Morris, 3 OCB2d 19 (BCB 2010)

(IP) (Docket No. BCB-2750-09).

Summary of Decision: Petitioner alleged that the Union breached its duty of fair representation, in violation of NYCCBL § 12-306(b)(1) and (3) after HHC terminated his employment, by failing to pursue any remedial action. Further, he alleged that HHC terminated his employment, in violation of NYCCBL § 12-306(a)(1) and (3) because he sought the Union's assistance regarding overtime compensation. The Union claimed that Petitioner failed to state a claim. HHC argued, primarily, that Petitioner failed to state a claim that it had retaliated against him for union activity, and that, regardless of motivation, it had legitimate business reasons for terminating Petitioner's employment. The Board found that the Union did not breach its duty of fair representation and that the Petitioner did not allege the necessary facts to support his claim that HHC's termination of his employment was improperly motivated. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

JEFFREY MORRIS,

Petitioner,

- and -

DISTRICT COUNCIL 37 and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

DECISION AND ORDER

On March 10, 2009, Jeffrey M. Morris, filed a verified improper practice petition *pro se* against District Council 37, AFSCME, AFL-CIO ("DC 37" or "Union") and the New York City Health and Hospitals Corporation ("HHC") claiming that the Union breached its duty of fair

representation by failing to contest the termination of his employment in violation of NYCCBL § 12-306(b)(1) and (3). He also claims that HHC terminated him because he sought the Union's assistance regarding overtime compensation, in violation of NYCCBL § 12-306(a)(1) and (3). The Union claims that Petitioner failed to state a claim. HHC argues, primarily, that Petitioner failed to state a claim that it retaliated against him for protected union activity and that, regardless of motivation, it had legitimate business reasons for terminating Petitioner. The Board finds that the Union did not breach its duty of fair representation and that Petitioner did not allege the necessary facts to support his claim that HHC was improperly motivated in terminating his employment.

BACKGROUND

Petitioner began work at the Psychiatry Emergency Department ("Department") of Jacobi Hospital ("Jacobi") as a provisional employee in the title of Clerical Associate, Level II on November 13, 2007. Petitioner claims that he was never counseled or otherwise notified of poor work performance, and he claims that he was often complimented on the quality of his work by staff. To the contrary, HHC claims that as early as December 2007, and continuing throughout his employment, his supervisors spoke with him regarding his poor work performance

On April 14, 2008, one of Petitioner's supervisors, Miriam Rivera, Assistant Director of Behavioral Health Services, completed an evaluation of Petitioner's work performance, which was approved by the Department Head. Petitioner's work performance was rated as "Satisfactory." (Pet., Ex. A). The evaluation noted that Petitioner "experiences some difficulty grasping new instructions/ideas without follow-up," "has established an ongoing absence pattern," "was advised to keep clerical counter clean free of residue for Infection Control and of unwanted rodents (mice)[,]

ants and roaches," and that Petitioner would continue to be educated and trained in registering and photographing patients. (*Id.*). In the Critical/Secretarial Competency Assessment form attached to the evaluation, Petitioner met many of the listed competencies. However, he did not maintain a neat office and pleasant work area, locate required files/documents quickly and accurately, and return documents or files quickly and accurately. Petitioner disputes the deficiencies listed on the evaluation, stating that he did not eat at his work area and that it was impossible for him to locate and replace files because the shared work area would often be in disarray due to others.

It is uncontested that in July 2008, Petitioner spoke to Rivera regarding his belief that he was not getting the amount of overtime he was promised when he was interviewed for the position. Petitioner claims that on the few occasions when he was getting overtime, he was only offered compensatory time. Petitioner also alleges that when he discussed these concerns with Rivera, she became visibly upset, asked him to resign, and threatened him with a reprimand if he contacted the Union. HHC alleges that Rivera actually encouraged Petitioner to speak to the Union.

HHC claims that at this meeting Rivera also spoke to Petitioner about complaints from other employees regarding his dirty work area and his failure to pull and file patient charts. Petitioner denies that his work performance was discussed, and claims that he also spoke to Rivera about his problems with another co-worker.

Immediately after this conversation, Petitioner encountered the employee with whom Petitioner had mentioned to Rivera that he was having problems. After the encounter, the employee in question wrote a report to Rivera, claiming that Petitioner had called her a "fucking cunt," and asked that the supervisor speak to him. (HHC Ans., Ex. C). Petitioner denies the allegation and claims that the other employee had been seeking retribution for his having broken up with her niece

when he was in high school. On July 31, 2008, Rivera made note that she spoke with Petitioner regarding the incident and told him that the behavior would not be tolerated. (HHC Ans., Ex. D). On August 28, 2008, the same employee made another written complaint against Petitioner, asserting that he had been harassing her and that she wanted charges filed against him. (HHC Ans., Ex. E).

