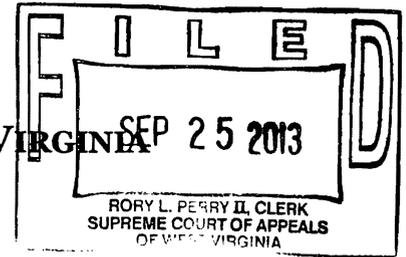


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0403



**WEST VIRGINIA
CONSOLIDATED PUBLIC
RETIREMENT BOARD**
Petitioner

V.)

**KEITH A. WOOD, WILLIAM E.
WALKUP, TED M. CHEATHAM,
HERBERT E. LATTIMORE, JR.,
and JOHNNY L. R. FERNATT**
Respondents

Appeal from a final order
of the Circuit Court of Kanawha
County (11-AA-143)

Petitioner's Reply Brief

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Petitioner, the West Virginia Consolidated Public Retirement Board (the Board) submits the following reply to supplement its brief and respond to the arguments and assertions contained in the response filed on behalf of the Respondents, Keith A. Wood, William E. Walkup, Ted M. Cheatham, Herbert E. Lattimore, Jr., and Johnny L.R. Fernatt.

ASSIGNMENTS OF ERROR

Respondents have not alleged any cross-assignment of error; therefore, the only assignments of error for the Court's review are those set forth in the Petitioner's opening brief. Those assignments of error are as follows:

- I. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE RESPONDENTS WERE ENTITLED TO MILITARY SERVICE CREDIT UNDER WEST VIRGINIA CODE SECTION 5-10-15 FOR MILITARY SERVICE DURING ANY PERIOD OF TIME NOT SPECIFICALLY EXCLUDED BY THE STATUTE.
- II. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE FOURTEENTH AMENDMENT OF THE WEST VIRGINIA CONSTITUTION REQUIRES THE BOARD TO RECOGNIZE ADDITIONAL PERIODS OF TIME AS "PERIODS OF ARMED CONFLICT" FOR PURPOSES OF MILITARY SERVICE CREDIT AWARDED PURSUANT TO WEST VIRGINIA CODE SECTION 5-10-15.
- III. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT RESPONDENT WOOD WAS ENTITLED TO MILITARY SERVICE CREDIT ON THE BASIS OF ESTOPPEL, BECAUSE THE HEARING OFFICER'S FACTUAL FINDING OF NO DETRIMENTAL RELIANCE WAS NOT CLEARLY WRONG, AND BECAUSE THE LEGAL ELEMENTS REQUIRED TO SHOW ESTOPPEL WERE NOT MET.
- IV. IT WAS AN ERROR FOR THE COURT TO CONCLUDE THAT THE BOARD DID NOT PROPERLY ARTICULATE ITS INTERPRETATION OF WEST VIRGINIA CODE SECTION 5-10-15, AND TO AFFORD RESPONDENTS MILITARY SERVICE CREDIT ON THAT BASIS.
- V. THE CIRCUIT COURT ERRED WHEN IT GRANTED RELIEF TO THE RESPONDENTS BASED ON PRIOR BOARD AND CIRCUIT COURT DECISIONS INVOLVING OTHER INDIVIDUALS, BECAUSE THE RESPONDENTS FAILED TO ESTABLISH THAT SUCH DECISIONS WERE BINDING ON THE BOARD.

STATEMENT OF THE CASE

Petitioner set forth a Statement of the Case in its opening brief, with which the Respondents did not disagree. The parties' disputes are primarily questions of law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner and Respondents have both requested Rule 19 oral argument, given the potential a decision in this case has to impact other PERS members.

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE RESPONDENTS WERE ENTITLED TO MILITARY SERVICE CREDIT UNDER WEST VIRGINIA CODE SECTION 5-10-15 FOR MILITARY SERVICE DURING ANY PERIOD OF TIME NOT SPECIFICALLY EXCLUDED BY THE STATUTE.

