OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS (DEPARTMENT OF YOUTH SERVICES)
-AND-
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION (AFSCME, LOCAL 11 AFL-CIO

APPEARANCES

FOR DYS

Nina Belli, Investigator
Ronald Bickers, Facility Intervention Administrator
Larry L. Burke, Labor Relations Officer 3/EEO
Victor Dandridge, Labor Administrator
Pat Mogan, Labor Relations Officer 3 (Advocate)
Cassandra Price, Labor Relations Officer 2
Reed Smith, Witness

FOR OCSEA

Belinda Bradley, Grievant
Russell Burkepile, OCSEA Staff, 2nd Chair
Jennie Lewis, OCSEA Staff Rep., Lead Advocate
Adam Ruth, Observer
Tanya Serrell, Observer
Karl Wilkins, Jr., Chapter President (Scioto Village)

CASE-SPECIFIC DATA

HEARING HELD
September 16, 2013

GRIEVANCE NUMBERS
UNION (35-07-13-02-05-0005-01-03)
MANAGEMENT (35-07-20130205-0005-01-03)

CASE DECIDED
December 4, 2013

SUBJECT
Termination/ Physical Assistance for Fellow Officer

DECISION
Fatal Procedural Error: Merits Not Addressed: Grievance Sustained

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I. THE FACTS

A. INTRODUCTION

The parties to this contractual dispute are the Ohio Department of Youth Services ("Agency" "DYS") and the Ohio Civil Service Employees Association ("OCSEA" "Union"), representing Ms. Belinda Bradley (Grievant).[1] DYS is a juvenile facility that houses Ohio's juvenile felonious inmates ranging from 10-20 years of age. As a Branch of DYS, Scioto Juvenile Correctional Facility (SJCF) houses Ohio's worst juvenile offenders. SJCF classifies its inmates as follows: (1) Minimum security-lowest custodial level/highest degree of liberty; (2) Medium security-enhanced custodial level/decreased liberty; (3) Close security-highest custodial level/lowest degree of liberty.

DYS decided to discharge the Grievant on January 30, 2013 (effective February 5, 2013) for the violating several work rules.[2] When DYS removed the Grievant, she was classified as a Youth Specialist with approximately twelve years of service, no active discipline, and a satisfactory record of performance.[3]

The Use of Force SOP, is an essential aspect of DYS institutional staff training and promotes a safe environment for staff, youth and visitors. Accordingly, all DYS institutional staff, including the Grievant,[4] must attend annual quarterly sessions of Use of Force SOP training. At least one of those sessions reviews the Use of Force policy.[5]

B. ORIGIN OF INSTANT DISPUTE

The Grievant's problems began on the evening of September 5, 2012 when she was working an overtime shift on the podium in the Jefferson Unit, which houses only close-security-level juvenile offenders. During the Grievant's shift, three male, "gang banger," juvenile inmates,[6] following the orders of their gang leader(s), viciously assaulted Unit Manager Jodi Dawson in her office,[7] repeatedly

[1] Hereinafter referenced as, "The Parties."
[2] Joint Exhibit 2, at 9.
[3] Joint Exhibit 2, at 2.
[4] *See* Management Exhibit 1, containing the Grievants signature and establishing that June 15, 2012 (three months before Ms. Dawson's assault) the Grievant had accumulated eight hours of MYR training.
[5] Joint Exhibit 16, at 10.
[6] The Arbitrator omitted the names of the three youths because the Parties will likely publish this opinion, and the Undersigned is unfamiliar with any rules governing public disclosure of youths' identities.
[7] Unfortunately, such violence is relatively common at SJCF.

punching and kicking her. As the staff member closest to Ms. Dawson's office, the Grievant was in the best position to observe the entire assault. However, the Grievant never entered Ms. Dawson's office to assist her during the brutal assault. Instead, the Grievant hit her "Man-Down" alarm, alerting other staff members to an ongoing emergency. Meanwhile, the Grievant yelled verbal commands to the juvenile offenders from the doorway of Ms. Dawson's office.