Also in August, Petitioner contacted the Union regarding his problems regarding overtime and his concern about potential retaliation. A Union representative contacted HHC–it is not clear whom– to discuss Petitioner's complaints regarding overtime. At that point, HHC maintains, it recognized that it had been mistakenly offering only compensatory time instead of monetary remuneration for scheduled overtime. HHC asserts that after the discussion with the Union, it agreed to offer compensatory time or payment for all overtime worked. However, HHC asserts that since overtime is assigned based upon seniority, and Petitioner had the least seniority in the Department, he would have had the fewest opportunities to work overtime. Petitioner alleges that after Rivera announced the new policy, she approached him and said that she hoped that they could move beyond that issue.

Petitioner had 20 unscheduled absences over seven incidences between January 29, 2008 and October 14, 2008. (HHC Ans., Ex. F). All of Petitioner's unscheduled absences during that period were immediately before or after a holiday or scheduled day off. According to HHC, Petitioner gave various excuses for his absences, such as he got into a fight and needed time off, or he was sick. Petitioner does not dispute that he was absent, but claims that he always provided a physician's note to explain those absences, which were due to asthma. He submitted several

physician's notes with his pleadings. (Rep., Ex. C).[1]

On November 12, 2008, Rivera completed a second performance review, listing a "Below Standard" rating for Petitioner and recommending termination based on: excessive absences; refusal to call the help desk for assistance; the need for continual re-training in primary job functions; failure to complete assigned projects in a timely manner; and the creation of a new chart for each patient upon admittance without checking for a patient's previous chart, which resulted in an incomplete medical history for clinical staff and the creation of more work for medical records. (Pet., Ex. B). Rivera noted that Petitioner was effective in dealing with the public, but that he lacked the ability to get along with another co-worker. (*Id.*).

When Petitioner reported for work on that date, the Department Head called him into his office and gave him his evaluation to review. He refused to sign the evaluation. At that time, the Department Head terminated Petitioner's employment, effective immediately, due to unsatisfactory performance.

Petitioner contacted the Union. The Union alleges that upon hearing of Petitioner's termination, a representative contacted Petitioner's former supervisor in an effort to extend his employment another three months for another performance evaluation to be conducted. The Union asserts that HHC refused the request because of Petitioner's attendance and work performance problems. At that time, the Union contends, the Union representative determined that the termination of the employment of Petitioner could not be challenged due to his status as a provisional employee with less than one year's service. The Union representative then contacted

[1] As an exhibit to the Petition, Petitioner included a Verified Complaint with the New York State Division of Human Rights, in which he states that although his work was satisfactory, he believed that he was terminated by HHC because he was asthmatic. (Pet., Ex. D).

Petitioner and explained to him that since HHC had legitimate business reasons for the termination, the Union could not prove retaliation.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that his claims are timely, because his employment was terminated on November 12, 2008, and he filed his petition on March 10, 2009, which is within the four-month statute of limitations.

Petitioner alleges that the Union breached its duty of fair representation to him when it failed to object to the termination of his employment for retaliatory reasons, in violation of NYCCBL § 12-306(b)(1) and (3).[2] He claims that when he contacted the Union representative to tell him that he felt he had been retaliated against, the Union representative was not supportive, nor did he offer to follow up on the matter. Petitioner disputes the Union representative's assertion that HHC appeared to have a legitimate business reason for terminating Petitioner's employment, claiming that whether or not retaliation can be proven is "arbitrary and a matter of opinion and conjecture." (Rep., ¶ 18). Further, he claims that "citing an allegedly legitimate business reason for termination does not obviate the right of fair representation and objectivity in examining motivation for termination." (*Id.*)

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[2] NYCCBL § 12-306(b) provides that it shall be an improper practice for a public employee organization:

> (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so. . . .
>
> (3) to breach its duty of fair representation to public employees under this chapter.

He argues that by not even raising or exploring the issue of retaliation with Jacobi, even though Petitioner had informed him of his concerns, the Union representative failed to make a good faith effort to explore all possibilities.

Petitioner claims that he was told at his interview that he would have significant opportunities for paid overtime, yet when he started working, he was only offered compensatory time. His discussion with the Union compelled HHC to change its illegal policy of failing to compensate employees for mandated overtime. Further, overtime was never based on seniority.

