



CHIEF NATIONAL GUARD BUREAU INSTRUCTION

NGB-JA
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NATIONAL GUARD DISCRIMINATION COMPLAINT PROGRAM

References: See Enclosure B.

1. Purpose. This instruction establishes policy and assigns responsibilities for implementing and maintaining a National Guard (NG) Discrimination Complaint (DC) Program in accordance with (IAW) references a through j.

2. Cancellation. This instruction rescinds and replaces National Guard Regulation (NGR) (AR) 690-600/(AF) 40-1614, 15 March 1993, Volumes I and II, "National Guard Civilian Discrimination Complaint System;" and NGR 600-22/Air National Guard Instruction 36-3, 30 March 2001, "National Guard Military Discrimination Complaint System."

3. Applicability. This instruction establishes National Guard Bureau (NGB) policy and applies to all NG members serving pursuant to reference k (Title 32) and all NG technicians employed under reference f (32 U.S.C. § 709). It does not apply to National Guard of the United States (NGUS) personnel serving on active duty under reference l (Title 10), or civilian personnel employed under reference m (Title 5) performing duty at a State NG organization or the National Guard Bureau (NGB), including the Air National Guard (ANG) and Army National Guard (ARNG) Directorates, the Air and Army Readiness Centers, and all NG Field Operating locations. It also applies to beneficiaries of services of the ARNG and ANG, who may file a complaint on the basis of race, color, national origin, religion or sex-gender, including sexual harassment, and reprisal concerning prior engagement in protected discrimination process related activity in programs receiving Federal financial assistance.

4. Policy. It is NG policy not to condone or tolerate unlawful discrimination, including sexual harassment, of any kind. Once unlawful discriminatory practices are alleged, immediate and appropriate action will be taken to investigate and resolve the allegations, and ensure any proven unlawful behavior ceases. Further, appropriate disciplinary action will be taken against

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any individual, military or civilian, who engages in unlawful discriminatory practices. Compliance with this policy is a leadership function. NG personnel serving or employed under references k and f are subject to the command, control, and disciplinary authority of the Adjutant General (TAG) of their respective state. The NGB ensures compliance with the policies set forth in this instruction via the authority granted in references b, f, h, i, j, sections 108 through 110 of reference k, and sections 10501 through 10503 of reference l. Receipt of Title 32 funding, in whole or part, is contingent upon compliance with the policies and processes set forth within this instruction, under the authority granted in section 108 of reference k, irrespective of whether the alleged discriminatory conduct falls within a specifically enumerated basis under reference j.

a. No individual, military or civilian, may unlawfully discriminate against, harass, intimidate or threaten another person on the basis of race, color, national origin, religion, sex-gender, including sexual harassment and reprisal for engaging in prior protected discrimination complaint processing related activity. Unlawful discrimination may take the form of a hostile work environment. Sexual harassment includes harassment based on sexual orientation. Sexual orientation harassment by military personnel may be punishable under Article 92, "Failure to obey order or regulation," or similar article of a local State military code of justice and should be addressed through State command channels or the State Inspector General. It must be noted though that the assignment and utilization of female servicemembers is governed by federal law.

b. The military aspects of NG military technician (dual-status) service are paramount over all other concerns. Therefore, all complaints of discrimination arising from the employment of military technicians (dual-status) under reference f are to be processed and given any applicable relief in an identical manner as those arising from military members of the non-federalized National Guard forces serving pursuant to section 502 of reference k.

(1) Unlike military personnel and NG military technicians (dual-status), non dual-status technicians may also file a complaint regarding discrimination on the basis of pregnancy, Equal Pay Act claims under reference n, age, disability, or genetic information. Non-dual status technicians may also be entitled to certain monetary awards. In some circumstances beneficiaries of services may also be entitled to monetary damages.

5. Definitions. See Glossary.

6. Responsibilities. See Enclosure A.

7. Summary of Changes. This instruction is a complete revision and integration of the NG discrimination complaint systems pertaining to both Title

32 military and civilian personnel performing duties or employed under the authority of reference k. This instruction affirms that the TAG of the State is the final appellate authority for State NG discrimination complaints. It also establishes formal processes within NGB to oversee, review, and provide relief in appropriate State NG discrimination complaints matters under the authority of references b, h, and i.

