ARBITRATION DECISION NO.:
408

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Bureau of Employment Services
Unemployment Compensation Div.
Cleveland Office

DATE OF ARBITRATION:
November 19, 1991

DATE OF DECISION:
December 15, 1991

GRIEVANT:
Joseph G. Daffner

OCB GRIEVANCE NO.:
11-02-(90-11-27)-0087-01-07

ARBITRATOR:
Hyman Cohen

FOR THE UNION:
Lois Haynes

FOR THE EMPLOYER:
Jerry Lehman

KEY WORDS:
Removal
Misuse of Position for
Personal Gain
Sale of Confidential Information

ARTICLES:
Article 24-Discipline
§24.02-Progressive Discipline
§24.04-Pre-Discipline

FACTS:

The grievant had been an Investigator for the Ohio Bureau of Employment Services for thirteen years. His supervisor noticed that he made and received an unusual number of telephone calls from a private investigator. The Ohio State Highway Patrol was contacted and in a meeting with the grievant's supervisor, was given 130-150 notes from the grievant's work area. The notes contained names, social security numbers, wage information, and number of weeks worked by individuals. The investigation found that three non-state employees had been in contact with the grievant, two investigators and one administrator of a

nursing home. The individuals admitted to receiving information from the grievant and one admitted to paying him for the information although the grievant never demanded payment. The grievant was removed for misuse of his position for personal gain.

EMPLOYER'S POSITION:

There was just cause for the grievants removal. As an Investigator for the state, he sold, for personal gain, confidential information received from client's employers. The information consisted of: wage records, claims history checks, dates of car purchases, and number of weeks individuals worked. The grievant also sold information obtained from the law enforcement computer network (LEADS) which is not available to the persons who received it from the grievant. It is irrelevant that the grievant never requested payment or that he received payment. Ohio Revised Code section 4141.21 prohibits the disclosure of confidential information to disinterested parties under any circumstances. The Bureau had distributed its policies on disclosure of confidential information and the grievant had notice of these policies.

UNION'S POSITION:

There was no just cause for the grievant's removal. The employer failed to meet its burden of proof to show that the grievant committed the violations charged. None of the disinterested parties who allegedly received confidential information testified at the arbitration hearing, thus the employer's case is built upon hearsay. The employer initiated its investigation of the grievant in bad faith. It acted on suspicion when the grievant's supervisor was instructed to watch him. The employer also committed a procedural error by not conducting an investigatory interview. Lastly, as a mitigating factor, the grievant was a thirteen year employee with a good work record.

ARBITRATOR'S OPINION:

The employer proved that the grievant violated Ohio Revised Code section 4141.21. As an Investigator, he disclosed for personal gain confidential information received by the Bureau of Employment Services and information obtained from the law enforcement information network to unauthorized persons. Administrative Directive No. 31-89 provides for removal for the first offense of this type. The employer met its burden of proof despite the fact that the disinterested parties did not testify. The State Highway Patrolman did make an investigation and his testimony was uncontroverted. The employer introduced transcribed interviews with the disinterested parties who admitted receiving and paying for the information. Also uncontroverted was the grievant's supervisor's testimony concerning the 130-150 notes found at the grievant's work area which were submitted into evidence. The grievant's thirteen year work record is an insufficient mitigating circumstance to reduce the penalty imposed.

AWARD:

Grievance Denied. Removal upheld.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration
between

OHIO BUREAU OF UNEMPLOYMENT COMPENSATION

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME AFL-CIO

ARBITRATOR'S OPINION

GRIEVANT:
Joseph G. Daffner
11-02-190-11-271-0087-01-07

FOR THE STATE:
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DATE OF THE HEARING:
November 19, 1991

PLACE OF THE HEARING:
OCSEA, Columbus, Ohio

ARBITRATOR:
HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
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Telephone: 216-442-9295

*** * * ***

The hearing was held on November 19, 1991 at OCSEA, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:00 a.m. and was concluded at 12:55 p.m.