Former Youth Specialist Reed Smith was the first staff to arrive at the scene. He brushed past the Grievant and pulled youth Anderson away from Ms. Dawson who was seriously injured. He later reported that the Grievant had "a look of panic" when he arrived on the scene, and he never saw the Grievant inside Ms. Dawson's office.

Meanwhile, other juvenile offenders approached Ms. Dawson's office. To avoid possible escalation of the violence, the Grievant ordered them to the return to the entryways of their rooms, per Agency rules. The Grievant, with staff assistance, secured the juveniles in their rooms. The day after the assault, the Grievant actually helped to restrain another juvenile offender.

In a letter dated November 29, 2012, the Agency charged the Grievant with the following violations:

1.	Rule 5.01P	Failure to follow policies and procedures (Specifically: ODYS Policy 103.17—General Work Rules (Responsiveness) SOP 301.0 5.01—Use of Force, including: Attachment (G) (Youth Resistance Grid)
2.	Rule 5.12P	Actions that could harm or potentially harm an employee, youth, or a member of the general public
3.	Rule 5.26P	Failure to report a procedural violation of Managing Youth Resistance Policy and Procedures (Rule 5.25P) OR Submitting an incomplete and/or false report of a procedural violation of Managing Youth Resistance Policy and Procedures (Rule 5.25 P). Failing to report are not competing a report per Report Writing training (refer to Standard Operating Procedure 301.0 5.01).[8]

C. PROCEDURAL BACKGROUND

An administrative investigation was launched on September 7, 2012[9] and concluded on or about

[8] Joint Exhibit 3, at 2-3.
[9] Joint Exhibit 4, at 1.

October 26, 2012.[10] The Agency held a pre-disciplinary meeting on December 4, 2012.[11] During that meeting the parties presented the evidence and arguments to a hearing officer school. In a letter dated December 5, 2012 Ms. Karen M. Lahman, LPCC sent a letter to Mr. Ziegler, attempting to explain why the Grievant did not physically intervene during the assault on Ms. Dawson and asking the Agency to spare the Grievant's job.[12] Nevertheless, on December 21, 2012, seventeen days after the pre-disciplinary hearing, the Pre-disciplinary Hearing Officer found cause to discipline the Grievant.[13] The Agency elected to discharge her and issued a formal "Order of Removal" that was signed on January 30, 2013,[14] fifty-seven days after the pre-disciplinary hearing. On February 1, 2013, the Grievant was hospitalized, and that same day the Union notified the Agency of the Grievant's hospitalization. The hospital released the Grievant on February 2, 2013, and the Agency notified her of her removal on February 5, 2013, ***sixty-three*** days after the pre-disciplinary hearing.[15]

On February 5, 2013, the Union issued Grievance No. 35-07-20130205-0005-01-03 ("Grievance"), challenging the Grievant's removal as not for just cause.[16] The Parties held a Step-3 Grievance Hearing on March 29, 2013; the Agency denied the Grievance in a letter dated April 11, 2013.[17]

The Parties were unable to resolve the dispute and elected to arbitrate it before the Undersigned who heard the matter on September 16, 2013 at SJCF. At the outset of those proceedings, the Union alleged that the Agency had committed a fatal procedural error by not notifying either the Union or the Grievant until 63 days after the pre-disciplinary hearing, thereby violating the contractually required sixty-day window. That procedural error, if established, effectively deprives the Undersigned of jurisdiction in this dispute.

Ultimately, the Parties agreed to: (1) present the merits of the case; (2) submit closing arguments

[10] Joint Exhibit 4, at 30.
[11] Joint Exhibit 2, at 1.
[12] Joint Exhibit 2, at 8.
[13] Joint Exhibit 2, at 7.
[14] Joint Exhibit 2, at 9.
[15] Id.
[16] Joint Exhibit 3, at 1.
[17] Joint Exhibit 3, at 2-3.

on the merits; and (3) submit post-hearing evidence and closing arguments on the procedural issue. The Parties also agreed that if the Union establishes the alleged procedural error, the Undersigned shall dismiss this dispute without addressing the merits thereof. If, on the other hand, the Union does not establish the alleged procedural, then the Undersigned shall resolve this dispute on the merits and substance.