Petitioner alleges that his initial performance evaluation indicated an overall rating of "Satisfactory," and despite HHC's claims that it discussed problems with his work performance with him on multiple occasions, no one ever spoke to him regarding work problems. He consistently received positive feedback from other Clerical Associates and staff and submitted four letters of recommendation from staff at Jacobi attesting to his personality and diligent performance at work. (Rep., Ex. D).

Petitioner also claims that the Department did not have patient charts organized in any systemic fashion, making chart location and retrieval difficult. He asserts that he personally spoke to Rivera about the situation. Further, gathering information from the patient was often difficult and dangerous, as the situation was often urgent and the patient would often be accompanied only by Emergency Medical Services and/or law enforcement, not a friend or relative who could assist with the information-gathering. Additionally, a significant percentage of the patients did not have heath insurance.

Moreover, Petitioner claims that he had doctor's notes for his absences, which were due to asthma, and that everyone in the Department knew that he had asthma.

Union's Position

The Union contends that Petitioner has not shown that the Union violated its duty of fair representation. The Union argues that the Union's inability to challenge the termination of Petitioner's employment was due to his status as a provisional employee. It contends that the instant petition does not allege that the Union acted deliberately in an invidious manner, arbitrarily or in bad faith, or that the Union did more for others in the same situation than it did for Petitioner. Therefore, even if the Board accepts as true everything alleged by the Petitioner, the petition fails to set forth facts upon which any relief can be granted. Further, Petitioner only makes speculative and conclusory allegations that his employment was terminated because of union activity. Thus, the petition should be dismissed.

HHC's Position

HHC claims that incidents which occurred more than four months prior to the filing of the petition are untimely and must be dismissed. Further, Petitioner has not established that he was retaliated against for engaging in protected union activity within the four month statute of limitations period. Even if the Board could presume union activity when Petitioner alleged that he would go to the Union following his conversation with Rivera, one cannot make a causal connection between the purported protected union activity and the alleged discriminatory acts. First, Rivera encouraged Petitioner to speak with the Union, and second, Petitioner was terminated for poor work performance. Petitioner has made a mere assertion that he was retaliated against, without supplying the Board with specific, probative facts to establish the employer's motivation.

Petitioner claims that he had performed satisfactorily and that he was not informed about any performance issues, which is untrue. Further, Petitioner received a "Satisfactory" rating on his first

evaluation because he was still being trained and the Department was trying to give him an opportunity to prove that he could handle his duties and responsibilities. Moreover, a review of both evaluations shows that Petitioner had the same deficiencies in his work performance throughout his employment. Since Petitioner was unable to demonstrate that he could be depended on to complete his responsibilities over time, he did not meet performance standards and was terminated. Thus, the record lacks any facts which demonstrate that Petitioner's termination was improper. Even if Petitioner could prove that he was retaliated against, HHC terminated Petitioner's employment for legitimate business reasons, based on the same issues mentioned above, and also because of his excessive absences.

HHC notes that in the Verified Complaint that Petitioner filed with the New York State Department of Human Rights, Petitioner claims that he was subjected to unlawful discriminatory actions by Jacobi. In the Complaint, he alleges that he is asthmatic and that Jacobi terminated his employment solely because of his alleged disability. This assertion impeaches Petitioner's credibility with regard to his improper practice petition, where he alleges that he was terminated because of retaliation for union activity.

Additionally, Petitioner has failed to show that the Union has breached its duty of fair representation, so those claims and any derivative claims against HHC on that basis must be dismissed. Also, Petitioner attached two sections of a collective bargaining agreement to his petition, so to the extent that the petition alleges a violation of a collective bargaining agreement, those claims must be dismissed. Finally, any alleged independent violation of NYCCBL § 12-306(a)(1) must be dismissed for failure to state a claim.

DISCUSSION

The Petitioner primarily contends the Union breached its duty of fair representation by failing to pursue any remedial action after HHC terminated his employment, allegedly in retaliation for his complaint to the Union about HHC's overtime practices. The duty of fair representation mandates that a union must represent fairly the interests of all bargaining unit members with respect to the negotiation, administration, and enforcement of collective bargaining agreements. *James-Reid*, 77 OCB 16, at 9 (BCB 2006); *Williams*, 59 OCB 48, at 8 (BCB 1997); *McAllan*, 33 OCB 26, at 7-9 (BCB 1984).