8. This instruction retains the integrity of the equal opportunity (EO) process required for both military and civilian personnel. It establishes the NGB requirement to implement federal statutes, regulations and directives of the Air Force, Army, and the Department of Defense (DoD) for Military Equal Opportunity (MEO) and civilian Equal Employment Opportunity (EEO), subject to the limitations established by federal case law. In some circumstances, the MEO and EEO complaint systems in references a through e may provide non-binding guidance.

9. This instruction reemphasizes the NG policy to voluntarily use Alternative Dispute Resolution (ADR) and other early collaborative dispute resolution processes to the maximum extent practicable and appropriate to resolve workplace disputes.

10. Releasability. This instruction is approved for public release; distribution is unlimited. Obtain copies through <<http://www.ngbpd.c.ngb.army.mil>>.

11. Effective Date. This instruction is effective upon publication and must be reissued, cancelled, or certified as current within five years of its publication.

Frank J. Grass
General, USA
Chief National Guard Bureau

Enclosure:

- A -- Responsibilities
- B -- References
- GL -- Glossary

ENCLOSURE A

RESPONSIBILITIES

1. Chief, National Guard Bureau (CNGB). IAW references b, e, f, and i, the CNGB is responsible for establishing and administering a NG DC program for all NG personnel in a Title 32 status. The CNGB serves as the Final Reviewing Official of NG complaints of discrimination filed under the NG DC Program. The CNGB will:

a. Establish programs; provide guidance, oversight and training; and enforce compliance regarding nondiscrimination in the NG of the several states, territories, commonwealths, and the District of Columbia. Hereinafter the term "State" shall refer to each of the several states, territories, commonwealths, and the District of Columbia.

b. Establish procedures to ensure compliance with references i and j.

c. Ensure that the NG DC Program is administered uniformly for all Title 32 personnel.

d. Establish a DC review process, and hold accountable those States that may fail to provide a work-environment free from unlawful discrimination or comply with the policies or requirements set forth in this instruction.

e. Establish sufficient staff positions within the NGB to adequately carry out the NG DC Program requirements.

f. Provide adequate resources to ensure the timely processing of complaints of discrimination, and, when appropriate, rectify unjust personnel actions or compensate persons wronged by unlawful discrimination.

2. Vice Chief, National Guard Bureau (VCNGB). The VCNGB is delegated the authority to act as the Final Reviewing Official for NG discrimination complaints under the NG DC Program, and will render such reviews in a timely manner. The VCNGB may delegate this authority to act as the Final Reviewing Official to The Special Assistant to the CNGB.

3. Directors, Air and Army National Guard (DANG, DARNG). The DANG and DARNG will act as Reviewing Officials for NG discrimination complaints filed by members of their respective services under the NG DC Program, and will render such reviews in a timely manner.

4. Chief of Equal Opportunity, Office of the Vice Chief, National Guard Bureau (NG-ZB-EO). The Chief, NG-ZB-EO will report directly to the VCNGB. The NG-ZB-EO will:

- a. Establish and implement NG DC related policy and guidance.
- b. Liaise with the Office of the NGB Chief Counsel (NGB-JA) to ensure all proposed policy and guidance regarding the NG DC Program is legally sufficient prior to promulgation.
- c. Submit, manage, and execute the NG DC Program budget.
- d. Encourage, develop, and implement initiatives, activities, and training programs throughout the NG related to the detection and elimination of unlawful discrimination and its dilatory effects upon the organization.