A. The Circuit Court's and Respondents' liberal construction reaches unreasonable results.

The Board's first assignment of error contests the Circuit Court's conclusion that West Virginia Code Section 5-10-15 requires all military service credit to be treated as service during a "period of armed conflict" unless the particular period of time during which it is served is expressly excluded in the statute. Respondents make clear in their response that the Circuit Court's ruling and their position rely heavily, almost exclusively, on the doctrine of liberal construction. As the Respondents note, the Circuit Court articulated exactly how it applied liberal construction to reach its decision:

A liberal construction would require the conclusion that unless the statute clearly excludes a particular military campaign from being considered, then all military

campaigns and periods of armed conflict must be used in calculating an employee's military service credit.

(A.R. 1093). This is the exact ruling the Respondents advocated for in the administrative proceedings below, and which they rely throughout their Response. (See, e.g., A.R. 280, 791, 872). The Board does not dispute the general proposition that liberal construction applies; it is clear that West Virginia Code Section 5-10-3a requires PERS statutes to be "liberally construed so as to provide a general retirement system for the employees of the state herein made eligible for such retirement." The Board does take issue, however, with the result the Circuit Court reached when purporting to apply this principle.

The specific formulation of liberal construction endorsed by the Circuit Court was in error, because West Virginia Code Section 5-10-15 does not specifically or expressly exclude any periods of time; instead, the statute is written in the positive, and only identifies those periods of time that are to be included as "periods of armed conflict." Applying the Circuit Court's specific theory of liberality, therefore, no periods of time at all could be excluded by the Board when granting military service credit, since the state does not expressly exclude even a single day. It is clear that the Circuit Court's version of liberal construction was never envisioned by the Legislature.

The Circuit Court's ruling is also in error because the liberal construction it applied results in clear violations of other rules of statutory construction. Liberal construction should not be viewed as a doctrine that permits an unreasonable result to be reached. *Repass v. Workers' Compensation Div.*, 212

W. Va. 86, 110, 569 S.E.2d 162, 186 (2002) (Davis C.J., dissenting) (observing that “liberal interpretation has been defined as ‘[i]nterpretation according to what the reader believes the author *reasonably* intended, even if, through inadvertence, the author failed to think of it.”) (quoting Black’s Law Dictionary 824 (7th ed. 1999) (emphasis added)). Most egregiously, and as explained more fully in the Board’s opening Brief, applying the analysis adopted by the Circuit Court, subsection (a)(7) of (governing the circumstances in which the Board may award credit for military service after the end date of an officially-recognized “period of armed conflict”), and subsections (b)(2)-(8) (defining particular “periods of armed conflict” with precise beginning and ending dates) would be rendered meaningless.

Respondents’ only response to this argument is to claim that subsection (a)(7) has no application to their cases, since the Board has not recognized certain proposed “periods of armed conflict” in the first instance. Respondents clearly misunderstand the point, which is that their specific requests would result in a violation of the statute based on the “periods of armed conflict” specifically identified therein. For example, Respondents believe, and the Circuit Court held, that they are entitled to service credit for military service occurring between July 24, 1987 and August 1, 1990, during which Operation Earnest Will was occurring, because that period appears as a military operation or campaign in a Veterans of Foreign Wars (VFW) handbook setting forth the organization’s membership eligibility conditions. (A.R. 1095). Subsection (b)(7) defines the Persian Gulf war as beginning August 1, 1990. West Virginia Code Section 5-10-15 clearly gives no credit for the events occurring immediately prior to August 1, 1990, whether a part of Operation Earnest

Will in the Persian Gulf region or otherwise; thus, awarding credit to the Respondents for service between January 1, 1981, and August 1, 1990 directly violates the statute.

Likewise, accepting the Circuit Court's conclusion that a "period of armed conflict" was occurring after April 11, 1991, violates the clear and unambiguous date on which the Legislature declared that a "period of armed conflict" ended. According to subsection (a)(7), the only time credit should be awarded for military service after the end date of a "period of armed conflict" is if the member served in hostile territory. None of the Respondents claim or allege their service outside the statute's official "period of armed conflict" dates was in hostile territory, even though they assert that various "periods of armed conflict" were occurring at the same time periods as those specifically addressed by the statute. Thus, their claim for benefits for service occurring after April 11, 1991, should have been held to the statute's clear standards.

