



# Administrative Tribunal

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## ADMINISTRATIVE TRIBUNAL

Judgement No. 1123

Case No. 1177: ALOK

Against:

The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Jacqueline Scott; Mr. Omer Yousif Bireedo;

Whereas at the request of Swatantra Kumar Alok, a former staff member of the United Nations Population Fund (hereinafter UNFPA), the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 December 2000 and thereafter until 31 May 2001;

Whereas, on 16 March 2001, the Applicant filed an Application, requesting the Tribunal, *inter alia*:

“7. ...

...

(c) *to decide* to hold oral proceedings on the present application ... and to examine ... witnesses ...;

...

(e) *to order* the production of the Applicant's official status file, including Performance Appraisal Reports for the period 1990 to 1998, ...

8. On the merits, the Applicant respectfully requests the Tribunal:

- (a) *to rescind* the decision of the Officer-in-Charge, [United Nations Development Programme (UNDP)] ... to separate the Applicant from service without notice or compensation in lieu thereof;
- (b) *to find and rule* that the [United Nations Development Programme/United Nations Population Fund (UNFPA)/United Nations Office for Project Services (UNOPS) Ad Hoc Disciplinary Committee (AHDC)] erred in matters of fact and of law in reaching its conclusions that the Applicant was guilty of misconduct within the meaning of Staff Rule 110;
- (c) *to order* that the Applicant be reinstated in service at the D-1, Step 9 level, with retroactive effect from 1 August 2000 ...;
- (d) *to award* the Applicant appropriate and adequate compensation on an exceptional basis in the amount of three years' net base pay for the actual, consequential and moral damages suffered by the Applicant as a result of the damage to the Applicant's career and professional reputation, for the denial of due process and fair treatment, to which he was subjected and for the effects of the Respondent's prejudicial actions on him and his family;
- (e) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;
- (f) *to order* that a letter exonerating the Applicant of any wrongdoing be published and that all prejudicial materials relating to this case be removed from the Applicant's records;
- (g) *to order* that any action for recovery by UNFPA under Staff Rule 112.3 be reversed and/or canceled and that the Applicant's entitlements be released without further delay;
- (h) *to award* the Applicant as cost, the sum of \$10,000.00 in legal fees and \$500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 August 2001 and periodically thereafter until 31 August 2002;

Whereas the Respondent filed his Answer on 28 August 2002;

Whereas, on 21 October 2002, the Applicant filed Written Observations and amended his pleas as follows:

"I would like to make the following addendum to Paragraph 7 (e) of the Applicant's pleas regarding the production of documents: '.. as well as the reports of the UNDP/UNFPA disciplinary committees in respect of [four named staff members'] cases."

Whereas, on 30 October 2002, François Lorient, filed an Application for intervention in the case in accordance with article 19 of the Rules of the Tribunal, in

which he requests the Tribunal to accept key information and documents in order to provide support and comments on the instant Application.

Whereas, on 13 November 2002, the Tribunal decided to adjourn consideration of the case to its next session;

Whereas, on 23 June 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNFPA on 7 March 1990, as Country Director for Bangladesh, at the P-5 level, on a two-year fixed-term contract, converted to permanent status on 7 March 1994. Promoted to the D1 level on 1 January 1995, he was reassigned to Nepal as UNFPA Representative, Nepal.

During 1997, the Applicant experienced severe neurological problems involving disorientation, memory loss, inability to concentrate, seizures and depression. In early 1998, the Applicant was diagnosed as suffering from Complex Partial Seizure, a form of epilepsy, in addition to thyroid deficiency and pituitary dysfunction. The Applicant sought medical treatment in New York and India, necessitating extended job absence. Repeatedly in 1998 and 1999, the Applicant requested transfer from Nepal to New York to enable him to obtain higher quality medical services than those available locally. His transfer refused, he requested early separation and on 30 September 1999, UNFPA agreed to negotiate a separation package with the Applicant and presented a formal separation agreement to the Applicant. The agreement however, was not concluded.

On 8 October 1999, a group of the Applicant's subordinates in the Nepal office wrote to the Chief, Office of Oversight and Evaluation, UNFPA, accusing the Applicant of breaching financial regulations and rules and failing to comply with the procurement guidelines applicable to local construction projects.