*** * * ***

On December 3, 1990, **JOSEPH G. DAFFNER** filed a grievance with the **OHIO BUREAU OF UNEMPLOYMENT SERVICES**, the "**State**," also referred to in this decision as the "**Bureau**" in which he protested his termination on November 26,1990. The grievance was eventually carried to arbitration under the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO**, the "**Union**".

FACTUAL DISCUSSION

Approximately thirteen (13) years ago, the Grievant was hired as an Investigator by the Cleveland Office of the Unemployment Compensation Division, which is a unit of the Ohio Bureau of Employment Services. Before proceeding further, it would be useful to set forth the mission of the Ohio Bureau of Unemployment Services. Its mission is to provide services in assisting persons to find employment and to administer the Ohio law so that qualified persons receive their appropriate benefits under the law.

The Investigation Unit of the Unemployment Compensation Division conducts investigations involving "allegations of fraudulent misrepresentation or the improper payment of unemployment benefits." As an Investigator in the State's Cleveland field office the Grievant obtained statements and other evidence to determine whether fraud has been committed by persons who applied for and obtained benefits. He also obtained evidence from employers, employees, the general public, governmental agencies and reviewed various records. If the State determines that there is sufficient evidence to establish fraud, the Grievant is authorized to present such evidence to the County Prosecutor.

The Supervisor of the State's Cleveland office is Robert M. Semancik. The office consists of two (2) rooms. In one (1) room, three (3) Investigators perform their work at desks with the assistance of two (2) secretaries. Semancik is in a separate room, the entrance to which is from the room with the Investigators and the two (2) secretaries. The Cleveland office was described as a "small office". As a result, Semancik could "overhear" conversations to the extent that he can determine not only the identity of many of the persons telephoned by the Investigators but also many persons who have called into the office.

In April or May, 1990, Semancik began to notice that the Grievant made many telephone calls. He said that some of the telephone calls were from Jerry Veneskey whom he knew from the time that he [Semancik] was employed at the Bureau of Workers Compensation. Semancik said that Veneskey had been an Investigator for Sanislow & Associates but during the relevant period in question, he was the owner of Veneskey & Associates which performed investigative services for clients. In April or May, 1990, Semancik overheard the Grievant exchange pleasantries with Veneskey. He would then hear him say to Veneskey "what can I do for you?," after which he would take out his yellow legal pad or "stick em pad" and he would say "Sure--shoot." According to Semancik, the Grievant "maintained a steno pad" covering most of the work that he did in the office and in the field.

On June 15,1990, Semancik contacted his immediate supervisor, William Anderson and informed him that he had a "suspicion" that the Grievant was selling confidential information to noninterested parties. Anderson brought Semancik's "suspicion to the attention of his Supervisor". A meeting followed with the Assistant Director of the Bureau, who believed that the matter should be turned over to the Internal Security Department of the Bureau. Meanwhile, pursuant to instructions from his supervisor, Anderson told Semancik to watch what was going on in the office and to report "anything that was out of the ordinary."

On September 9 or 10, 1990, the Assistant Director of the Bureau informed Anderson to contact "Sgt. Dean" of the State Highway Patrol. A meeting with Sgt. Dean, and Semancik followed within the next few days. At the meeting, Semancik reported that he had found 130 to 150 notes written on "stick ems" and sheets of paper on the Grievant's desk, in his desk drawers and the waste paper basket, which referred to names, social security numbers, wage record information, wages, the number of weeks worked by individuals and various computer print outs on employers and individuals. There were also "letters and attachments" that were found by Semancik.

Subsequent to the meeting with Sgt. Dean, both Anderson and Semancik reviewed the Grievant's notes and they determined that the notes fell into three (3) lists or categories. One (1) set of notes contained information which was supplied to Veneskey, a second set of notes indicated to them that information was given to Bill Taylor and a third set of notes referred to Sam Mann. Taylor is the owner of Corporate Investigative Services and Mann is the administrator of a nursing home. Both Anderson and Semancik checked the names, social security numbers and other data which the Grievant had written on the "stick ems" and yellow legal pad against the inventory of cases that were current or pending with the Bureau. However, they found that none of the names "fit [the] normal case load." None of the persons referred to on the Grievant's notes were under investigation by the Bureau.

