007 were made with the approval of the Prime Minister, and therefore, as a natural corollary, amendments in the said decisions could not be made or their effect nullified without the approval of the Prime Minister. Be that as it may, the Secretary, Planning and Development Division, in his letter dated 28.07.2010, recommended that the Secretary of a Division, being the appointing authority of positions in development projects, should also be competent to accord extensions in their contract periods. The Secretary, Planning and Development Division, wanted the decision to extend the contract periods of persons appointed against posts in development projects to be that of the Secretary rather than the Evaluation Committee. On 04.08.2010, the Finance Secretary recorded that he would have no objection if such extensions were considered and granted by the appointing authority. The matter was, thereafter, sent for the concurrence of the Establishment Division, which on 17.08.2010, churned out an O.M. referring to the Planning and Development Division's above-mentioned letter dated 28.07.2010 and conveying its concurrence to the proposal that extensions in employment contracts of persons appointed against posts in development projects should be considered and granted by the appointing authority. There is nothing on the record to suggest that the said O.M. dated 17.08.2010 was issued after obtaining the approval of the Prime Minister.

18. The concurrence given by the Establishment Secretary and the Finance Secretary to the proposal made by the Secretary, Planning and Development Division, in his letter dated 28.07.2010, culminated in the issuance of the Establishment

Division's O.M. dated 17.08.2010 by virtue of which the decision to grant an extension in the term of a contract appointment of a person appointed against a project post was to be taken by the appointing authority (i.e. the Secretary, Planning and Development Division), and not by the Evaluation Committee. The decision of the Establishment Secretary and the Finance Secretary to agree with the proposal made by the Secretary, Planning and Development Division, in his letter dated 28.07.2010, that the extension in the contract periods should be considered and granted by the appointing authority, i.e. the Secretary, Planning and Development Division, in fact amounts to abdication of the authority specifically conferred in terms of paragraph (vii) of the Establishment Division's O.M. dated 28.01.2008 read with the Finance Division's O.M. dated 11.04.2007. Since by virtue of the Finance Division's O.M. dated 11.04.2007, the Establishment Secretary and the Finance Secretary were also a part of the Evaluation Committee, the issuance of the Establishment Division's said O.M. dated 17.08.2010 rendered the Evaluation Committee virtually dysfunctional since the decision to extend the terms of such contracts no longer remained the responsibility of the Evaluation Committee. Since the Establishment Division's O.M. dated 17.08.2010 had the effect of changing the decisions embodied in the Establishment Division's O.M. dated 28.01.2008 and the Finance Division's O.M. dated 11.04.2007, and since the approval of the Prime Minister was not obtained before the issuance of the said O.M. dated 17.08.2010, the same, in my view, was of no legal effect or consequence.

19. Rules of Business, 1973 have been made by the Federal Government in exercise of the powers conferred by Articles 90 and 99 of the Constitution. Rule 15(a) of Part C of the Rules of Business, 1973 provides that cases involving important policy or departure from important policy shall not be issued without the approval of the Prime Minister. It is explained in the Note to the said Rule 15(a) that departure from policy includes departure

from a previous decision of the Cabinet or the Prime Minister. In the case of Azra Jamali Vs. Federation of Pakistan through Secretary, Ministry of Commerce (2017 PLC (C.S.) 533), I had the occasion to hold as follows:-

“Now, Rule 15(a) of Part C of the Rules of Business, 1973, mandates that the making of an important policy or a departure from an important policy cannot take place unless and until approval in this regard is obtained from the Prime Minister. Hence, decisions pertaining to the making of an important policy or a departure therefrom stand on a higher pedestal from the ordinary business transacted by the government under the Rules of Business, 1973.”