5. Chief of the Office of Complaints Management and Adjudication (NG-ZB-CMA). NG-ZB-CMA is the office of primary responsibility (OPR) for implementing the NG DC Program. The Chief of NG-ZB-CMA will:

- a. Administer the NG DC Program to ensure compliance with the CNGB's policies and guidance. As needed, conduct investigations of alleged instances of discrimination.
- b. Administer the DC process ensuring timely resolution and closure of formal complaints, and provide advice and assistance throughout the complaint process.
- c. Issue timely decisions, determinations, and certifications relating to NG DC Program.
- d. Review all settlement offers and agreements, and coordinate these through the NGB-JA Litigation and Employment Law Division (NGB-JA/LEL) prior to finalization.
- e. Coordinate with the NGB-JA/LEL when issuing guidance on the NG DC Program.
- f. Assist the Chief, NG-ZB-EO in:
 - (1) Providing NG DC Program awareness throughout the NG and training for personnel assigned to administer the Program.
 - (2) Ensuring NG personnel are aware of and have access to existing NG DC Program resources to include the NG-ZB-EO website located at reference o.
 - (3) Advocating and defending the NG DC Program.

(4) Identifying and eliminating unnecessary barriers to a work-environment free from unlawful discrimination.

(5) Soliciting NG DC Program data from the field for each preceding Fiscal Year and preparing a summary report to the CNGB regarding progress made in implementing the NG DC Program in accordance with this instruction.

g. Utilize and support the utilization of ADR processes throughout the NG DC process.

6. Office of the Chief Counsel, NGB (NGB-JA). The Chief Counsel, NGB-JA, will:

a. Appoint NG DC Hearing Officers who have the requisite skills, abilities, and experience. This authority may be delegated to one or more individuals within NGB-JA. A prospective Hearing Officer may be required to undergo a background investigation. The Chief Counsel may withdraw or suspend a Hearing Officer's appointment for any reason he or she feels appropriate. The decision to withdraw or suspend a Hearing Officer's appointment under this instruction is not appealable.

b. Designate the uniform to be worn by a military officer who is appointed a Hearing Officer while conducting a hearing, pre-hearing conference, or fact finding interview, to include authorizing the wearing of civilian clothes.

c. Provide legal advice as required throughout the NG DC process, to include legal reviews of military/civilian complaint determinations, acceptance and dismissal letters, reports of investigation, settlement agreements, and agency decisions. These functions are generally delegated to the NGB-JA/LEL.

7. NGB-JA/LEL. NGB-JA/LEL will:

a. Provide full spectrum legal representation and support to the NGB, and support to State NG management, regarding DC matters, including discrimination complaints made or forwarded to other State or federal entities. NGB-JA/LEL attorneys and paralegals are not authorized to provide individual complainants legal representation or assistance.

b. Participate in ADR proceedings, when appropriate, arising in the course of DC disputes.

c. Coordinate with the State full-time Judge Advocate (JA):

(1) In disputes in which NGB-JA/LEL has representational responsibility.

(2) Regarding participation by the servicing NGB-JA/LEL attorney in DC proceedings.

(3) Regarding the terms of any settlements resulting from such proceedings.

d. Coordinate with the Chief, NG-ZB-EO and the Chief of NG-ZB-CMA to provide DC process training and guidance for NG Hearing Officers, JAs, civilian attorneys, and paralegal personnel.

8. The Adjutant General (TAG). Hereinafter the term “Adjutant General” shall include the Commanding General of the District of Columbia National Guard. The TAG, or his or her designee, will:

a. Establish a State DC program to supplement the guidance provided in this instruction; provide guidance, oversight and training; and enforce compliance regarding nondiscrimination in the NG.

b. Provide adequate resources to ensure the timely processing of complaints of discrimination at all levels, and, when appropriate, rectify unjust personnel actions or compensate persons wronged by unlawful discrimination.

(1) The NG unit or organization in which the discrimination complaint arises is normally responsible for all costs associated with a discrimination complaint – including: expenses incurred in the administrative processing of an discrimination complaint, such as the costs of investigators, counselors, agency representatives and expenses for the court reporter and transcripts; agency witness travel, travel of a Complainant’s witnesses who are under the authority of the NG unit or organization in which the discrimination complaint arises, and NGB personnel travel; depositions; and back pay. For non dual status technicians and beneficiaries of services, costs may include attorney fees, and compensatory damages stemming from an approved settlement agreement, litigation, or awarded by an appropriate authority.