Veneskey, Taylor and Mann were interviewed in September, 1990 by Sgt. Roney Powell of the

Department of Highway Patrol. In the statements that were given to Sgt. Powell, they admitted that they had been given information by the Grievant. According to Sgt. Powell, Veneskey disclosed to him that he paid money to, the Grievant for information which he obtained, although the Grievant never requested money for the information which he supplied.

It is undisputed that the Grievant provided a statement to Sgt. Powell. According to Sgt. Powell, the Grievant told him that he "forwarded information to some people including" Veneskey for which he was paid $200. The Grievant told Sgt. Powell that he never solicited the payment of money but he did not refuse the money when it was offered to him.

On November 26, 1990, the State terminated the Grievant for violation of its policies including the prohibition on divulging confidential information to noninterested parties, misuse of his position for personal gain and divulging "employer or employee information" not permitted by Section 4141.21 of the Ohio Revised Code.

DISCUSSION

The parties stipulated to the following issue to be resolved by this arbitration: "Was the Grievant terminated for just cause?; if not, what shall the remedy be?

On the basis of the evidentiary record I have concluded that while serving in the position of Investigator for the State, the Grievant obtained confidential information which is the exclusive possession of the State and for its exclusive use, for the purpose of divulging such information to the public for which he received money. In addition the Grievant used his position as an Investigator for the State in obtaining confidential record information from other State and Federal departments and agencies for the sole purpose of divulging such confidential record information to unauthorized parties. The evidence warrants the conclusion that the Grievant engaged in these unauthorized and illegal activities on behalf of Veneskey for a part of 1989 until September, 1990. He acted for Taylor and Mann for a shorter period of time.

The confidential information that was obtained for Veneskey, Taylor and Mann included such information as social security numbers of numerous persons, "history checks," "wage record checks," wage record printouts, "claims history checks," dates of purchase of automobiles, number of weeks worked and various computer print outs concerning individuals and employers."

Anderson elaborated on the nature of the confidential information that was obtained by the Grievant. The information included various items relating to claims, including information about individuals who have filed unemployment claims, their places of employment, their wages, dependents and the amount of unemployment compensation that they have collected. The confidential information also included wage record information that each employer is required to supply the State, the names and social security numbers of its employees, the number of weeks that they have worked in the quarter and their wages during the quarter. Finally, the information divulged by the Grievant to unauthorized and noninterested parties included contributions, information relating to "wage record systems" supplied by employers, which summarizes the wages paid, the number of employees and the history of charges against unemployment compensation.

The information which the Grievant obtained not only came from the Bureau but also was obtained from other sources which are not accessible to the general public. Thus, State Trooper Tim Del Vecchio indicated that the Grievant contacted him for "checks" through the LEADS system. LEADS is a law enforcement computer network which provides ready access to the Bureau of Motor Vehicles files, and includes such information as an individual's license, title and registration information concerning an individual's vehicle; in addition, the criminal history of an individual can be obtained through the National Crime Center. As Sgt. Powell stated in his undisputed testimony, Veneskey, Taylor and Mann did not have access to the LEADS terminal.

The Grievant acknowledged that he released information to Veneskey concerning individuals involved with workers' compensation claims. He had "no idea how many times" he supplied Veneskey with such information. The State submitted a "Dear Joe" letter dated August 24, 1990 from Veneskey which stated as follows:

"Here are a couple of new things I received. Also a check for for [sic] your help some things I just completed. The one on this page is just a LOCATE. The others have letters of explanation attached."

Semancik found Veneskey's letter in the Grievant's desk drawer. One of the "attached" letters from a client serviced by Veneskey sought information concerning settlement of a claim by an insured, which would be "based largely on who the decedent was, his financial background, criminal, civil and domestic make up as well as learning whether-or-not he had a future on the [sic] par with Donald Trump or otherwise." Another letter which was attached to the August 24 "Dear Joe" letter from Veneskey requested Veneskey to conduct a "financial report" on the driver of an adverse vehicle, and the owner of the vehicle. The letter from Veneskey's client indicated the following: "We're interested in seeing if there's some money out there for us to become attached to and, if there may be some other autos owned by these two (2) which by chance may be insured."