Respondents fail to explain why the Board should be required to violate the clear and unambiguous portions of Section 5-10-15, in favor of an overly liberal interpretation of ambiguous language found therein. The rule of liberal construction should not necessarily mean that the Respondents should be awarded the maximum possible military service credit, which is exactly what the Circuit Court did. *See Repass*, 212 W. Va. at 93 (observing that the rule of liberal construction as applied to workers' compensation claims "does not mean that any person claiming an injury should instantly be awarded the maximum possible compensation.") Rather, they

should be afforded a liberal construction that still respects the language and structure of the statute.

Respondents still refuse to acknowledge that the ruling they seek - that the Board can only deny service credit for a period expressly excluded in Section 5-10-15 - actually will result in a mandate that the Board ignore other portions of the statute. The Respondents continue to avoid explaining where the limit to their reasoning lies. If the Board cannot deny these Respondents' requests and the Circuit Court's ruling stands, the Board will be prohibited from denying any other requests for military service credit, regardless of the dates on which the military service was rendered, or where it was served. In response to this, Respondents point out that there is no particular limit to the number of days to be included in a period of armed conflict. This is true, but Respondents' arguments shows they have again missed the point: the ruling adopted by the Circuit Court should not have wholly ignored those specific dates and limitations imposed in clear and unambiguous language by the Legislature in Section 5-10-15. It is clear that the Legislature envisioned "periods of armed conflict" to be limited, discrete periods of time. If it were enough that a U.S. military mission be ongoing somewhere in the world, the 2000 Legislature would have simply granted service credit for active duty service at any time.

B. The Board's interpretation should have been upheld because, in addition to being reasonable, it was consistent with other rules of statutory construction.

Although they admit that the statute is ambiguous, Respondents continue to ignore the importance of other rules of statutory instruction, including the rule of *ejusdem generis*. In response to the Board's argument on this point,

Respondents only claim that the Board has not explained how the periods of time for which they seek credit are different from those recognized in statute. In fact, the Hearing Officer concluded that

[i]t is apparent from the statutorily defined events of periods of armed conflict that the listed events are characterized by full-scale military operations of significant duration, unlike the events for which the Applicant seeks entitlement. ... There is nothing in the record to suggest that this Board has acted in an arbitrary or capricious manner in declining to recognize any of the myriad events of limited scale and duration as periods of armed conflict. This is particularly true when viewed in the context of the lack of any general requirement that the member actually be in the theater of operations.

(A.R. 320-21, 555, 779-80). The Hearing Officer had been presented with evidence in the administrative hearing which contradicted the broad date ranges for military missions included in the VFW handbook relied upon so heavily by the Respondents and the Circuit Court on appeal. *See, e.g.,* Lists of Recent Military Incidents/Operations/Conflicts/Wars with Reported Casualties (A.R. 253-256). The Veterans Bonus Amendment to the West Virginia Constitution, on which Respondents explicitly rely, also uses much more limited date ranges than the VFW handbook. *See* W. Va. Const. amend. XIV (ratified Nov. 3, 1992).

In fact, the Department of Defense has itself recognized these differences, distinguishing World Wars I and II, and the Korean and Vietnam conflicts, from Lebanon, Libya, and Grenada, for example. *See* 32 C.F.R. § 47.3 (defining a “period of armed conflict” as “[a] prolonged period of sustained combat involving members of the U.S. Armed Forces against a foreign belligerent,” and as “more than a military engagement of limited duration or for limited objectives, and

involv[ing] a significant use of military and civilian forces.”) The Circuit Court should have considered the effect of *ejusdem generis* in its analysis, as well as the evidence in the record establishing the limited duration of the various events in issue, and determined that the Board’s interpretation was correct.