20. The decisions embodied in the Establishment Division's O.M. dated 28.01.2008, and the Finance Division's O.M. dated 11.04.2007, were important policy decisions made with the approval of the Prime Minister in accordance with the mandate of Rule 15(a) of the Rules of Business, 1973. A departure from the said policy decisions could not be made without the approval of the Prime Minister. In the case of Tariq Aziz-ud-Din (2010 SCMR 1301), the Hon'ble Supreme Court has emphasized that due weight was required to be given to Rules of Business, 1973, which had a Constitutional sanction. In the case of Amin Jan Vs. Director-General, T&T (PLD 1985 Lahore 81), it has been held that Rules of Business are based on public policy and designed to safeguard State interests effectively. To act in consonance with these Rules is a clear duty cast on all the Divisions and Ministries of the Federal Government. In the case of Sardar Muhammad Vs. Federation of Pakistan (PLD 2013 Lahore 343), it has been held as follows:-

“43. Adherence to the rule of law, in general, and to the Rules of Business, in particular, in conducting its business determines the quality of governance of the government in power. Rules of Business flow out of the Constitution, and are the sinews of a workable government. Besides providing a departmental organogram of a workable democracy, these Rules are a fine weave of democratic principles including: participatory engagement, written and reasoned dialogue, divergence of opinion, open and transparent deliberations, etc. These Rules of Business besides providing a procedural manual for the Federal Government to conduct its business also act as constraints on governmental power.”

(Emphasis added)

21. It is an admitted position that save the extension in respondent No.2's contractual employment from 08.03.2010 to 07.03.2011, all other extensions in his contractual employment were granted with the approval of the Secretary, Planning and Development Division, and not the Evaluation Committee constituted under the Finance Division's O.M. dated 11.04.2007. Therefore, it is held that the extensions in the term of respondent No.2's employment contract without the approval of the Evaluation Committee constituted under the Finance Division's O.M. dated 11.04.2007 were unlawful.

22. There is no denying the fact that the term "*project posts*" has not been used in the Civil Servants Act, 1973, and the Rules made thereunder. The Establishment Division's O.M. dated 27.07.2002 provided *inter-alia* that where projects are executed by a Government department, i.e. Division/Attached Department or a Subordinate Office, project posts shall fall in the category of "*civil posts in connection with affairs of the Federation*" and shall fall within the purview of the Federal Public Service Commission ("F.P.S.C.") in terms of Section 7 of the Federal Public Service Commission Ordinance, 1977, and the recruitment rules for such posts would require the approval of F.P.S.C. The said O.M. also provided that where the project was being executed by an autonomous body, the project posts would be outside the purview of F.P.S.C. It is crucial to bear in mind that the said O.M. dated 27.07.2002 was expressly withdrawn by the Establishment Division's O.M. dated 28.01.2008. It is an admitted position that respondent No.2 was not employed through F.P.S.C. since the said O.M. dated 27.07.2002 was withdrawn by the O.M. dated 28.01.2008.

23. The learned Assistant Attorney-General submitted that the repeated extensions were granted to respondent No.2 on the basis of his annual performance evaluation reports. Respondent No.2's performance evaluation reports that have been brought on the record do not contain anything adverse against him, but at the same time, these performance evaluation reports also do not

establish his indispensability. The remarks column of some of respondent No.2's performance evaluation reports are blank, whereas others state that he is a *"great support and fit to work"*, and *"he is an experienced and hard working officer who works as a complete professional. Achieves targets set for him and maintains confidentiality"*. Such remarks, I am afraid, are no justification for granting as many as nine extensions in his employment contract.

24. Although the advertisement dated 21.09.2007 had provided that the term of the contractual appointment against the post of Advisor/Consultant was extendable, but by no stretch of imagination, could this be read as meaning nine extensions stretching over period of nine years. As mentioned above, the Establishment Secretary, while recommending respondent No.2's first extension, observed that the Planning and Development Division may groom up respondent No.2's replacement. This observation was simply ignored by the Planning Commission. There is nothing on the record to suggest that any effort was made by the Planning Commission to groom any officer to replace respondent No.2.

25. There is no law which provides that a contract appointment made against a project post will be extended from time to time for as long as the project takes to complete. Since the advertisement dated 21.09.2007 had simply provided that the term of the contract appointment was extendable, this must be read to mean an extension for a reasonable period. Nine yearly extensions can certainly not be termed as reasonable. The essential question that crops up in the mind is that was there no other person in the country, other than respondent No.2, competent to serve as a Consultant/Advisor against the project post in question? There would be nothing preventing respondent No.2 from competing for appointment against the said post as an when it is re-advertised.