The August 24 letter from Venesky to the Grievant along with the attached letters indicates that the information sought by Veneskey was of value to him in servicing his client. The information supplied by the Grievant had no relevance to a matter being handled by the Bureau. The confidential information which was readily accessible to the Grievant, through the network of sources which the State utilizes to carry out its mission was utilized by the Grievant to benefit Veneskey's investigatory business. The value to an insurance company or a law firm in obtaining such information is apparent from the "attached" letters. The confidential data could and was utilized to determine the settlement of a claim arising from an automobile accident. Moreover, the information sought to be obtained could disclose the assets of a party who might be legally responsible for injuries and damages suffered in an automobile accident and which might be utilized for purposes of attachment. Clearly, the Grievant's conduct constitutes a serious violation of the duty that he owed to the State. The Grievant capitalized on the State's data and information bank, along with the availability of sources of information from other agencies, some of which are engaged in law enforcement, and provided information on request from Veneskey, Taylor and Mann. The information which the Grievant provided to these persons was not even remotely connected to the mission of the State. Indeed, the information is within the exclusive possession of the Bureau and to be used exclusively to support is mission. The Grievant's service was of benefit and value to two (2) private investigative businesses along with a nursing home.

Semancik found 130 to 150 notes in and around the Grievant's desk concerning information. When Veneskey was interviewed by Sgt. Powell on September 19, 1990, he estimated that he requested information from the Grievant "20-30 times may be..... over the past year, maybe." The Grievant "had no idea" how many times he provided Veneskey with information that he obtained as an Investigator with the Bureau. He also believed that Veneskey gave him around "$600--a little more or less" for the information which he provided to him. It is irrelevant that the Grievant never requested payment from Veneskey. The point is that the Grievant received money. To be sure, the money given to the Grievant by Veneskey was not a gift. Clearly, the payment of money was for services rendered, namely, providing confidential information which was of value to Veneskey in providing information to his client.

That the Grievant did not receive the payment of money from Taylor and Mann does not lessen the offense. Taylor indicated that he treated the Grievant to a lunch. In this connection it is said that "there is no such thing as a free lunch." I cannot attribute to the Grievant that he provided information to Taylor and Mann as merely a "favor" or as a gift. The expectation of a reciprocal benefit is very much the order of things whether the lunch is "free" or the information that is provided is "free". The expectation of a reciprocal benefit may not be realized soon but it is nevertheless eventually realized.

VIOLATION OF POLICIES

By furnishing confidential information to private parties which in no way fulfills the goals of the Bureau, the Grievant violated various policies of the State. UC Letter 21-89 provides instruction to "claims personnel in proper procedures when responding to a claimant's inquiry for claims information." The letter provides for

a “standardized inquiry response letter” when a claimant “presents an information request form from an outside source.” UC Letter No. 21-89 also provides that when “local office personnel receive a request for information from a noninterested party [an] eligibility letter is to be prepared in duplicate.” The Letter proceeds to set forth an internal Bureau procedure for completing a request for such information, which includes a signature by the "local office manager or UC supervisor.” The Letter also declares that: "Under no circumstances is the information to be given or mailed to a non-interested party.”

UC Letter No. 21-89 assumes that the claims information that is requested concerns an active file or claim. In this case, the Grievant divulged information on employers and claimants who were not involved in cases pending before the Bureau. UC Letter No. 21-89 provides that "Confidentiality provisions of the law prohibit bureau employees from completing non-interested party's request forms.” Clearly, the Grievant violated UC Letter No. 21-89.

UC Letter No. 21-90 sets forth instructions and guidelines concerning the use of the telephone for furnishing information contained in a claimant's file to interested parties. The Letter provides an accurate paraphrasing of Sections 4141.21 and 22 of the Ohio Revised Code which is set forth as follows:

“* * A. Section 4141.2 1--Information Furnished by Administrator Not Open to Public. This section of the law provides that information contained in claims records is for the exclusive use of the bureau in processing claims for unemployment benefits and shall not be available to the public for any other purpose. Claims information may be released to most recent and base period employers involved in UC-401N application (or his/her authorized representative) and the claimant (or his/her authorized representative). The file may be reviewed and written notes taken on documents, but copies cannot be furnished to the interested party. All requests for copies are to be directed to the Office of Legal Counsel in central office.