Respondents also misunderstand the relevance of the fiscal note and actuarial study to the statutory interpretation this case calls for. This information is relevant to ascertaining the intent of the Legislature. *See, e.g., Telecom*USA, Inc. v. Collins*, 393 S.E.2d 235, 238-39 (Ga. 1990) and *Robey v. Maryland*, 918 A.2d 499 (Md. 2007). There is no question that, whatever the Court’s ruling may be, it is up to the Legislature to fund the PERS plan, and that ultimately, the intent of the statute must apply regardless of the cost. *See, e.g., Syl. pt. 13, Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995) (recognizing the legislature’s obligation to fund pension systems). The Board clearly recognizes this, having declared September 11, 2001 to the present as a “period of armed conflict,” without regard to its fiscal impact - it is abundantly clear that this constitutes a “period of armed conflict” under the statute, and therefore must be creditable to PERS members.

However, the reality is that legislatures can, should, and do consider the costs of benefits awarded through public pension plans. This Court recognized this explicitly in *Booth*, noting, when the Court struck down a reduction in a cost-of-living increase, that the Legislature may wish to remove additional benefits it had given in the last session which were tied to the reduction. 193 W. Va. at 343-44. As a matter of legislative history, the fiscal note is therefore relevant. While the Legislature could not have foreseen the costs associated with granting credit for the

conflict that began September 11, 2001 and continues today, in 2000, it was well aware of the events proposed for inclusion by the Respondents. Respondents do not explain how legislation that awards free military service credit for all periods of time could have a *de minimus* cost impact, and an assessment that the number of claims expected under the legislation would be “extremely small.” (A.R. 243).

Respondents admit in their brief that West Virginia Code Section 5-10-15 is ambiguous with respect to “periods of armed conflict,” conceding that rules of statutory construction must apply. Respondents’ Response, p. 13. However, they apparently believe that the only applicable rule is that of liberal construction. The Board has appealed the Circuit Court’s ruling because it has a fiduciary duty, as the trustee of PERS, not only to construe statutes liberally, but also to uphold the terms of the trust, and to protect the fund and the interests of all of its beneficiaries. See syl. pts. 5 and 14, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988). Simply put, it was an error for the Circuit Court to adopt the most liberal construction that could be given to the statute, to the exclusion of all other rules of statutory construction, in order to reach a result that is clearly incorrect. Accordingly, the Board respectfully requests the Court deny Respondents’ argument that liberal construction, and liberal construction alone, entitle them to relief, and overturn the Circuit Court’s reversal of the Board’s decision. The Board was specifically granted the authority to determine the amount of service credit to be awarded under this statute, in any case of doubt. W. Va. Code § 5-10-15(a)(6). The Board’s reasonable determination should have been upheld.

II. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE FOURTEENTH AMENDMENT OF THE WEST VIRGINIA CONSTITUTION REQUIRES THE BOARD TO RECOGNIZE ADDITIONAL PERIODS OF TIME AS “PERIODS OF ARMED CONFLICT” FOR PURPOSES OF MILITARY SERVICE CREDIT AWARDED PURSUANT TO WEST VIRGINIA CODE SECTION 5-10-15.

In the proceedings below, the Respondents argued that their claims should be granted because, at a minimum, the dates specified in the Fourteenth Amendment to the West Virginia Constitution, awarding cash bonuses to veterans with service during certain specific periods, were “dispositive on this issue.” (A.R. 793, 899, 955, 977, 998). The Circuit Court adopted this reasoning in its Final Order. (A.R. 1095). The Board believes it is obvious that the Circuit Court’s ruling on this point was erroneous, and the Respondents have made no real effort to dispute that. Instead, Respondents now back away from their position, claiming that the Circuit Court merely “considered” or “examined” the Veterans Bonus Amendments as evidence of when “periods of armed conflict” occurred. Not only were the dates set forth in the Amendment not dispositive, but if anything, they show that the Legislature did not intend to include these particular events as “periods of armed conflict” for PERS – the Legislature’s enactment of West Virginia Code Section 5-10-15 came well after the Veterans Bonus Amendment, making even more clear that the Legislature was aware of, and yet opted not to give credit for, the periods listed therein. The Board reiterates its request that the Circuit Court’s ruling on this point be reversed.

III. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT RESPONDENT WOOD WAS ENTITLED TO MILITARY SERVICE CREDIT ON THE BASIS OF ESTOPPEL, BECAUSE THE HEARING OFFICER'S FACTUAL FINDING OF NO DETRIMENTAL RELIANCE WAS NOT CLEARLY WRONG, AND BECAUSE THE LEGAL ELEMENTS REQUIRED TO SHOW ESTOPPEL WERE NOT MET.

Respondents' entire response to the Board's arguments made regarding this assignment of error consists of a general statement that the Circuit Court's conclusion was consistent with this Court's analysis of equitable estoppel, and a claim that a different result would be unfair. Respondents have not adequately responded to the Board's third assignment of error.

For example, the Respondents do not dispute the evidence that supported the Hearing Officer's factual finding that Respondent Wood did not detrimentally rely on the "representations" made by the Board regarding his military service credit, which came only in the form of an annual, automatically-generated statement. These factual findings should not have been overturned by the Circuit Court, and without them, Respondent Wood's estoppel claim cannot hold. Similarly, the Respondents do not address this Court's ruling in *Myers v. W. Va. Consol. Pub. Ret. Bd.*, 226 W. Va. 738, 752-54, 704 S.E.2d 738, 752-54 (2010) (per curiam), in which the Court declined to give a PERS member service credit based on an essentially identical argument that he should receive it simply because it appeared on his annual statements, without more, and further held that the Board was actually "statutorily bound" by West Virginia Code Section 5-10-44 to correct service credit errors, regardless of equitable reasons. Petitioner's request for relief from the Circuit Court's ruling should therefore be granted.

IV. IT WAS AN ERROR FOR THE CIRCUIT COURT TO CONCLUDE THAT THE BOARD DID NOT PROPERLY ARTICULATE ITS INTERPRETATION OF WEST VIRGINIA CODE SECTION 5-10-15, AND TO AFFORD RESPONDENTS MILITARY SERVICE CREDIT ON THAT BASIS.

Respondents repeatedly assert in their Response, and the Circuit Court held, that the Board failed to explain why the events are different than those listed in the statute. (A.R. 1108). This ruling erroneously shifted what should have been the Respondents' burden, and was simply the result of Respondents' attempts to avoid the ruling reached by the Hearing Officer that *ejusdem generis* should apply.

In the administrative hearings below, the Hearing Officer specifically considered the various lists of military events or incidences that were introduced into evidence by both parties, and found as a factual matter that “[t]here is no evidence presented, however, which would permit a finding that these events constituted periods of armed conflict as contemplated by the statute ...” (A.R. 357-58, 549, 764). The Hearing Officer also made a factual finding that, while the Board had studied the possibility of approving additional periods, and did ratify the treatment of the period beginning September 11, 2001, as a “period of armed conflict,” it had declined to adopt any other periods. (A.R. 358, 549-50, 764). The Hearing Officer went on to conclude as a matter of law that none of the events proposed for inclusion by the Respondents were sufficiently similar in scope or nature to those specifically identified in the statute, but instead, based on evidence in the record, these were events of “limited scale and duration.” (A.R. 320-21, 555, 779-80). Thus, there is no merit to the Respondents' claim, or the Circuit Court's findings (*see* A.R. 1107, 1111) that the Board has not explained why the events listed in the statute are different from those adopted by the

Circuit Court, or taken a definitive position on what qualify. Clearly, the Board has determined that no events other than those specified in the statute, and the ongoing September 11, 2001, conflict, apply.

The Board has also argued throughout these proceedings that the open language in Section 5-10-15 regarding additional “periods of armed conflict” should be read as only applying to those events similar in duration and scope to the specifically-listed events occurring after 2000, when the legislation was enacted. The Respondents do not dispute this argument, instead simply claiming that this is the rule the trial court applied. Response, p. 16. This is simply incorrect; all of the periods of time the Circuit Court’s ruling actually approved occurred before 2000, and therefore before the legislation was enacted. Thus, the Circuit Court failed to take into account the historical context of the Legislature’s actions. While Respondents accuse the Board of not offering sufficient explanations, it is Respondents who have not explained why the Legislature, with full knowledge of the U.S. military’s involvement in El Salvador, Lebanon, Grenada, the Persian Gulf, Panama, Somalia, and many other military missions, decided not to include such periods in Section 5-10-15 (or in the case of the Persian Gulf, choose to expressly limit credit to service between August 1990 and April 1991).

