STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES V. ENDRES, Complainant,

v.

TEAMSTERS UNION LOCAL 695, and
CITY OF MADISON – MADISON METRO, Respondents.

Case 266
No. 69415
MP-4560

Decision No. 33021-A

Appearances:

Ms. Jill M. Hartley, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union 695.

Mr. Roger Allen, Assistant City Attorney, City of Madison, 210 Martin Luther King, Jr. Boulevard, Room 401, Madison, Wisconsin 53710, appearing on behalf of City of Madison – Madison Metro.

Mr. Michael Deiters, Labor Relations Manager, City of Madison, 210 Martin Luther King, Jr. Boulevard, Room 401, Madison, Wisconsin 53710, appearing on behalf of City of Madison – Madison Metro.

Mr. James V. Endres, 5794 Ledgemont Court, Madison, Wisconsin 53711, appearing *pro se*.

ORDER DENYING AS MOOT TEAMSTERS UNION LOCAL 695'S MOTION FOR MORE DEFINITE STATEMENT, DENYING CITY OF MADISON'S MOTION TO DISMISS, AND GRANTING CITY OF MADISON'S MOTION TO MAKE MORE DEFINTE AND CERTAIN

On December 21, 2009, the Commission received from James V. Endres an unsigned Complaint against Respondent City of Madison (the City) and Respondent Teamsters Union

Local 695 (the Union). On February 25, 2010, the Commission received from Mr. Endres correspondence acknowledging that he had forgotten to sign his Complaint and providing his signature.

The gravamen of Mr. Endres Complaint is that the City committed prohibited practices in violation of Sec. 111.70(3)(a)5, Stats., when the City: 1) relieved him of his duties as a motorcoach driver on December 30, 2008, pending the results of an independent medical exam (IME); 2) failed to timely schedule the IME; and 3) caused him to lose sick time, holiday and overtime pay, and to sustain other damages, as a result of its allegedly dilatory IME scheduling.

Complainant also alleges that the Union breached its duty of fair representation under Sec. 111.70(3)(b)1, Stats., regarding the grievance he had filed against the City on or about May 26, 2009, by disregarding him during settlement negotiations and settling his claim for an arbitrary amount far less than that which he alleges would have made him whole.

On February 5, 2010, the City filed a "Motion to Dismiss or in the Alternative Motion to Make More Definite and Certain" and a brief supporting those motions. On February 8, 2010, the Union filed a "Motion for More Definite Statement".

A briefing schedule was set, pursuant to which Complainant timely filed a response to the Union's and City's motions on February 25, 2010. The City timely filed a reply on March 10, 2010.

Having considered the pleadings, submissions and arguments of the parties, the Examiner makes and issues the following

ORDER

1. Teamsters Union Local 695's Motion for More Definite Statement is moot and therefore denied;

2. The City of Madison's Motion to Dismiss is denied;

3. The City of Madison's Motion to Make More Definite and Certain is granted;

4. Complainant Endres is directed, within fifteen days of the date of this Order, to file a statement with the Commission identifying the language in the collective bargaining agreement(s) in force and effect from December 30, 2008, through May 1, 2009 (the period

during which Complainant alleges the City relieved Complainant of his duties) that the Complainant believes Respondent City of Madison has violated.

Dated at Madison, Wisconsin, this 15th day of April, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/
John C. Carlson, Jr., Examiner

CITY OF MADISON

MEMORANDUM ACCOMPANYING ORDER DENYING AS MOOT TEAMSTERS UNION LOCAL 695'S MOTION FOR MORE DEFINITE STATEMENT, DENYING CITY OF MADISON'S MOTION TO DISMISS, AND GRANTING CITY OF MADISON'S MOTION TO MAKE MORE DEFINTE AND CERTAIN

Complainant's Allegations Against the City

Complainant's allegations include the following.[1] On December 30, 2008, the City relieved Mr. Endres of his duties as a Motorcoach Operator, pending his completion of an IME to verify his ability to see adequately. In April, Complainant received a letter that an IME with Dr. Michael Shapiro, an ophthalmologist, had been scheduled for April 28, 2009. Mr. Endres underwent the IME as scheduled. On Friday, May 1, 2009, Mr. Endres received a recorded message on his answering machine from his Madison Metro Management Supervisor, Dick Buss, indicating that he was cleared to return to work on Monday, May 4th.