D. THE HEARING

When they presented their cases in the arbitral hearing, the Parties' advocates made opening statements and proffered documentary/testimonial evidence supporting their positions in this dispute. All documentary evidence was available for proper and relevant challenges; all witnesses were duly sworn and subjected to both direct and cross-examination. The Grievant was present throughout the proceedings. At the close of the hearing, the Parties agreed to submit all relevant materials pertaining to the procedural issue as well as Post-hearing Briefs, addressing both procedural arbitrability and the merits. Upon receipt of those materials, the Undersigned closed the arbitral record on October 10, 2013.

II. THE ISSUES

A. PROCEDURAL ISSUE

Whether the Agency timely notified either the Grievant or the Union of the Grievant's termination.

B. MERITS-BASED ISSUE

Whether the Agency terminated the Grievant for just cause. If not what shall be the remedy?

III. RELEVANT CONTRACTUAL AND REGULATORY PROVISIONS

ARTICLE 24.06 IMPOSITION OF DISCIPLINE

The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-disciplinary meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

IV. SUMMARIES OF THE PARTIES' PROCEDURAL ARGUMENTS

A. SUMMARY OF THE UNION'S PROCEDURAL ARGUMENTS

1. The Agency had ample time to notify the Grievant of its disciplinary decision within the sixty-day contractual window.
2. The Parties did not mutually agree to modify the sixty-day contractual time limit within which the Agency must notify the Union of Management's disciplinary decisions.

3. The Parties amended the Collective-bargaining Agreement, taking pains to adopt a sixty-day window to replace the old forty-five-day window, which Management continually violated. Article 24.06 explicitly and emphatically mandates the Agency to notify either the Grievant, the Union, or both of its disciplinary decision ***no later than*** sixty days ***after*** pre-disciplinary hearings.
4. Union officials were available to receive the Agency's disciplinary decision within the sixty-day window.
5. The Grievant was available to receive Management's disciplinary decision on February 1 and 2, 2013, fifty-nine days after the pre-disciplinary hearing.

B. SUMMARY OF THE AGENCY'S PROCEDURAL ARGUMENTS

1. The Grievant failed to notify the Agency of her hospitalization, thereby violating the Agency's Call-In Rule, constructively abandoning her job, and preventing the Agency from timely notifying her of Management's disciplinary decision. The Agency telephoned the Grievant and left voicemails before the sixty-day window had closed. The Grievant responded to neither the telephone calls nor the voicemails.
2. Approximately 2.5 years ago, the Parties adopted a past practice of notifying the Union of Management's disciplinary decisions only after it had notified the Grievant thereof. This practice obtains even if that means that the Agency does not notify the Union of its decision within the sixty-day contractual window.
3. Management has presented the following evidence that establishes the existence of the aforementioned past practice:
   a. Affidavits from institutional Labor Relations Officers, attesting to the practice of first notifying grievants of disciplinary decisions before notifying unions of those decisions. See Attachment A.
   b. Since January 2011 90% of all agencies' disciplinary orders revealed no union signatures. See Attachment B. Furthermore, nothing in the arbitral record establishes that the Union has received written notice of discipline before the same was issued to employees.
4. By failing to address, let alone rebut, the affidavits, the Union essentially concedes the validity of the Agency's evidence.
5. The Union's arbitral precedent is inapplicable because it contains no managerial arguments of a past practice.
6. How Arbitration Works (Elkouri & Elkouri (sixth edition)) embraces the following as attributes that establish the existence of a past practice:
   a. "Unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties."
   b. "Clarity, consistency, and acceptability." "The lack of bilateral involvement should not necessarily be given controlling weight." The weight to be accorded past practice as an interpretive guide may vary greatly from case to case. . . . Unilateral interpretations might not bind the other party. However, continued failure of one party to object to the other party's interpretation is sometimes held to constitute acceptance of such interpretation so as, in effect, to make it mutual. . . . [C]laims of lack of knowledge often carry relatively little weight and a party may be 'assumed' to know what is transpiring, or . . . The party knew or should have reasonably known' of the asserted practice.

