Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Public Schools	
Complainant,	PERB Case No. 16-A-09
and	Opinion No. 1610
Washington Teachers' Union, Local # 6, American Federation of Teachers, AFL-CIO,	
Respondent.	

DECISION AND ORDER

I. Introduction

On April 25, 2016, the District of Columbia Public Schools ("DCPS," or "Petitioner") filed this Arbitration Review Request ("Request") pursuant to D.C. Official Code § 1-605.02(6).[1] DCPS seeks review of an arbitration award ("Award") that sustained the grievance filed by the Washington Teachers' Union ("WTU") on behalf of Mr. Thomas O'Rourke ("Grievant"). The Arbitrator determined that DCPS did not adhere to the evaluation process that eventually led to the Grievant's termination. The Arbitrator therefore ordered DCPS to reinstate the Grievant to his former position and make him whole for all losses. DCPS seeks review on the grounds that the Arbitrator exceeded his jurisdiction and that the Award is contrary to law and public policy."[2]

For the reasons stated herein, the Board affirms the Award and denies the Request.

[1] D.C. Official Code § 1-605.02(6) (2014).
[2] Request at 1; *See* D.C. Official Code § 1-605.02(6) (2014).

II. Statement of the Case

The Grievant worked as a teacher at Roosevelt High School where he served as a Building Representative for the Union, and was a member of the Roosevelt School Chapter Advisory Committee during his last eight years there. During the 2010-2011 school year, DCPS assessed teacher performance under the evaluation system known as IMPACT. Under this framework, teachers underwent five (5) classroom observations: three (3) by a principal or assistant principal, and two (2) by a Master Educator.[3] A teacher with a final school year evaluation of "ineffective" was subject to termination.[4] Ivor Mitchell, the principal at Roosevelt during the 2010-2011 school year, conducted three of the Grievant's five observations.[5] The two Master Educators, Timothy Stroud and Ijeoma Kush, each observed the Grievant once.[6] The Grievant was terminated at the end of the 2010-2011 school year, as a result of being scored "ineffective" on IMPACT.[7]

On August 15, 2011, the Grievant filed a grievance pursuant to the collective bargaining agreement ("CBA"), alleging that he received the "ineffective" rating as retaliation for his union activities.[8] The Grievance advanced through the three-step mediation process as provided in the parties' collective bargaining agreement.[9] On September 12, 2013, the Union filed a Demand for Arbitration.[10]

After the Union submitted a Demand for Arbitration with the American Arbitration Association, DCPS filed a Motion with the D.C. Superior Court to stay the arbitration.[11] DCPS argued that the dispute was not arbitrable because final IMPACT evaluation ratings are not subject to arbitration.[12] The Court denied DCPS's Motion.[13] For guidance, the Superior Court looked to *Washington Teachers' Union v. District of Columbia Public Schools*, a D.C. Court of Appeals decision involving the same parties.[14]

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[3] Award at 4. The IMPACT Guidebook describes Master Educators as "impartial, third-party observer(s)" who are "expert practitioner(s) in a particular content area." (Request, Exhibit 5 at 10).
[4] *Id.* at 7.
[5] *Id.* at 4.
[6] *Id.* at 6.
[7] *Id.* at 3.
[8] Request, Exhibit 4 at 2; *DCPS v. WTU, Local # 6, Am. Fed'n of Teachers, AFL-CIO*, 2014 CA 000082 B, Sep. 9, 2014
[9] *Id.* at 2. The Superior Court explained the three-step mediation process as follows: In Step 1, the Grievant and various officials from DCPS and the WTU meet in a three-stage informal mediation process. If the dispute is not resolved in Step 1, Step 2 allows the grievant to have a hearing in front of a neutral officer, and present witnesses and evidence. Should Step 2 also fail to satisfy either party, they may elect to invoke arbitration in Step 3.
[10] *Id.*
[11] Request at 3.
[12] *Id.*
[13] Request, Exhibit 4 (*DCPS v. WTU, Local # 6, Am. Fed'n of Teachers, AFL-CIO*, 2014 CA 000082 B, Sep. 9, 2011).
[14] Request, Exhibit 4 at 3 (*citing Washington Teachers' Union v. D.C. Pub. Sch.*, 77 A.3d 441, 458 (D.C. 2013)).