On 10 November 1999, a special audit team was constituted by the Office of Audit and Performance Review, UNDP, (OAPR) "to perform auditing and forensic work on the procurement activities, including construction works and other procurement activities" undertaken by the UNFPA Office in Nepal. On 3 December 1999, the team interviewed the Applicant. The same day, the Applicant was informed that, in light of the outcome of "a preliminary fact-finding mission", he

was being placed on special leave with full pay (SLWFP), with immediate effect, pending a full investigation. He was instructed to proceed on home leave.

On 18 December 1999, the Director, Office of Human Resources, UNDP, (OHR) transmitted a copy of the special audit team's report to the Applicant. The report concluded that the Applicant's

“acts ... constitute[d] conclusive evidence of serious misconduct that ... resulted in significant financial loss to the Organization and widespread morale issues in the office”, and recommended that he “be suspended without pay with a view to eventually subjecting him to the most severe disciplinary sanctions allowed by the Organization's rules and regulations [and that] action should be initiated against [him] for the determination and recovery of the financial losses incurred by UNFPA”.

The Director, OHR, informed the Applicant that he was being suspended without pay with immediate effect, and invited his comments on the report.

On 4 February 2000, the Applicant was suspended without pay, subsequently retroactively converted to suspension with pay.

On 5 March 2000, the Applicant advised the Chief of the Legal Section, UNDP, that he had submitted his reply to the allegations of misconduct contained in the report and claiming that, as the “preliminary fact-finding mission” was an investigation under the provisions of UNDP/ADM/97/17, dated 12 March 1997, and resulting action had been taken against him on 18 December 1999, he had not been apprised of his due process rights, in violation of paragraph 2.2 of UNDP/ADM/97/17.

On 5 April 2000, OAPR produced a report containing two additional allegations against the Applicant: wilful insubordination and attempting to obstruct justice

On 10 April 2000, the Applicant was presented with a number of charges, and informed that these charges constituted serious misconduct, the sanction for which could range from separation from service to summary dismissal, with recovery of losses suffered by UNFPA as a result of his unsatisfactory performance and negligence. He was further advised that his case would be submitted to the AHDC. He submitted a detailed response to the charges on 25 April 2000, alleging that his rights of due process had been violated as he had been denied the right to defend himself against the allegations of misconduct as he had not been informed of the

allegations made by his subordinates in their letter of 8 October 1999; he had not been informed of the purpose of the special audit team's inquiry; he had been denied access to records in the UNFPA office in Katmandu; as well as a fair opportunity to rebut the evidence on which the allegations against him were based.

The case was referred to the AHDC. The AHDC submitted its report dated 9 May 2000. Its findings and recommendations read, in part, as follows:

**“(e) THE FINDINGS, INDICATING WHICH OF THE ALLEGATIONS, IF ANY, APPEAR TO BE SUPPORTED BY THE EVIDENCE**

...

*A Allowing the irregular and fraudulent award of a service contract to the architect firm ... in 1998.*

... the Disciplinary Committee found [the Applicant] guilty of **gross negligence** for the irregular award of a service contract [to] the architect firm ... This relates directly to [his] failure to invoke the general principles of UNFPA procurement rules ...

...

*B. Signing a contract with the above architect firm without headquarters' approval*

The Committee found the staff member not guilty of signing this contract without the approval of HQ since it was not expected that it would exceed the \$70,000 threshold before which ... approval was necessary. However, once the staff member as representative of the UNFPA FO realised the implications that an increased construction component would have on a single contract award to the sole architect, then the Committee judges it an act of serious negligence for this staff member not to have submitted the contract for ... review in the light of the changed circumstances.

*C. Allowing non-competitive selection of sub-contractors and overpayments for their services in the range of 15-18% over the market price*

The Committee considered this an act of **gross negligence**, leading to avoidable overinvestment in construction costs. ...

*D. ... improper oversight over the construction projects and inadequate supervision of ... staff.*

... The Committee finds the staff member guilty of **gross negligence** in its oversight of responsibility in the construction projects for not having ensured proper and adequate systems of monitoring and control were put in place on the part of UNFPA as executing agency of the construction contract.