V. EVIDENTIARY PRELIMINARIES

Because the Union alleged a procedural error, it has the burden of proof. Specifically, the Company has the burden of persuasion (risk of non-persuasion) and, hence, must establish the existence

of the procedural error by preponderant evidence in the arbitral record as a whole. Doubts about proof of that error will be resolved against the Union. Similarly, the Agency shoulders the burden of persuasion (risk of non-persuasion) regarding its allegations and affirmative defenses, doubts about the proof of which will be resolved against the Agency.

VI. DISCUSSION AND ANALYSIS

A. PROCEDURAL ARBITRABILITY—TIMELINESS OF THE AGENCY'S DISCIPLINARY NOTIFICATION

At the outset of the arbitral proceedings, the Union alleged that the Agency had committed a fatal procedural error under the Collective-bargaining Agreement by untimely notifying the Union and the Grievant of its disciplinary decision.

B. The Parties' Procedural Positions

1. The Union's Procedural Contentions

The Union offers several arguments in support of the alleged procedural error. First, the Union stresses that the sixty-day window in the current Contract reflects the Parties' considerable efforts to adopt a sixty-day window of notification for disciplinary decisions because Management frequently violated the previous forty-five day window. Second, the Union urges that during the sixty-day window Management knew of the Grievant's hospitalization on February 1, 2013 and of her release on February 2, 2013. Hence, according to the Union, Management could have delivered its disciplinary decision on either of those days. Furthermore, in the Union's view, Management could have timely delivered its decision to Union personnel on either February 1, 2013 or February 2, 2013. The Union also stresses that Article 24.06 ***explicitly*** requires the Agency to deliver disciplinary decisions to either the Grievant, the Union, or both within the sixty-day window. Finally, the Union insists that the Parties never ***mutually agreed*** to deliver its disciplinary decisions to employees ***before*** delivering those decisions to the Union.

2. The Agency's Procedural Contentions

The Agency concedes that it missed the sixty-day contractual window for notifying either party. Still, it counters with essentially two arguments: (1) The Grievant failed to notify Management of her whereabouts, thereby preventing Management from timely delivering the penalty decision; (2) the

Parties adopted a past practice of not delivering disciplinary decisions to the Union until they are delivered to grievants.

C. Overview of Specific Evidentiary Considerations

Ultimately, the Union must establish the alleged procedural error. In this respect, the Union has established a prima facie case of the alleged procedural violation by: (1) referencing the sixty-day window in Article 24.06; and (2) establishing that the Agency delivered its penalty decision after the sixty-day procedural deadline. Once that prima facie case is established, the burden of persuasion shifts to the Agency to establish its allegations of interference by the Grievant and of a past practice modifying the sixty-day window. To prevail on the procedural issue, the Agency must establish ***both*** of its allegations because Article 24.06 facially and explicitly recognizes the Grievant and the Union as entitled recipients of the Agency's penalty decisions within the sixty-day timeframe. Consequently, the ensuing analysis focuses on the Agency's contentions because they must overcome contractual language that appears to be clear and unambiguous regarding the Agency's sixty-day duty of notification.

D. Assessing the Parties Procedural Arguments

1. Grievant's Role in Management's Tardy Notification

Here, the Union essentially claims that the Agency had ample opportunity to satisfy its contractual notification obligation, stressing the Grievant's hospitalization and release on February 1 and 2, respectively. In addition, the Union emphasizes that Union President Carl Wilkins notified Management of the Grievant's hospitalization and release. Furthermore, the Union observes that despite the Agency's claim that the Grievant violated the call-In Policy and, thereby, constructively abandoned her position, the Agency, nevertheless, compensated the Grievant for her February 1 absence. Ultimately, the Union seems to contend that the Grievant's failure to notify the Agency of her hospitalization is, somehow, irrelevant because: (1) The Agency either knew or should have known that she was hospitalized before the expiration of the sixty-day procedural window; and (2) The Agency compensated the Grievant for the February 1 absence. As noted above, the Agency maintains that the

Grievant's violation of her duty to appraise Management of her whereabouts prevented Management from timely notifying her of its penalty decision.[18]