(2) The Federal government is not obligated to pay travel expenses of a Complainant’s witnesses who are not Federal employees.

(3) Unless required by the Hearing Officer in the administrative process, the agency is not responsible for paying the travel expenses of a Complainant who is not a Federal government employee or NG member. In the judicial process, the Federal government is not responsible for any of Complainant’s travel expenses. Complainants who prevail in their complaints may be reimbursed for travel expenses as part of their costs.

c. Implement this instruction, focused on maintaining a work-environment free of unlawful discrimination, and encourage personnel to participate in the complaint process without fear of retaliation.

d. Resolve all findings of unlawful discrimination within allowable timeframes to ensure compliance with internal policy and this instruction.

e. Ensure that responsible officials (i.e., commanders, directorate heads, etc.):

(1) Disseminate information on how to file complaints, and the time limits for such filing and processing of the complaint.

(2) Permanently post required information on easily accessible bulletin boards for all applicable personnel to review.

f. Display the URL link to the NG-ZB-EO website in a conspicuous place on all of the State NG workplace dispute-related websites. The NG-ZB-EO website address is located at reference o.

g. IAW reference f, fairly and impartially act as the State's final arbiter in all State NG EO DC matters, subject to any State requirements and limitations.

h. Appoint an individual assigned to the Joint Force Headquarters-State (JFHQ-State) to serve as the State Equal Employment Manager (SEEM).

9. The State Equal Employment Manager (SEEM). The SEEM will:

a. Serve as the TAG's central point of contact for all civilian and military complaints arising within the State NG, and have direct access to the TAG.

b. Manage the State DC program on behalf of the TAG, to include:

(1) Maintaining a database with all open and closed complaints.

(2) Monitoring and tracking the progress of all open complaints.

(3) Timely notifying NG-ZB-CMA of all complaints, both informal and formal, and timely coordinating all complaint processing with NG-ZB-CMA.

(4) In coordination with the State Civilian Personnel Office (CPO) and Human Resources Office (HRO), or the military EO officer at the State NG or first subordinate command level, ensuring that complaints are timely and properly processed.

c. Coordinate legal aspects of a complaint with the State JA, NG-ZB-CMA and NGB-JA/LEL as required and advise the TAG on all aspects of DC processing and management at the State level.

d. Act as the custodian of records for discrimination complaint files and related records.

e. Prepare and timely submit required reports, reviews, or other correspondence as scheduled or requested by NGB.

f. Administer the State pre-complaint fact-finding phase and provide support, as required, during the investigative phase of the complaint process.

g. Receive a minimum of 16 hours of specified training by NG-ZB-CMA within 60 days of appointment. Training will include, but is not limited to, NG DC Program processing and a case-by-case review of all open and pending complaints in the SEEM's State.

h. Receive training prescribed for EO professionals and any additional training applicable to State and NG DC Program duties.

i. Ensure that the State has no fewer than two EO counselors.

j. Ensure EO training is provided to EO professionals in accordance with NGB, Army, Air Force and DoD rules, regulations and policies, and provide EO professionals adequate resources to accomplish their fact-finding and resolution duties.

k. Assist the State ADR Manager in developing and implementing the State ADR Program with respect to DC procedures, DC educational programs, unit climate assessments, and other elements of the NG DC Program and other NGB EO programs.

l. Review settlement agreements resulting from ADR proceedings for compliance with applicable NGB, Army, Air Force and DoD rules, regulations and policies.

10. Commanders, Supervisors and Managers. Commanders, supervisors and managers will:

a. Ensure that:

(1) All complaints are processed IAW the procedures in this Instruction.

(2) Unit members and employees are briefed annually of their right to file discrimination complaints.

(3) Action is taken to end unlawful discrimination or sexual harassment when a formal complaint is found substantiated.