Under the facts here, the Union did not breach its duty of fair representation in refusing to file a grievance on behalf of Petitioner. We have repeatedly held that a "reasoned refusal to take a legal position on the basis that the position is without merit cannot, as a matter of law, constitute a basis for claiming that the decision breached the duty of fair representation." *James-Reid*, 1 OCB 2d 26, at 25 (BCB 2008) (citing *Sicular*, 77 OCB 33, at 15); *Gibson*, 29 OCB 13, at 4 (BCB 1982) (union's reasoned decision that proceeding with a grievance would be fruitless could not constitute a breach of the duty of fair representation). In the instant case, Petitioner, as a provisional employee, did not possess grievance rights pursuant to the collective bargaining agreement between the parties. As the Petitioner did not have any grievance rights as a provisional, the Union had a reasonable basis for determining that filing a grievance on his behalf would be without merit. *James-Reid*, 1 OCB2d 26.

Neither can the Union be faulted for declining to pursue an improper practice in this matter. In *McAllan*, we stated:

> To the extent that a union's status as exclusive collective bargaining

> representative closes off an individual employee's access to available remedies, such as negotiation with the employer, a union owes a duty to represent fairly the interests of the employee who is unable to act independently to protect his own interests. It does not extend to the enforcement of provisions of the NYCCBL, the vindication of which may be obtained by any affected employee through free access to the processes of this Board.

33 OCB 26, at 7-8 (BCB 1984).

In the latter case, a union does not control the sole access to the forum through which rights may be vindicated, and thus there exists no policy reason why the union should be held responsible for protecting those rights. *Id.,* at 7-9 (BCB 1984); *see Vazquez*, 75 OCB 36, at 10 (BCB 2005). This policy strikes an appropriate balance between the rights and interests of unions and employees. To impose a broader scope of duty upon unions would be, in our view, unwarranted and unduly burdensome.

In the instant matter, the Union does not control the sole means of obtaining enforcement of employees' rights under the NYCCBL. To the contrary, any affected employee has access to this Board to challenge the alleged violation of these rights by the employer. In fact, the Petitioner has made use of this right by commencing an improper practice proceeding before this Board challenging the same actions by HHC of which he complained to the Union. Under these circumstances, we hold that DC 37 owed no legal duty to petitioner to institute an improper practice proceeding on his behalf.

Where, as here, the Union does not solely control access to the remedial forum, the bargaining representative's duty is limited to evenhanded treatment of the members of the unit. We have stated:

> a union's fundamental statutory duty of fair representation extends

> only to matters involving collective negotiations, the administration of collective bargaining agreements and the processing of grievances. With respect to other matters, the duty of fair representation merely prohibits discriminatory practices.

Keyes, 37 OCB 32, at 9 (BCB 1986) (citing *Barry v. United University Professions*, 17 PERB 3102, at 3179 (1984)).

As the Petitioner has not alleged that DC 37 has represented other provisional employees in similar situations, we find no breach of the duty of fair representation in the Union's refusal to challenge the Petitioner's termination by HHC.

Petitioner further claims that HHC retaliated against him for complaining to the Union about the amount and distribution of overtime in the Department, in violation of NYCCBL § 12-306(a)(1) and (3).[3] Since no hearing was held, in reviewing the sufficiency of the petition, we draw all permissible inferences in favor of Petitioner from the pleadings and assume for the sake of argument that the factual allegations contained in the petition are true. *Seale*, 79 OCB 30 (BCB 2007); *see D'Onofrio*, 79 OCB 3, at 20, n. 11 (BCB 2007). Additionally, because Petitioner is *pro se* in this proceeding, we are especially aware that such review "should be exercised with an eye to establishing whether the facts as pleaded support any cognizable claim for relief and not define such

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[3] NYCCBL § 12-306(a)(1) provides, in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

NYCCBL § 12-305 provides, in relevant part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

claims only by the form of words used by Petitioner." *Feder*, 1 OCB2d 27, at 12 (BCB 2008); *D'Onofrio*, 79 OCB 3, at 20; *see also, Castro v. City of New York*, 2007 U.S.Dist. LEXIS 77878, at 31-32 (S.D.N.Y. October 10, 2007).

As set forth by NYCCBL § 12-306(e), the statute of limitations for filing an improper practice petition is four months from the accrual of the claim.[4] Failure to file a petition within this period renders the claims untimely, and this Board will not consider the substantive merits of those claims. *Feder*, 1 OCB2d 27, at 12; *Howe*, 77 OCB 32 at 16 (BCB 2006); *Castro*, 63 OCB 44 at 6 (BCB 1999). Nevertheless, the Board may admit the portion of a Petitioner's claim that is untimely as background information. *Feder,* 1 OCB2d 27, at 12; *see PBA*, 77 OCB 10, at 13 (BCB 2006). Although Petitioner raises many issues that span a length of time in his petition, he makes it clear in his reply that the focus of his claim is that HHC retaliated against him for Union activity by terminating his employment for complaining about overtime compensation. Since Petitioner's employment was terminated on November 12, 2008, which is the date of accrual, and he filed his petition on March 10, 2009, we find that the claim is timely. *DC 37*, 1 OCB2d 21, at 10-11 (BCB 2008); *Lucchese*, 57 OCB 22, at 9-10 (BCB 1996) (general discussions of timeliness and accrual). We will consider the other allegations as background to this claim.