The Agency prevails on this issue. First, the Undersigned finds that preponderant evidence in the record establishes that while she was on administrative leave, the Grievant was ***duty-bound*** to inform the Agency of her whereabouts, including her hospitalization. Indeed, the Union does not contend otherwise. Second, the Undersigned holds that the Grievant failed to satisfy her notification obligations. Again, the Union does not contend that the Grievant somehow ***satisfied*** her duty to notify the Agency of her hospitalization while she was on administrative leave. Third, the Undersigned holds that, contrary to the Union's suggestions, the Agency's knowledge of the Grievant's hospitalization on February 1, 2013 did not somehow excuse the Grievant's failure to obey the Agency's Call-In Policy.

This is not to suggest, however, that the Agency bears no fault in this matter; clearly it does. Preponderant evidence in the arbitral record as a whole establishes that on February 1, 2013 (within the sixty-day window), the Agency learned of the Grievant's hospitalization and likely could have notified her of its penalty decision within the sixty-day time frame. Given this balance of mutual fault, the Undersigned holds that but for the Grievant's noncompliance with the Agency's Call-In Policy, Management likely would have timely notified the Grievant of her removal.

2. The Agency's Duty to Notify the Union

The pivotal (outcome-determinative) issue in this dispute is whether the Parties mutually adopted a past practice of permitting the Agency to ignore the contractual sixty-day requirement until it could first notify the Grievant of her termination. Here, the Agency argues that the Parties mutually agreed to ignore the unambiguous sixty-day window in Article 24.06 by permitting Management to deliver its penalty decisions to the Union after that procedural deadline. The Union disagrees by simply underscoring the language of Article 24.06 and the absence of any explicit mutual agreement to waive the sixty-day deadline in a past practice.

[18] Although the Arbitrator could not find definitive evidence that the Grievant was on administrative leave when she was hospitalized, the Agency makes that assertion, and the Union does not contest it. Therefore, the Undersigned adopts, as a fact, that the Grievant was on administrative leave when she was hospitalized.

For the following reasons, the Undersigned holds that the Union prevails on this issue. First and foremost, arbitrators are ***eternal and irrevocable*** creatures of their parties' Collective-bargaining Agreements and, therefore, must pay irrevocable obeisance thereto.[19] In this respect, Article 24.06 states:

> The decision on the recommended disciplinary action ***shall be*** delivered to the employee, if available, and the Union in writing within ***sixty (60) days*** of the date of the pre-disciplinary meeting, which date shall be ***mandatory***. It is the intent to deliver the [disciplinary] decision to both the ***employee and the Union*** within the ***sixty (60) day*** timeframe; however, the showing of delivery to ***either*** the ***employee or the Union*** shall satisfy the Employers procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.[20]

This language is not only clear and unambiguous regarding the Agency's duty of notification to the Union, but also explicitly enumerates the sole circumstance in which the Agency may ignore the sixty-day window. Furthermore, preponderant evidence in the arbitral record demonstrates that the Parties adopted this deadline largely because of the Agency's frequent violations of the earlier forty-five-day deadline. Why, then, would they ***implicitly*** agree to modify that procedural standard and grant the Agency what is essentially an open-ended right to ignore the deadline? Such pellucid language and surrounding circumstances paint an extremely clear picture of the Parties' intent regarding the Agency's duty of notification to the Union. That "picture" in turn creates an extremely resilient rebuttable presumption that the Parties fully intended for the Agency to honor the sixty-day deadline for notifying the Union.

It would require a mutual agreement equally as explicit as the language in Article 24.06 to modify the manifest intent of that language. Mere silence or inferences from circumstantial evidence do not suffice to rebut the highly resilient rebuttable presumption arising from such lucid language. Indeed, a strict application of the "Plain Meaning" Rule would render inadmissible any evidence offered to establish a past practice contrary to the manifest intent of clear and unambiguous language

[19] See Appendix A for a discussion of the two major schools of arbitral thought, regarding contractual interpretation.
[20] Joint Exhibit 1, at 97 (emphasis added).

such as that in Article 24.06.