...

*F. Allowing the fabrication of false documentation related to procurement activities.*

The Committee considered this an injudicious act, which potentially could have compromised the professional integrity of both the staff member and the Organization.

*G. Concealing from headquarters a case of bribery in September 1999 ...*

The Committee felt that the evidence provided was insufficient to support the charge. However, it also considered that [the Applicant] failed to act in accordance with his responsibility for overall personnel management, and as such, saw it as an act of **negligence** having failed to disclose promptly an alleged case of bribery. ...

...

**(f) ANY AGGRAVATING OR MITIGATING FACTORS THAT MIGHT BE RELEVANT**

The Committee finds the following factors as mitigating factors that might be relevant to [the Applicant's] case:

1. his medical condition in early 1998, and
2. the lack of credibility of the statements made and evidence provided by his subordinates.

**(g) ADVICE OF THE AD HOC DISCIPLINARY COMMITTEE TO THE ADMINISTRATOR**

In view of the above mitigating factors, the ad hoc Disciplinary Committee recommends that the staff member be separated from service with compensation in lieu of notice and that the period of suspension without pay be converted to suspension with pay.

The Committee also recommends that stricter adherence to due process be observed by the Administration in future disciplinary cases to ensure that sufficient and credible evidence is obtained from all parties involved before severe administrative steps are taken.

..."

On 13 June 2000, the Officer-in-Charge of UNDP at Headquarters transmitted a copy of the report to the Applicant and informed him as follows:

"After a complete review of the ... report and of all relevant evidence adduced in this case, it was concluded that your behaviour was unbecoming of an international civil servant, that your sub-standard performance reached the level of gross negligence and that, as a senior official, you had breached the fiduciary obligations entrusted to you by UNFPA in the management of its assets and properties. The losses suffered by UNFPA in your mismanagement of the construction projects were also taken into account. Some of these losses resulted from your systematic approval of construction contracts above market prices, and other damages were caused to UNFPA's image and integrity by your condoning a variety of highly irregular and misleading administrative practices described in the Committee report.

In view of your unsatisfactory conduct and after consulting the Executive Director of UNFPA, I have decided that continuation of your services would not be in the best interest of the Organization. Consequently, effective on the

day of receipt of this letter, and in accordance with Staff Rule 110.3(a)(vii), you will be separated from service without notice or compensation in lieu thereof, notwithstanding Staff Rule 109.3

Taking into account the mitigating circumstances of this case, it has been agreed with the Committee's recommendation that your previous suspensions without pay be converted to a suspension with pay until your separation from service becomes effective. In addition, UNFPA reserves its right under Staff Rule 112.3 to recover losses and overpayments resulting from your negligent actions and omissions, and from your violation of any regulation, rule or administrative instruction. Once UNFPA has completed the evaluation of such losses and overpayments and has determined each official's respective share of responsibility, you will be notified of the appropriate recovery action applicable to you, if any. If it is decided that no recovery action will take place against you, you will then be entitled to receive the statutory termination indemnities provided by Annex III (c) of Staff Regulations, as well as any final entitlements that may be owed to you.

..."

On 16 March 2001 the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's rights of due process were violated.
2. The AHDC failed to distinguish misconduct from questions of judgement and performance. The report of the AHDC and the subsequent decision of the Respondent were arbitrary and were premised upon inadequate and inaccurate information.
3. The Applicant's impugned conduct does not meet the threshold of "gross negligence". Even assuming the Applicant *was* guilty of negligence, the penalty imposed was disproportionate under the circumstances.
4. The Respondent should not have suspended the Applicant; there was no evidence that he was a threat to documents or to staff. Thereafter, keeping the Applicant on leave without pay for a period of eight months caused him severe financial hardship. In addition, contrary to the Respondent's assertion, the Applicant's suspension without pay through August 2001 was never converted to suspension with pay.
5. The Applicant has not received his final entitlements, as the Respondent claims that it is still making a final decision regarding recovery action.