B. Section 4141.22--Divulging Information. This section of the law makes it clear that bureau employees shall not divulge any information secured by them while employed by the bureau with respect to the transaction or mechanical, chemical, or other industrial process of any person, firm, corporation, association, or partnership to any person other than the administrator, other employee of the bureau (as required by such person's duties), or to the persons as authorized by the administrator.* *”

UC Letter No. 21-90 also sets forth the procedure to be followed when personnel of the bureau respond to a telephone inquiry for claims information. It is sufficient to state that the Grievant violated Section 4141.21 of the Ohio Revised Code and the procedures contained in UC Letter 21-90 by disclosing confidential information to Veneskey, Taylor and Mann.

On November 10, 1988 Anderson and Robert L. Heilman, Chief Benefit Payment Control issued Inter-office communications (IOC) concerning confidentiality. Anderson's IOC stated the following:

“* * It has been brought to our attention that there have been breaches of security in the computer system and the confidentiality statutes in the law concerning releasing claims information and wage record information to unauthorized persons.
First, it is imperative that all Investigation Department personnel follow proper procedures concerning computer security such as not releasing passwords to unauthorized individuals and not allowing unauthorized persons an opportunity to view data on the screen, etc.

Second, Section 4141.21 and Section 4141.22, O.R.C., deal with the confidentiality of bureau records. The confidentiality laws must be strictly followed. Administrative Directive 289 explains the Administrative Disciplinary Policy dealing with the violation of the confidentiality of information. Section 4141.99 explains further legal penalties that may be involved.* *”

The language is simple, clear and understandable. Anderson underscores that “The confidentiality laws must be strictly followed.”

Heilman's IOC concerns computer security and the confidentiality of both employer and claimant

information while stressing the gravity of improperly disclosing confidential information. In his IOC, Heilman states: "Field staff deal with confidentiality constantly, and they are periodically reminded of the seriousness of a confidentiality violation."

To indicate that the Grievant read UC Letters 21-89, 21-90, and the November 10, 1988 IOC'S, each of the documents was signed by the Grievant. Moreover, the Grievant also signed a document which contained the text of O.R.C., Sections 4141.21 and .22 dealing with "Information Furnished Administrator Not Open To Public" and "Divulging Information." The evidentiary record warrants the conclusion that the Grievant understood the serious violation of the Bureau's policy and state law when he divulged confidential information in 1989 and until September 1990 to Veneskey, Taylor and Mann.

In light of his position as an Investigator in a unit of the Bureau which investigates allegations of fraudulent misrepresentation or the improper payment of unemployment benefits, it is astonishing that the Grievant said that he "never gave it a second thought as to whether it was permissible to receive money" from Veneskey for the information that he provided to him. The Grievant further indicated his inability or unwillingness to understand the serious nature of his violation of both Bureau policy and state law when he stated that he "saw" no harm in releasing information to Veneskey.

It may be that the Grievant's failure to acknowledge that there was "harm" releasing information to Veneskey is due to the fact that a person can obtain information from the Bureau of Motor Vehicles provided the person pays a nominal fee to open an account with the Bureau. However, had accounts been established with the Bureau of Motor Vehicle, it is difficult to understand the reason why Veneskey, Taylor and Mann sought information from the Grievant. If Veneskey could have easily opened an account with the Bureau of Motor Vehicle, it is unreasonable for him to have paid approximately $600 to the Grievant for information that was supplied to him. Moreover, on the basis of the evidentiary record, the Grievant supplied Veneskey, Taylor and Mann with confidential information about individuals and employers that was not limited to merely information from the Bureau of Motor Vehicles concerning automobiles owned and driven by various individuals.