In *Washington Teachers' Union*, the D.C. Court of Appeals reviewed a decision that concerned whether a grievance challenging the IMPACT teacher ratings during the 2009-2010 school year was arbitrable.[15] The Court of Appeals, affirming the trial court, found that under Article 15, Section 15.3 of the CBA, evaluation results could not be challenged through arbitration.[16] The Court of Appeals stated that if a process violation is found, the Arbitrator could not "rescind" or "amend" the evaluation ratings, "although the arbitrator is free to craft other remedies."[17] The Superior Court noted that in this case, the Grievant alleged that his IMPACT score was a form of retaliation by DCPS and sought to arbitrate procedural compliance issues, i.e., "faults in the way his evaluation was carried out," which were arbitrable under the parties' CBA.[18] As such, the Court directed that, if the Arbitrator found that DCPS used the Grievant's IMPACT evaluation as a form of retaliation, or that DCPS failed to follow evaluation procedure, the Arbitrator must issue an "alternative remedy."[19] The parties then proceeded to arbitration.[20]

III. Arbitrator's Award

The issues, as clarified by the Arbitrator, were as follows:

(1) Did DCPS commit a process violation with respect to the Grievant's 2010-2011 IMPACT evaluation? If so, what shall be the remedy?

(2) Was the Grievant's 2010-2011 IMPACT evaluation the result of anti-union bias? If so, what shall be the remedy?[21]

Based on a review of the evidence before him, the Arbitrator found that the Grievant's claims of anti-union bias during the 2010-2011 school year were unsubstantiated.[22] The Arbitrator found the Grievant's recounting that Principal Mitchell was "briefed" on the faculty and staff was "second-level hearsay, and, even more important, [made] no mention of the Grievant or of Union activities."[23] Mitchell testified that the alleged "briefings," were merely an introduction to the teachers and staff and their respective job assignments.[24] Finally, the

[15] *Id*.
[16] *Id*. at 5. Article 15, Section 15.3 of the CBA states: "DCPS's compliance with the evaluation process, and not the evaluation judgment, shall be subject to the grievance and arbitration procedure." (Request, Exhibit 2 at 50.
[17] *Id*.
[18] *Id*.
[19] *Id*. at 6.
[20] Award at 3.
[21] *Id*.
[22] The Arbitrator focused solely on events that occurred during the 2010-2011 school year. Accordingly, while the Arbitrator found troubling the testimony that the former principal warned that she would "IMPACT [the Grievant] out," the evidence is immaterial, because the former principal was no longer there in the 2010-2011 school year and there is no probative evidence that Mitchell was "told, warned, or influenced by [the former principal] or any other administrator at Roosevelt about the Grievant's union activities." (Award at 22).
[23] Award at 22.
[24] *Id*.

Arbitrator found little to no evidence to support the Grievant's beliefs that Mitchell "had ill feelings towards [the Grievant] and a desire to retaliate," or that Mitchell deliberately gave the Grievant a low IMPACT score as the result of anti-union bias."[25] To the contrary, the Arbitrator noted that Mitchell was open to dialogue and that Mitchell's evaluations were "entirely consistent with, and mostly higher" than those by Master Educators Stroud or Kush.[26] Taken together, the Arbitrator found that the Grievant failed to prove that the alleged anti-union sentiment had any effect on his IMPACT evaluations or ratings.

Regarding the allegations of process violations, the Arbitrator first determined that the parties' CBA clearly states that process violations may be challenged in the grievance and arbitration procedure under Sections 15.3 and 15.4.[27] Limiting his review to the IMPACT process, the Arbitrator noted three of the alleged process violations: (1) Mitchell conducting his first observation on November 3, 2010; (2) Master Educator Stroud refusing to postpone his observation during a class period where the Grievant held a quiz; and (3) the length of Mitchell's observations.[28] The Arbitrator dismissed the first two allegations, finding that WTU failed to prove that DCPS committed process violations.[29] As to the third allegation, the Arbitrator determined that Mitchell's three observations of the Grievant violated the IMPACT Guidebook.[30] The IMPACT Guidebook states that classroom observations are to be "at least 30 minutes."[31] Before the Arbitrator, DCPS argued that "at least 30 minutes" only referred to the minimum amount of time for an observation.[32] The Arbitrator, however, found the testimony of IMPACT Deputy Chief Michelle Hudacsko on this point particularly compelling. Hudacsko stated that observations should be 30 minutes.[33] Hudacsko explained that "at least" is included in the guidebook language because "evaluators don't set a timer and walk out. But they leave at the 30-minute mark"[34] Hudacsko affirmed that this mandate ensures that everyone is observed for the "exact same amount of time."[35] The Arbitrator noted that Master Educators Stroud and Kush "scrupulously" observed a 30-minute limit.[36] In contrast, Mitchell testified that each of his three observations lasted "easily over 60 minutes," and the Grievant stated that the observations lasted