In resolving discrimination and retaliation claims under the NYCCBL, this Board, in

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[4] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

Bowman, 39 OCB 51 (BCB 1987), applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and its progeny, which states that a petitioner must demonstrate that:

> 1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
>
> 2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also Edwards*, 1 OCB2d 22, at 16 (BCB 2008).

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, "the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *DC 37*, 1 OCB2d 5, at 64 (BCB 2008); *see also City Employees Union, Local 237, IBT*, 77 OCB 24, at 18-19 (BCB 2006).

Here, we find that Petitioner has satisfied the first element of the *Bowman-Salamanca* test. In the instant case, Morris told Rivera in July 2008 that he intended to seek the assistance of the Union in remedying his claim that he was being inappropriately denied overtime and actually sought such assistance from his Union. The City acknowledges that Morris told Rivera that he was going to seek assistance from the Union, and shortly after that HHC changed its policy regarding overtime, admitting a policy error at the Department level. Therefore, the first prong of the *Bowman-Salamanca* test has been established. *DEA*, 79 OCB 40, at 22 (BCB 2007).

Regarding the second prong of the *Bowman-Salamanca* test, which addresses the motivation behind the employment action in question, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *Id.*; *Burton*, 77 OCB 15, at 26 (BCB 2006); *see also City Employees Union, Local 237,* 67 OCB 13, at 9 (BCB 2001); *CWA, Local 1180*, 43

OCB 17, at 13 (BCB 1989). "At the same time, petitioner must offer more than speculative or conclusory allegations." *DEA*, 79 OCB 40, at 22; *SBA*, 75 OCB 22, at 22 (BCB 2005). Rather, "allegations of improper motivation must be based on statements of probative facts." *Edwards*, 1 OCB2d 22, at 17; *see also SSEU, Local 371*, 77 OCB 35, at 15 (BCB 2006). In addition, while proximity in time alone is not sufficient to establish causation, the "repeated, suspicious, temporal proximity" between the protected activity and the retaliatory action, in conjunction with other facts supporting a finding of improper motivation, may be sufficient to satisfy the second prong of the *Bowman-Salamanca* test. *Colella*, 79 OCB 27, at 55 (BCB 2008) (citing *SSEU, Local 371*, 77 OCB 35, 15-16 (BCB 2006)).

In the instant matter, and taking all of Petitioner's allegations as true, we find that his assertions are sufficient to establish a *prima facie* case of retaliation on behalf of the employer. The Petitioner has alleged facts sufficient to indicate the existence of some level of anti-union animus arising from his protected Union activity, and which might be found to have been a factor in the adverse employment action here. However, we need not resolve the credibility dispute, because we find that HHC has demonstrated that it had a legitimate business reason for terminating Petitioner's employment.

Where a petitioner has established a *prima facie* case, "then the employer may attempt to refute this showing by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *SSEU, Local 371*, 1 OCB2d 25, at 17 (citing *SSEU, Local 371*, 77 OCB 35, at 18); *see also Lamberti*, 77 OCB 21, at 17 (BCB 2006) (finding that the business reason proffered by the agency was legitimate because the public employer's decision to promote another employee other than petitioner was based

upon the other applicant's past supervisory experience and not petitioner's status as the shop steward). In examining whether the reasons proffered by the public employer are legitimate, "this Board will look to whether the record supports their contentions." *SBA*, 75 OCB 22, at 24 (BCB 2005); see also *Local 1182, CWA*, 57 OCB 26, at 23 (BCB 1996).

Here, we find that HHC satisfied its burden by offering a legitimate business reason supporting its decision to terminate the employment of Petitioner. A review of both performance evaluations shows similar concerns of a serious nature expressed by his supervisors. In this case, Petitioner's performance evaluation early in his time at the Department–in April 2008–nearly mirrors that of the November 2008 performance evaluation. At the time of his November performance evaluation, Petitioner had been in his position for almost a year, with no documented improvement. Therefore, we find the business reason proffered by HHC to be legitimate, and dismiss the instant petition in its entirety.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition filed by Jeffrey M. Morris, docketed as BCB-2750-09 be, and the same hereby is, dismissed in its entirety.

Dated: April 6, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

GABRIELLE SEMEL
MEMBER

PETER PEPPER
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