Whereas the Respondent's principal contentions are:

1. The substantive requirements of due process were met in conducting the audit and in pursuing the matter as a disciplinary case.
2. The material facts on which the charges were founded were correct. The Applicant ignored the general rules of procurement, to the financial detriment of the Organization.
3. The charges against the Applicant were not changed from fraud to negligence, as negligence was included in the initial charges.
4. The AHDC did not err in finding the Applicant guilty of gross negligence, and in recommending the imposition of a disciplinary sanction.
5. The contested decision of dismissal was a proper exercise of the UNDP Administrator's discretionary authority, and the decision to impose a disciplinary measure other than that recommended by the AHDC was properly taken. The decision was not tainted by bias, improper motivation, or other extraneous factors.

The Tribunal, having deliberated from 5 to 13 November 2002 in New York and from 25 June to 25 July 2003 in Geneva, now pronounces the following Judgement:

I. On 7 March 1990, following a 25 year career in the Indian Civil Service, the Applicant joined UNDP as UNFPA Country Director for Bangladesh at Dhaka. On 7 March, 1994, he was offered, and he accepted a permanent appointment. In March 1995, the Applicant was reassigned as UNFPA Representative for Nepal. At the time he was separated from service, he was two years and four months from retirement.

The Applicant enjoyed an unblemished record of service with the United Nations before the matters giving rise to these proceedings were first alleged against him. During that period, he was rated in his performance evaluations as either "highly satisfactory" or "an unusual contribution".

II. While serving in Nepal, the Applicant began to suffer from and was periodically treated for a variety of medical problems of a neurological nature. Among the symptoms the Applicant was alleged to have suffered were confusion,



disorientation, inability to comprehend written material or conversations for periods of time, loss of memory, lack of concentration, involuntary lip smacking and muscle twitching. He also allegedly suffered from depression. In March of 1998, the Applicant was diagnosed with Complex Partial Seizure, a type of epilepsy. Later in 1998, he also was diagnosed as having a thyroid deficiency and pituitary dysfunction. His physicians prescribed various drugs to help improve his condition.

The Applicant sought treatment for his neurological illness. For extended periods of time, he was absent from his office, seeking treatment in India and New York. In 1998, the Applicant requested a transfer from Nepal to New York to afford him better access to sophisticated medical facilities and treatment. His request was refused. Again, in 1999, the Applicant requested a transfer, and, when it was refused again, he sought an agreed early separation from service on health grounds. On 30 September, the Respondent proposed terms and conditions upon which it would agree to separate the Applicant.

III. On 8 October 1999, five of the Applicant's subordinates wrote a letter to the Respondent, accusing the Applicant of breach of financial regulations and rules and failure to comply with procurement guidelines. In response to that letter, a special audit team was constituted on 10 November 1999 to investigate and audit the "procurement activities, including construction works and other procurement activities". On 3 December 1999, the Respondent placed the Applicant on Special Leave with Full Pay with immediate effect pending a full investigation.

IV. In its report, issued on 16 December 1999, the special audit team concluded that the Applicant had engaged in "serious misconduct" and "seriously inadequate performance". The allegations against the Applicant included allegations that the Applicant had (1) allowed the irregular and fraudulent award of a service contract to an architect firm, (2) signed a contract with the same architect firm without headquarter's approval, (3) allowed non-competitive selection of sub-contractors and overpayments for their services, (4) failed to report to his supervisor, in 1998 and 1999, a large number of unauthorized absences from work, (5) allowed contract splitting to avoid submitting for headquarter approval contracts in excess of \$70,000, (6) allowed the fabrication of false documentation related to procurement activities, (7) concealed a case of bribery in September 1999, (8) ignored December

1999 instructions from headquarters to refrain from any contact with your subordinates.

V. The Applicant was invited to comment on the auditors' conclusions and did so on 4 March 1999. Included in his reply to the Respondent, the Applicant alleged that he had been denied his rights to due process. On 10 April 2000, the Respondent notified the Applicant that, upon review of the record, the Respondent had concluded that the evidence established a prima facie case of serious misconduct against the Applicant. The Respondent also notified the Applicant that the matter would be sent to an ad hoc disciplinary committee (the "AHDC"). The Respondent also refused to go through with the proposed agreed separation from service, intending first to await the conclusion of a further investigation of the complaints alleged.