[25] *Id*.
[26] *Id*.
[27] Award at 25. Article 15, Section 15.3 of the CBA states: "DCPS's compliance with the evaluation process, and not the evaluation judgment, shall be subject to the grievance and arbitration procedure." Article 15, Section 15.4 of the CBA states: "The standard for separation under the evaluation process shall be 'just cause,' which shall be defined as adherence to the evaluation process only." (Request, Exhibit 2 at 50).
[28] *Id*. at 26.
[29] *Id*. The Arbitrator found that Mitchell's first observation on November 3, 2010 took place within the prescribed IMPACT Guidebook timeframes of September 13 to December 1, 2010. (Award at 26). As to Stroud's observation, the Arbitrator found that the Grievant's claim that he asked Stroud to leave during the quiz was disputed. Assuming that the Grievant asked Stroud to leave and Stroud refused, the Arbitrator determined that "it has not been shown that such refusal would constitute a process violation." (*Id*.)
[30] *Id*.
[31] *Id*.
[32] *Id*. at 27.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*.

for the entire 80-minute class.[37] Accordingly, the Arbitrator found that Mitchell's three observations violated the guidelines in the IMPACT Guidebook.

The Arbitrator, finding that DCPS significantly violated the IMPACT process, crafted an alternative remedy pursuant to the Superior Court's decision in this case as well as the Court of Appeals decision in *Washington Teachers Union*. The Arbitrator did not alter the Grievant's "ineffective" rating, but adopted the "No Consequences" status from the 2014-2015 IMPACT assessment guidelines.[38] When a teacher is given a "No Consequences" status, neither the teacher's employment nor compensation will be affected by the rating for the current school year.[39] Finding that Mitchell's "lengthy" observations were significant violations, the Arbitrator determined that there was no just cause for the Grievant's termination.[40] Accordingly, the Arbitrator determined that "No Consequences" status was appropriate as it adheres to the limits set out in the CBA and prevailing case law.[41] To remedy the violation, the Arbitrator rescinded the termination and reinstated the Grievant with back pay.[42] DCPS contended there was no relief available to the Grievant under the terms of the CBA.[43] Citing Article 6, Section 6.5.4, DCPS contended that any additional request for relief is untimely.[44] Additionally, DCPS asserted that crafting an alternate remedy, with respect to the Grievant's removal, would require the Arbitrator to add terms to the parties' agreement or alternatively, substitute the Arbitrator's judgment for that of DCPS.[45]

IV. Discussion

The Board has limited authority to review an arbitration award. In accordance with D.C. Official Code § 1-605.02(6), the Board is permitted to modify or set aside an arbitration award in only three narrow circumstances: (1) if an arbitrator was without, or exceeded his or her jurisdiction; (2) if the award on its face is contrary to law and public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.[46]

DCPS seeks to have this Award reversed on the grounds that the Arbitrator exceeded his jurisdiction and because it is contrary to law and public policy.

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[37] *Id*. at 28.
[38] *Id*. at 30.
[39] *Id*.
[40] *Id.* at 31. Article 15, Section 15.4 of the CBA further specifies that, "The standard for separation under the evaluation process shall be 'just cause,' which shall be defined as adherence to the evaluation *process* only." (Emphasis added) (Request, Exhibit 2 at 50).
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*. Article 6, Section 6.5.4 states, "Once a grievance has been filed it may not be altered, except that the Grievant may delete items from the grievance."
[45] *Id*.
[46] *Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 62 D.C. Reg. 12587, Slip Op. 1531, PERB Case No. 15-A-10 (2015) (*citing* D.C. Code § 1-605.02(6)).

A. Did the Arbitrator Exceed His Jurisdiction?

DCPS's first argument is that the Award should be reversed because the Arbitrator exceeded his jurisdiction. When determining if an Arbitrator has exceeded his jurisdiction, the Board looks to whether or not "the Award draws its essence from the collective bargaining agreement."[47] The Board has held that by agreeing to submit a grievance to arbitration, it is the Arbitrator's interpretation, not the Board's, for which the parties have bargained.[48] The Board has found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings on which the decision is based."[49] Moreover, "[t]he Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator."[50] A party's disagreement with an arbitrator's interpretation of a provision in the parties' collective bargaining agreement does not mean that the arbitrator exceeded his jurisdiction.[51]