26. Emphasis was laid by the learned counsel for the petitioner on an objection raised by the Audit and Inspection Officer of the

Ministry of Planning, Development and Reform to the extensions in respondent No.2's employment contract beyond the period when he attained the age of sixty-five years, i.e. on 07.03.2013. This objection was based on the Cabinet Division's circular No.6/12/2007/RA-1, dated 09.10.2007, which conveys the approval of the Prime Minister that the provisions relating to the terms of office and age limit of Chairmen and Members prescribed in various legislations relating to Regulatory Authorities, Autonomous Bodies, Corporations and Commissions etc. be standardized as follows:-

***“Chairman:** The Chairman/Chief Executive shall, unless he resigns from office earlier, hold office for a period of 3-years and shall be eligible for re-appointment for such term or position may be clarified otherwise to audit. Terms as the Federal Government may determine, provided that the Chairman shall cease to hold office on attaining the age of sixty five years or position may be clarified otherwise to audit. Expiry of the tenure whichever is earlier.*

***Member:** A member shall, other than an ex-officio member, unless he resigns from office earlier, hold office for a period of three years and shall be eligible for re-appointment for such term or position may be clarified otherwise to audit. Terms as the Federal Government may determine, provided that the member shall cease hold office on attaining the age of sixty five years or expiry of term, whichever is earlier.”*

27. The above-mentioned circular dated 09.10.2007 merely conveys the Prime Minister's approval for amending the laws/statutes so as to provide for the Chairmen and Members of Regulatory Authorities, Autonomous Bodies, Corporations and Commissions, etc. to cease to hold an office on attaining the age of sixty-five years. Respondent No.2's appointment, which has been impugned in the instant petition, is not as a Chairman or Member of any Regulatory Authority, etc. or of a body created by statute. The post of Advisor/Consultant on Development Budget (Operation) is not a post created by any statute/legislation. Therefore, the said circular dated 09.10.2007 would be inapplicable to the said post. The said circular is not a directive ordaining that persons appointed against project posts on contract basis after a competitive process shall cease to hold office upon attaining the age of sixty-five years. There is no

decision of the Federal Government brought on record to show that appointments made in public sector organizations or against project posts under the administrative and supervisory control of the Federal Government cannot continue beyond the incumbent attaining the age of sixty-five years. Therefore, it is my view that the audit objection referred to herein above has no legal foundation.

28. Section 14(1) of the Civil Servants Act, 1973, provides *inter alia* that a retired civil servant shall not be re-employed under the Federal Government unless such re-employment is necessary in the public interest and is made with the approval of the authority next above the appointing authority. Establishment Secretary's D.O. letter No.7/3/89-OMG-II, dated 28.01.1989, set out in Esta Code at Serial No.20 titled "*Re-employment after superannuation*" provides *inter-alia* that re-employment beyond superannuation should be an exception and not the rule, and it may be recommended only in cases where Government considers that experience gained by the retiring person is of vital importance and can be gainfully utilized, particularly the fields where suitable qualified and experienced persons are not available. The said letter dated 28.01.1989 also sets out the criteria for re-employment after superannuation.

29. Indeed, respondent No.2 was appointed as Advisor/Consultant on Development Budget (Operation) after his superannuation, but was so appointed after participating in a competitive process pursuant to an advertisement published by the Planning Commission. Respondent No.2 was not re-employed against the same post which he had held prior to retirement. Neither Section 14(1) of the Civil Servants Act, 1973 nor does the above-mentioned letter dated 28.01.1989 place any embargo on a retired civil servant to compete for appointment on contract basis against a post in a project funded and controlled by the Government or any public sector organization. Since respondent No.2 had emerged as the most responsive candidate in the competitive process for appointment as Advisor/Consultant on

Development Budget (Operation), his appointment cannot be termed as *“Re-employment after superannuation”*.

30. By reason of the aforementioned, the instant writ petition is allowed to the extent that extensions in respondent No.2's employment contract granted in a manner other than the process envisaged in paragraph (vii) of the Establishment Division's O.M. dated 28.01.2008 read with the Finance Division's O.M. dated 11.04.2007 are declared unlawful. Since respondent No.2 has been rendering services until the announcement of this judgment, his salaries and benefits etc., shall not be recovered from him. The Planning Commission may re-advertise the project post of Advisor/Consultant on Development Budget (Operation) for which respondent No.2 shall be at liberty to apply and participate in the competitive process. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON ____/2019

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

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