Even if the Undersigned permitted parole evidence to modify the clear and unambiguous contractual language in this dispute, the Agency's evidence, in the instant case, does not establish the alleged past practice.[21] The Agency seeks to modify the clear and unambiguous language of Article 24.06 by adducing numerous documents in which the Union did not signed off on the Agency's disciplinary decision and affidavits of the alleged past practice. This circumstantial evidence essentially invites a reasonable ***inference*** that the Parties have ***mutually agreed*** to modify the italicized language under Article 24.06. In the Undersigned's view, however, such a reasonable inference, even if forthcoming, would be insufficient to modify the foregoing italicized language under Article 24.06. Such a modification would, at the very least, require ***direct*** evidence that the Parties have ***mutually agreed*** to modify the sixty-day deadline. In short, where contractual language is clear and unambiguous on a given issue, evidence of an intent to modify that language must be equally clear and unambiguous. Circumstantial evidence may support inferences that clarify/modify ambiguous contractual language as well as fill gaps therein, but circumstantial evidence is unlikely to supersede contractual language that is clear and unambiguous regarding a given issue(s).

VII. THE AWARD

For all the foregoing reasons, the Union's procedural Grievance is hereby **SUSTAINED** in its entirety, and the Undersigned accordingly refrains from addressing the merits of this dispute. Consequently, the Agency shall forthwith reinstate the Grievant with ***full backpay and all other benefits*** that she might have forfeited ***because of*** her removal in this case.

Appendix A

When enlisted to interpret controversial contractual provisions, arbitrators splinter into two schools of thought that embrace antithetical interpretive approaches. Both schools of thought

[21] Observe, however, that the Undersigned does not subscribe to barring evidence that seeks to refute the thrust of clear and unambiguous language. The point is that such evidence must establish the intent to modify that language with the same force and clarity as the original language establishes the status quo intent. In short, the clarity of the intent of modification must be as clear as the original intent of creation.

essentially agree that the sole purpose of arbitral interpretation in contractual disputes is to discern the parties' intent regarding disputed contractual provisions.

The dominant and time-honored approach firmly embraces the "Plain Meaning" Rule, which obliges arbitrators to seek out and enforce clear and unambiguous contractual language, as the best indication of the Parties' intent. Under the "Plain Meaning Rule," parole evidence, such as *past practice*, bargaining history, etc., becomes relevant in contractual disputes *if and only if* contested contractual language has, in the first instance, succumbed to either latent or patent ambiguities. A contractual provision that is susceptible to more than one reasonable interpretation is inherently ambiguous. That is, if a reasonable person can embrace more than one interpretation of a disputed contractual provision, then that provision is, by definition, ambiguous. Perhaps the major benefit of the "Plain Meaning Rule" is that it affords *linguistic clarity* a high priority among contractual draftspersons, given the decisive interpretive role of clear and unambiguous contractual language in "Issues" disputes. To the greatest extent possible, contracting parties should be able to rely on the language they select during contractual negotiations to shape their prospective relationship. Still, no contractual language, however carefully crafted, can be clear and unambiguous for *all* issues that may arise thereunder. But that linguistic shortcoming hardly justifies either subordinating or otherwise ignoring language that is clear and unambiguous with respect to a given issue. Ample opportunities abound to reference parole evidence *after* careful scrutiny reveals that contentious contractual language is ambiguous regarding a given issue(s).

In stark contrast, the second interpretive approach flatly ignores contractual language—however clear and unambiguous regarding the issue in question—screening *all* contractual language through parole evidence. This school of thought maintains that *past practice*, rather than clear and unambiguous contractual language, more accurately reflects the parties' intent regarding disputed contractual provisions. In other words, as an interpretive aid, *conduct* categorically trumps clear, unambiguous, mutually-adopted contractual language. This approach prompts the query: Why have collective-bargaining agreements in the first instance if conduct is the sole interpretative source?

Despite the numerous opposing and supporting arguments relating to the foregoing schools of thought, the Undersigned subscribes to the "Plain-Meaning" Rule, which emphasizes clear and unambiguous contractual language as most accurately mirroring the parties' intent.

Robert Brookins

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