(4) Personnel actions are carried out fairly and offer all members an equal opportunity to advance in the organization.

b. Allow personnel with collateral EO duties, whether civilian or military, sufficient duty time to perform their EO functions.

c. Allow complainants and their representatives reasonable amounts of duty time during both the fact-finding and investigatory phases of the complaint process to pursue the complaint.

d. Ensure full cooperation with EO counselors, SEEMs, investigators, JAs, NGB representatives, and Hearing Officers.

e. Promote the use of ADR to resolve disputes under his or her jurisdiction.

f. Participate “in good faith” in ADR proceedings, and consider issuing a policy that all subordinates participating in the ADR process do likewise.

11. Full-time JA. Full-time JAs will:

a. Provide legal advice to the TAG and SEEM on all aspects of discrimination complaints, including the development, implementation, and administration of the State’s DC program.

b. Assist the SEEM, as required, during the fact-finding and investigatory phases of the complaint process.

c. Advise the TAG, in conjunction with the SEEM, and after coordination with NGB-JA/LEL, on settlement agreements and claims for attorney’s fees and costs.

c. Coordinate with the NGB-JA/LEL:

(1) In disputes in which NGB-JA/LEL has representational responsibility.

(2) Regarding participation or assistance by the servicing NGB-JA/LEL attorney in State DC proceedings.

(3) Regarding the terms of any settlement agreement.

(4) When anticipating or engaging in DC litigation.

d. Notify NG-ZB-CMA and NGB-JA/LEL when informed that a complainant has initiated or terminated a civil action.

e. Represent the State NG in proceedings relating to complaints of discrimination. In disputes in which NGB-JA/LEL has representational responsibility, act as the State's legal point of contact and cooperate fully with the servicing NGB-JA attorney.

g. Advise on the suitability of disputes for resolution through the use of ADR. In disputes in which the NGB-JA/LEL has representational responsibility, this function will be accomplished by or coordinated with the servicing NGB-JA attorney.

h. Draft or review settlement agreements. In disputes in which the NGB-JA/LEL has representational responsibility, the servicing NGB-JA attorney will review and coordinate with the Full-time JA on all settlement agreements.

i. Assist the ADR Manager in providing personnel awareness training and briefings on ADR processes and techniques.

12. Air and Army National Guard (ANG and ARNG) EO Professionals. ANG and ARNG EO Professionals will:

a. Advise commanders, supervisors and managers regarding issues, merits, validity, and processing of discrimination complaints.

b. Conduct informal fact-finding into allegations of discrimination on behalf of the State NG to facilitate informal resolution.

c. Advise complainant on the DC process.

d. Assist the complainant in processing a DC, particularly in clarifying the issues and bases of the complaint.

e. Provide feedback to the complainant on the status of the complaint at each step of the process and advise the complainant of the next step.

f. Notify the SEEM immediately upon receipt of a complaint or as soon as reasonably possible thereafter, and coordinate processing of the complaint with the SEEM.

g. Provide technical assistance to investigators of formal complaints of discrimination.

h. Assist in developing and implementing the State DC and ADR programs, DC educational programs, unit climate assessments, and other elements of the NG EO and DC Programs.

i. Review and coordinate settlement agreements with the State JA and NGB-JA/LEL.

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ENCLOSURE B

REFERENCES

- a. DoD Directive 1440.1, 21 May 1987, certified current as of 21 November 2003, "DoD Civilian Equal Opportunity (EEO) Program"
- b. DoD Directive 1350.2, 23 December 1988, certified current as of 21 November 2003, "Department of Defense Military Equal Opportunity (MEO) Program"
- c. DoD Directive 1020.1, 31 March 1982, "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense"
- d. Army Regulation (AR) 600-20, 18 March 2008, "Army Command Policy," as amended
- e. Air Force Instruction (AFI) 36-2706, 5 October 2010, "Equal Opportunity Program Military and Civilian," as amended
- f. Section 709 of title 32, United States Code (32 U.S.C. § 709), "National Guard Technician Act of 1968," as amended
- g. Executive Order 13160, 23 June 2000, "Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs," as amended
- h. DoD Directive 5500.11, 27 May 1971, "Nondiscrimination in Federally Assisted Programs," as amended
- i. DoD Directive 5105.77, 21 May 2008, "National Guard Bureau (NGB)"
- j. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d - 2000d-7, "Federally Assisted Programs," as amended
- k. Title 32, United States Code, "National Guard," as amended.
- l. Title 10, United States Code, "Armed Forces," as amended.
- m. Title 5, United States Code, "Government Organization and Employees," as amended.
- n. 29 U.S.C. § 206 (d), "Equal Pay Act of 1963," as amended.