VI. On April 25, 2000, the Applicant responded to the allegations made against him and submitted it to the AHDC, and on 9 May 2000, the AHDC issued a report. The AHDC found the Applicant guilty of several instances of gross and serious misconduct, as well as simple negligence. Specifically, the AHDC made the findings against the Applicant, including the following findings:

1. the Applicant was guilty of gross negligence for the irregular award of a service contract to the architect firm M/SML Kayasha & Associates, because it did not comply with the general principles of UNPA procurement rule;
2. the Applicant was guilty of serious negligence when he did not submit a contract signed with the above architect for approval by UNFPA Headquarters, since the Applicant should have realized the implications that an increased construction component would have on a single contract award to the sole architect;
3. the Applicant failed to put into effect controls to ensure quality construction;
4. the Applicant ignored the request of the Nepal Government to appoint a technical engineering expert to oversee construction, which resulted in mismanagement and irregularities in the design, tendering and outputs of the construction process;.

5. the Applicant improperly allowed non-competitive selection of sub-contractors and overpayments to such subcontractors, in the range of 15-18% over the market price;
6. the Applicant paid a contractor 50% of the contract value in advance, contrary to customary practice, whereby advanced payments are usually broken into 4-5 installments with a view to ensuring compliance with terms and conditions of the construction contract.

The AHDC also concluded that the Applicant's conduct was incompatible with and inconsistent with the highest standard of integrity expected of international civil servants, as set forth in Article 101 of the United Nations Charter and staff regulation 1.2(b).

The AHDC noted that in **mitigation** (emphasis added) of the Applicant's liability, it had considered the fact of "his medical condition in early 1998" and the lack of credibility of the statements made and evidence produced by his subordinates. The AHDC also considered as a **mitigating** (emphasis added) factor the lack of clear and appropriate guidance and direction by the UNFPA headquarters of the Nepal office and the Applicant. The AHDC found no evidence of dishonesty or intent to defraud on the part of the Applicant. In light of the mitigating factors, the AHDC recommended that the Applicant be separated from service with compensation in lieu of notice and that his leave without pay be converted to leave with pay. The Officer-in-Charge of UNDP at Headquarters, New York adopted the recommendation of the AHDC, and also reserved the Respondent's right to recover losses and overpayments suffered by the United Nations as a result of the Applicant's actions/omissions, as found by the AHDC.

VII. The record suggests a temporal correlation between the declining state of the Applicant's health, including the progression of his neurological symptom, and his inability and failure to perform his duties in an appropriate fashion, the latter being the essence of complaints filed against him by his colleagues and alleged to have constituted misconduct. Whilst in the view of the Tribunal, the AHDC received sufficient evidence as entitled it to make findings of fact that the Applicant had not performed his duties, which findings were later construed as misconduct, it is singularly obvious that neither the AHDC nor the Respondent ever sought to investigate the extent to which the Applicant's declining performance and his

failures to perform his duties might have been attributable to his declining health and might have been caused by his long absences from his office, occasioned by his illness and when receiving medical treatment. This was an extraordinary omission by the AHDC and the Respondent, as the nature and alleged severity of the Applicant's symptoms had been fully disclosed to the Administration, prior to commencement of the disciplinary proceedings; yet, throughout the investigation the Applicant was treated, for the purposes of determining his responsibility, as if he were a man in the whole of his health. No consideration was given to his diminished capacity and neurological illness and the part such physical and mental impairments might have played in the Applicant's failure to perform his duties. This is all the more so when there is no evidence that the Applicant behaved dishonestly or fraudulently for financial gain. In so far as the AHDC gave any consideration to the Applicant's illness or to the lack of guidance or direction provided by UNFPA Headquarters, the AHDC considered it only in the context of mitigation (i.e., reduction or diminution of penalty), not in relation to what should have been the pivotal question of whether or not the facts found ought to have been categorized as inadequate performance as a result of illness, rather than as misconduct.