DCPS first points to Article 15, Section 15.1 of the parties' collective bargaining agreement, that provides that the "evaluation process and instruments" for evaluating teachers are non-negotiable for collective bargaining.[52] Here, DCPS notes, the Arbitrator determined that DCPS violated the IMPACT process by conducting teacher evaluations for more than 30 minutes.[53] DCPS contends that "this finding is in direct contradiction with the IMPACT tool as set out in the 2010-2011 IMPACT Guidebook, which states that evaluations must be *at least* thirty (30) minutes."[54] DCPS asserts that by refusing to honor DCPS' evaluation instrument, "the Arbitrator passed judgment on a matter which is not subject to arbitration under the Parties' collective bargaining agreement and therefore exceeded his jurisdiction under the contract."[55]

The Board finds that MPD's argument amounts to a disagreement with the Arbitrator's evidentiary findings and conclusions. DCPS's position is a reiteration of the argument presented before the Arbitrator and rejected in the Award. As previously noted, the Arbitrator found that it is IMPACT policy that an observation should be 30 minutes.[56] The Arbitrator relied on the testimony of Michelle Hudacsko, Deputy Chief of IMPACT, who clarified that, "The reason those words "at least" are in there…is because evaluators don't set a timer and walk out. But

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[47] *UDC v. UDC Faculty Ass'n*, 39 D.C. Reg. 9628, Slip Op. 320, PERB Case No. 92-A-04 (1992) (*citing Michigan Family Resources, Inc. v. SEIU Local 517M*, 475 F.3d 746, 753 (6th Cir. 2007)).
[48] *UDC v. UDC Faculty Ass'n*, 39 D.C. Reg. 9628, Slip Op. 320, PERB Case No. 92-A-04 (1992).
[49] *D.C. Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *DC Metro. Police Dep't and Fraternal of Police, Metro. Police Dep't Labor Comm. (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. No. 738 PERB Case No. 02-A-07 (2004).
[50] *D.C. Dep't of Corr. and Int'l Bhd. of Teamsters, Local Union No. 246*, 34 D.C. Reg. 3616, Slip Op. 157 at 3, PERB Case No. 87-A-02 (1987).
[51] *D.C. Dept. Pub. Works v. AFSCME Local 2091*, Slip Op. 194, PERB Case No. 87-A-08 (1988).
[52] Request at 4.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] Award at 7.

they leave at the 30 minute mark....”[57] Accordingly, the Arbitrator found that DCPS violated the IMPACT process. The Award is not “so untethered from the [collective bargaining agreement] that it casts doubt on whether he was engaged in interpretation, as opposed to implementation of his “own brand of industrial justice.”[58] Accordingly, the Board finds that DCPS’s Request on this point is only a disagreement with the Arbitrator’s reliance on the credible testimony of IMPACT Deputy Chief Hudacsko. This disagreement is not a basis for the Board to overturn the Award.

Additionally, DCPS asserts, as it did before the Superior Court, that the Arbitrator exceeded his jurisdiction by “subjecting the Grievant’s final rating to the grievance and arbitration process.”[59] DCPS notes that Article 15, Section 15.3 of the parties’ collective bargaining agreement dictates that the evaluation process shall not be subject to the grievance and arbitration process.[60] DCPS also notes that this issue was addressed in the Superior Court’s Order, which specifically states that “an arbitrator may not alter [the Grievant’s] ‘Ineffective’ rating.”[61] DCPS argues that the Arbitrator’s “No Consequence” remedy “nullified the Grievant’s final rating,” which thereby exceeded the scope of the Arbitrator’s jurisdiction under the collective bargaining agreement.[62]

In the instant case, the Arbitrator’s jurisdiction derives from Article 15, Section 15.3 of the parties’ collective bargaining agreement, which states: “DCPS’s compliance with the evaluation process, and not the evaluation judgment, shall be subject to the grievance and arbitration procedure.”[63] The Arbitrator arguably construed the collective bargaining agreement, as well as the Superior Court’s decision in this case and the Court of Appeals’ decision in *Washington Teachers’ Union*, and crafted a remedy. The Board finds nothing in the record that suggests that the Arbitrator exceeded his jurisdiction.

Finally, DCPS argues that the Arbitrator adopted a remedy that was established outside the relevant grievance time period, thereby exceeding his jurisdiction.[64] DCPS notes that under Article 6, Section 6.5.1 of the parties collective bargaining agreement, grievances must be raised with the other party within ten (10) school days.[65] Further, DCPS points to Article 6, Section 6.5.4, which states that a grievance cannot be altered once filed, except to delete items.[66] In the instant matter, DCPS notes that the parties agreed that only the 2010-2011 evaluation period was

[57] *Id.* at 8.
[58] *D.C Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 61 D.C. Reg. 4285 (2014), Slip Op. 1458 at 10, PERB Case No. 14-A-03 (2014) (*citing Michigan Family Resources*, 475 F. 3d. at 754.)
[59] Request at 5.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] Request, Exhibit 2 at 50.
[64] Request at 5.
[65] Award at 5.
[66] Request at 5.