As the claimants in the administrative and Circuit Court proceedings below, it was the Respondents who were required to prove that the Board’s position was incorrect. Respondents do not argue that the doctrine of *ejusdem generis* should not apply, or even attempt to establish the similarity of the various military events at issue to those already approved by the Legislature. Respondents’ argument that the

Board has not explained its position is simply an attempt to avoid attention to Respondents' own failure to address the issues in dispute.

In the proceeding below, the Circuit Court granted Respondents relief in part based on the idea that the Board "made no effort to explain" its position, after considering the Respondents' arguments that the Board was required to promulgate a legislative rule specifically stating which periods would not qualify, and why. (A.R. 791, 897, 954, 974, 996). Respondents now back away from that position, claiming that the trial court merely "noted" that no rule had been issued. Respondents' Response, p. 15, n. 5. Because the Board has clearly articulated its position, and Respondents now concede no legislative rule was necessary, the Board respectfully requests that this Court reverse the Circuit Court's decision.

V. THE CIRCUIT COURT ERRED WHEN IT GRANTED RELIEF TO THE RESPONDENTS BASED ON PRIOR BOARD AND CIRCUIT COURT DECISIONS INVOLVING OTHER INDIVIDUALS, BECAUSE THE RESPONDENTS FAILED TO ESTABLISH THAT SUCH DECISIONS WERE BINDING ON THE BOARD.

Respondents similarly back away from the claims they made in the proceedings below with regard to the application of one administrative and one judicial opinion involving other PERS members to these cases. They now simply claim that the *Hubbard* and *Olthaus* decisions show that the Board has acted "inconsistently," and has treated PERS employees differently. See Respondents' Response, pp. 15-16. The Respondents do not address the assignment of error raised by the Board: that the Circuit Court erroneously relied on prior decisions in overturning each of the Board's decisions with respect to these Respondents. The Circuit Court should not have

afforded Respondents relief on the basis of those decisions, and the Respondents apparently do not dispute that.

Nonetheless, the Respondents' statements regarding these decisions warrant a reply because through them, the Respondents' continue to mischaracterize the timing, effect and importance of these prior decisions. First, the Respondents' claim that this is the first time the Board has argued the *Hubbard* ruling was in error, is simply incorrect. The record establishes that the Board has made this argument at each stage of these proceedings. (A.R. 305-306, 541-42, 754-55, 821-22, 924, 1032). Second, the argument that these decisions establish unfairness is simply incorrect, because it is undisputed that, albeit for different reasons, neither of the orders actually granted any military service credit to anyone.

The Board certainly owes a fiduciary duty to all State employees, as the Respondents note. This Court has made clear that among those duties is the duty to faithfully apply the laws as written, keeping in mind the rights of all of the members of a plan. *See* syl. pts. 5 and 14, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988) (holding that the "PERS Trustees have the highest fiduciary duty to maintain the terms of the trust, as spelled out in the statute," and that the trustees also have "a fiduciary duty to protect the fund and the interests of all beneficiaries thereof...") (emphasis added). The Board believes in good faith that the Circuit Court's decision in *Olthaus* was incorrect, and that its ruling in *Hubbard* was similarly mistaken; therefore, the Board therefore had a duty to seek a definitive ruling on the issue which could be applied to PERS members in the future, and in bringing this appeal, has done so.

CONCLUSION

Petitioner, the West Virginia Consolidated Public Retirement Board respectfully requests that this Court reverse the March 20, 2013, Final Order of the Circuit Court of Kanawha County in all respects and reinstate the Board's administrative final orders denying Respondents' requests for additional military service credit in PERS.

Respectfully Submitted,

West Virginia Consolidated Public
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September 2013, true and accurate copies of the foregoing **Petitioner's Reply Brief** were deposited in the U.S. Mail, contained in a postage-paid envelope, addressed to counsel for all other parties to this appeal as follows:

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