VIII. The concept of poor performance is quite different from misconduct. The very essence of misconduct is conduct that is either willful or reckless or irresponsible and which deserves punishment, rather than conduct arising from innate inefficiency or incapacity. (See Judgement No.926 *Al Ansari* (1999).) No right thinking person would argue that a lack of performance brought on by illness could merit punishment, save, perhaps, for illnesses that might be considered self-induced, such as might be argued in the case of substance abuse.

The Tribunal believes that had the AHDC and the Respondent given proper consideration to the extent to which the matters ultimately found to constitute misconduct may have been attributable to the Applicant's declining health and the incapacity brought on by his illness, as well as to the other disadvantages under which the Applicant worked, it may well have concluded that the matters found ought to have been categorized as performance failures rather than as misconduct.

IX. The Tribunal is further satisfied that even if such matters are to be considered as misconduct, having regard to the totality of the circumstances and the effects of the Applicant's illness, the Respondent's imposition of what is, in effect, the

ultimate sanction – namely dismissal – cannot be considered to be reasonably proportional. The Tribunal has previously held that it will not interfere with a disciplinary decision unless it is satisfied that it is so disproportionate or unwarranted as to amount to an injustice. (See Judgement No. 908, *Baghoud* (1998), para. XV.) In the instant matter, the Tribunal finds that the dismissal of the Applicant, given his previously unblemished record and the extent to which his health was compromised, amounts to an injustice and an abuse of the Respondent's discretion.

X. Since the Applicant's retirement package negotiations had been shelved, so as to allow the Respondent to investigate the Applicant's alleged misconduct, and since the Tribunal is satisfied that the manner in which the conclusion of misconduct was reached by the Respondent was erroneous, for the reasons previously stated, the Applicant should receive the retirement package that was offered to him, by letter dated 30 September 1999, giving to him the entitlements he would have received had the retirement been effected. The Applicant's record should be amended to show retirement on the basis of health grounds, rather than dismissal, as the reason for the Applicant's departure from the service of the United Nations. The Tribunal stops short of ordering reinstatement, as this would be wholly inappropriate at this time, given the Applicant's age and compromised health.

XI. The Tribunal now turns its attention to the question arising from the limited intervention granted to Mr. Lorient in this matter. Were it not for the enemy of time, the Tribunal would have welcomed the opportunity to seek responses from other parties on the matters raised by Mr. Lorient in his intervention, which matters currently await the outcome of other proceedings pending before the JAB. However, the Tribunal is satisfied that, in the circumstances of the Applicant's case, and given his ailing health and that he is beyond retirement age, it would be unjust to endure the delays attendant upon such consideration. In the circumstances, whilst the Tribunal has been advised as to the nature, but not the content, of the documents furnished by Mr. Lorient since he was granted a limited right of intervention, the Tribunal has not read or considered the documents, and they have no bearing on the decision.

XII. In the course of its deliberations, the Tribunal was concerned about the nature and extent of the lack of supervision, direction and guidance provided by UNFPA Headquarters to the Nepal office and the Applicant. In the view of the Tribunal, this lack of guidance and direction requires immediate attention to rectify the situation, if such efforts have not already been made.

XIII. The Tribunal was also alarmed that, allegedly, efforts were made by the Administration to hinder the investigation of issues related to the responsibility of the UNFPA Headquarters with respect to irregularities and mismanagement that took place in the Nepal office. The Tribunal's apprehensions arise from the alleged improper removal of a legal advisor involved in, and concerned with, the investigation, as well as from the alleged, unexplained disappearance of documents relating not only to the issues of the Headquarters' responsibilities but also to the case at hand. The Tribunal expresses no view as to the merit of the allegations; however, the Tribunal feels that such allegations deserve further investigation by the appropriate United Nations authorities.

XIV. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant the retirement package that was offered to him, by letter dated 30 September 1999, giving to him the entitlements he would have received had the retirement been effected on those terms;
2. Rejects all other pleas.

(Signatures)

**Kevin Haugh**  
Vice-President

**Omer Yousif Bireedo**  
Member

**Jacqueline Scott**  
Member

Geneva, 25 July 2003

**Maritza Struyvenberg**

Executive Secretary

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