before the Arbitrator for review.[67] Despite this limitation, DCPS states that the Arbitrator adopted a remedy based on the introduction of evidence concerning the 2014-2015 school year.[68]

The Board finds that DCPS's position is merely a disagreement with the Arbitrator's interpretation of the collective bargaining agreement. DCPS's position is a reiteration of the argument presented before the Arbitrator and rejected in the Award. As noted by the Arbitrator, the Superior Court directed the Arbitrator to issue an "alternative remedy," but did not dictate that the remedy must have been available during the 2010-2011 school year.[69] Furthermore, the Arbitrator noted that the remedy is appropriate because it adheres to the limits set out in Article 15, Sections 15.3 and 15.4 of the collective bargaining agreement as well as in *Washington Teachers' Union*.[70] DCPS's disagreement with the Arbitrator's interpretation of the collective bargaining agreement does not mean that the Arbitrator exceeded his jurisdiction.[71]

B. Is the Award Contrary to Law and Public Policy?

In order for the Board to find that the Arbitrator's Award is contrary to law and public policy, the asserting party bears the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result."[72] By submitting the grievance to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings on which the decision is based."[73] Disagreement with the arbitrator's findings is not a sufficient basis for concluding that an award is contrary to law or public policy.[74]

DCPS contends that the Arbitrator's adopting the "No Consequences" remedy nullified the D.C. Court of Appeals order that the Arbitrator "cannot rescind or amend the final evaluation, i.e., an 'evaluation judgment.'"[75] Secondly, DCPS contends that the Arbitrator refused to "honor the Agency's evaluation tool and insert[ed] his own interpretation of the IMPACT guidelines.[76]

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[67] *Id*. at 6.
[68] *Id*.
[69] Award at 30-31.
[70] *Id*. at 31.
[71] *See DC Dept. Pub. Works v. AFSCME Local 2091*, Slip Op. 194, PERB Case No. 87-A-08 (1988).
[72] *Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Committee*, 47 D.C. Reg. 717, Slip Op. 633 at 2, PERB Case No. 00-A-04 (2000); *See also D.C. Pub. Sch. v. Am. Fed'n of State, County and Municipal Emp., District Council 20*, 34 D.C. Reg. 3610, Slip Op. 156 at 6, PERB Case No. 86-A-05 (1987).
[73] *D.C Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. 633 at 3, PERB Case No. 00-A-04 (2000); *D.C. Metro. Police Dep't and Fraternal of Police, Metro. Police Dep't Labor Comm. (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. 738, PERB Case No. 02-A-07 (2004).
[74] *D.C. Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Comm*., 31 D.C. Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984).
[75] Request at 6-7 (*citing Washington Teachers' Union v. D.C. Pub. Sch*., 77 A.3d 441, 458 (D.C. 2013)).
[76] *Id*. at 7.

The Board finds that DCPS's disagreement with the Arbitrator's findings is not a sufficient basis for concluding that the Award is contrary to law and public policy. As previously stated, in *Washington Teachers' Union*, the Court of Appeals held that if the arbitrator found IMPACT process violations, the Arbitrator may craft a remedy, but cannot rescind or amend the final evaluation.[77] In this case, the Arbitrator did not alter the Grievant's final IMPACT score. He adopted a "No Consequences" remedy so that the Grievant's employment would not be affected by his "ineffective" rating.[78] The "ineffective" rating remains unchanged by the Arbitrator. Moreover, the Arbitrator crafted this remedy pursuant to the limitations articulated in *Washington Teachers' Union* and by the Superior Court in this case, based on the Arbitrator's finding that DCPS violated the IMPACT process. Accordingly, the Arbitrator's factual conclusions and remedy are not on its face contrary to law.

V. Conclusion

Based on the foregoing, the Board finds that the Arbitrator did not exceed his authority and that the Arbitrator's Award is not contrary to any specific law or public policy. For these reasons, the Board rejects DCPS's arguments and finds no cause to set aside or modify the Arbitrator's Award. Accordingly, DCPS's Arbitration Review Request is denied and the matter is dismissed in its entirety with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.

2. Pursuant to Board Rule 559. 1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By the unanimous vote of Board Chairperson Charles Murphy and Members Ann Hoffman and Douglas Warshof.

February 23, 2016

Washington, D.C.

[77] Award at 31.
[78] *Id*.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 16-A-09, Op. No. 1610 was sent by File and ServeXpress to the following parties on this the 24th day of February, 2017.

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