UNION'S POSITION

The Union contends that the State's case is based upon hearsay, because Veneskey, Taylor and Mann were not present at the hearing to provide testimony. It should be noted that Sgt. Powell's testimony was undisputed concerning his interview with the Grievant in which he admitted that he provided "information" to Veneskey "and other people." At the time, the Grievant said that he was given $200 by Veneskey; at the hearing he said that Veneskey gave him approximately $600. Furthermore, Trooper Del Vecchio's testimony was undisputed concerning the Grievant requesting checks of persons on the LEADS system which were not available to the public. There is also Semancik's testimony that he found 130 to 150 notes on the Grievant's desk, in his desk drawers and in the trash basket. The numerous notes that were written by the Grievant were made part of the evidentiary record and were not disputed by the Grievant. In light of the evidence the transcription of the taped statements given to Sgt. Powell by Veneskey and Taylor merely corroborated the probative, reliable and undisputed evidence of Anderson, Semancik, Sgt. Powell and Del Vecchio concerning the wrongful conduct of the Grievant. Accordingly, the transcriptions of the statements given by Veneskey and Taylor to Sgt. Powell along with the "notes" written by the Grievant for their use and for the benefit of Mann is entitled to great weight.

The Union alleges that the State conducted a "witch hunt" against the Grievant and relied upon "suspicion" to terminate the Grievant. In June, 1990, Semancik suspected that the Grievant was releasing and selling information to noninterested parties. Rather than take action at that time, Anderson instructed Semancik to gather evidence in order to substantiate his suspicions. By September, 1990 Semancik accumulated sufficient evidence to take disciplinary action. I find nothing improper in the State's procedure from June 1990, until the Grievant was terminated in November, 1990.

The Union argues that the State failed to conduct an investigatory interview of the Grievant, in the presence of a Union Steward as provided under Article 24.04 of the Agreement. It should be underscored that under Article 24.04, the investigatory interview is held at the request of the disciplined employee. The

Grievant was given the opportunity to be present at the investigatory interview but refused to attend because of a criminal indictment stemming from the same conduct that gave rise to his termination. The Grievant was advised by his attorney that he would compromise his constitutional rights under the Fifth Amendment if he spoke at an investigatory meeting. Thus, the failure to conduct an investigatory interview was not due to the State's action; rather it was due to the Grievant's conduct which not only led to his termination but to a criminal indictment against him.

In both the pre-disciplinary meeting and the third step meeting the Grievant's, attorney again advised him to invoke his Fifth Amendment rights inasmuch as criminal charges were pending against him. Under Article 24.04 of the Agreement, dealing with the pre-discipline meeting the State refused to exercise its discretion and delay the prediscipline meeting (and the third step meeting) until the disposition of the criminal charges. I find that the State did not commit a contractual violation in the procedure which it utilized before arriving at its decision of termination.

CONCLUSION

The Grievant has been employed by the State for approximately thirteen (13) years. Except for two (2) verbal reprimands that were issued in October, 1989 and February 1990, the Grievant has been a satisfactory employee. I have concluded that the Grievant's tenure with the State is not a mitigating circumstance of sufficient weight to overcome his discharge.

Finally, turning to Article 24.02 in relevant part, provides as follows:

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense * *."

The offenses committed by the Grievant are extremely serious. He misused his position for personal gain and used and divulged confidential information in violation of Sections 4141.21 and 4141.22. The information supplied by the Grievant in 1989 and until September 1990 to noninterested parties was for the exclusive use and information of the Bureau and not available to the public. I find that the discharge of the Grievant is commensurate with the offenses that he committed. His conduct constitutes a serious violation of the duty owed to the State not to disclose confidential information to noninterested parties. Violations 19 and 21 of the State's Administrative Directive No. 31-89, provides for disciplinary guidelines of "removal" for a "1st" occurrence for "Accepting bribes; misuse of position for personal gain" and "Violation of Section 4141.22 of the O.R.C.-- divulging information not permitted by Section 4141.21 of the O.R.C." Violation 20 calls for "Suspension or Removal" for "Unauthorized use or disclosure of confidential material." The Grievant did not only commit one (1) of these offenses, he committed all three (3) of them.

The State proved by clear and convincing evidence that the Grievant was discharged for just cause.

AWARD

In light of the aforementioned considerations, the State proved by clear and convincing evidence that the Grievant was discharged for just cause.

The grievance is denied.

Dated: December 15, 1991
Cuyahoga County
Cleveland, Ohio

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