o. < <http://www.nationalguard.mil/Leadership/JointStaff/ZB/OfficeofEqualOpportunity.aspx> >, day month year

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GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
AFI	Air Force Instruction
ANG	Air National Guard
AR	Army Regulation
ARNG	Army National Guard
CNGB	Chief, National Guard Bureau
CPO	Civilian Personnel Office
DC	Discrimination Complaint
DoD	Department of Defense
EEO	Equal Employment Opportunity
EO	Equal Opportunity
EOA	Equal Opportunity Advisor
EOL	Equal Opportunity Leader
HRO	Human Resources Office
IAW	In accordance with
JA	Judge Advocate
JFHQ-State	Joint Force Headquarters-State
MEO	Military Equal Opportunity
NG	National Guard
NG-ZB-CMA	Chief of Complaints Management and Adjudication
NG-ZB-EO	Office of Equal Opportunity
NGB	National Guard Bureau
NGB-JA	Office of the National Guard Bureau Chief Counsel
NGB-JA/LEL	Litigation and Employment Law Division
NGR	National Guard Regulation
NGUS	National Guard of the United States
OPR	Office of primary responsibility
SEEM	State Equal Employment Manager
TAG	The Adjutant General
U.S.C.	United States Code
VCNGB	Vice Chief, National Guard Bureau
ZB	Office of the Vice Chief, National Guard Bureau

PART II. DEFINITIONS

Air and Army National Guard Equal Opportunity Professionals -- Civilian Personnel Office and Human Resource Office Equal Opportunity designees, Air National Guard Equal Opportunity Specialists and Equal Opportunity Counselors, and Army National Guard Equal Opportunity Advisors and Equal Opportunity Leaders.

Alternative Dispute Resolution -- Any procedure that is used to resolve issues in controversy including but not limited to the services of a neutral third party through facilitation, mediation, fact-finding, mini-trial, arbitration, and the use of ombuds, or any combination.

Harassment – Any unwelcome conduct that is based on race, color, religion, sex (including pregnancy) or sexual orientation, national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Hostile work environment -- Discriminatory conduct or behavior in the workplace that is unwelcome and offensive to an employee or group of employees based on race, color, religion, sex (including pregnancy) or sexual orientation, national origin, age (40 or older), disability or genetic information. The conduct or behavior must be pervasive and constitute a pattern rather than consist of one or two isolated incidents. The pattern of behavior has to be of a degree severe enough to cause disruption beyond a reasonable degree in the work of the targeted employee such as when the employee becomes disturbed because of intimidation or due to fear of loss of employment. The complainant must have reason to believe that such behavior patterns are likely to continue indefinitely. Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee. The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct. The discrimination may occur without economic injury to, or discharge of, the victim.

Sexual harassment -- Any unwelcome conduct that is based on sex or sexual orientation, including unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature particularly when submission to such conduct is made directly or indirectly as a term or

condition of employment, or when submission to or rejection of such conduct is used as a basis for an employment decision affecting the person.

The conduct must be pervasive or severe enough to significantly and adversely alter the conditions of the victim's employment and create an abusive working environment. The behavior in question is evaluated from the standpoint of a reasonable person, taking into account the particular context in which it occurred. Unless the conduct is very severe, a single incident or group of isolated incidents will not be regarded as discriminatory.

Unlawful discrimination -- Unfair or unequal treatment of an individual (or group) on the basis of race, color, religion, sex or sexual orientation, national origin, age (40 or older), disability, reprisal, or genetic information.

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