The City, according to Complainant, never explained its reasons for requiring an IME to test his vision and did not communicate with him from the time he was instructed to cease working until the time he received written notice of the IME. While Mr. Endres admits "there may not be any written provision in the contract" regarding the scheduling of an IME, he maintains that "[w]aiting for nearly four months is a long time to wait for an appointment to be made", and concludes that Madison Metro failed to schedule an IME "in a timely manner."

Complainant's Allegations Against the Union

Complainant alleges that the Union breached its duty of fair representation, because the representative assigned to his case, Gene Gowey, failed to represent him adequately. More specifically, Mr. Gowey allegedly failed to telephone or meet with Mr. Endres prior to a scheduled grievance hearing; had union stewards instruct him to sit in the hallway for two hours prior to the hearing; treated him as an adversary by asking questions designed to minimize his grievance and loss; threatened twice to withdraw his grievance; asked questions bordering on violating his federal HIPAA rights; failed to consider all portions of his grievance; and chose an arbitrary date in January as the cut-off point for calculating the City's repayment obligations. Complainant alleges that although the Union settled his claims for about $4,000, his compensable damages were approximately $27,000.

Union's Position

The Union's "Motion for More Definite Statement" pursuant to Secs. ERC 12.02(7) and 12.04(2)(b), Wis. Adm. Code, requests an Order for the Complainant to provide a more

[1] Some of Complainant's allegations are set forth in the addendum to his grievance, dated May 26, 2009, which he attached to his Complaint and expressly incorporated by reference.

definite and certain statement with respect to the actions of David Brugger, if any, that Complainant contends constituted a prohibited practice in violation of Sec. 111.70(3)(b)1, Stats. The Union notes that although Mr. Endres identifies David Brugger in his Complaint as a person/party against whom the Complaint is being made, Mr. Endres does not allege any acts or omissions by Mr. Brugger as a basis for his liability.

City's Position

The City moves to dismiss the Complaint pursuant to Sec. ERC 12.04(2)(f), Wis. Adm. Code. Alternatively, pursuant to Sec. ERC 12.02(7), Wis. Adm. Code, the City moves for an Order requiring Mr. Endres to amend his Complaint so as to enable the City to file an Answer.

As grounds for these motions, the City argues *inter alia* that the Complaint is conclusory and lacks any factual foundation to support a breach of the Union's duty of fair representation. Moreover, the Complainant, according to the City, fails to state a claim on which relief can be granted by failing to allege that any party breached a duty owed to the Complainant based on any statute, rule or terms of an applicable collective bargaining agreement. The City also maintains that the Complaint is so vague and indefinite that it seriously hinders the City's ability to file an Answer. Lastly, the City points out that the Complaint is not signed, as required by Sec. ERC 12.02(1), Wis. Adm. Code.

Additional facts are set forth in the analysis below where appropriate.

ANALYSIS

I. Union's Motion for a More Definite Statement

The Union moves for an Order requiring a more definite statement of the acts and omissions by David Brugger on which his alleged liability is based. In his response to the Union's motion, however, Endres clarifies that he named Brugger in the Complaint only because he believed that as president of the Union, Brugger "should be cognizant of what was happening in the organization." Endres adds that "[t]he person that had direct contact in this matter was Gene Gowey", and that "[h]is name should have appeared" in the Complaint.

The Examiner interprets Complainant's clarification of the reason for his inclusion of Brugger in the Complaint to mean that he did not intend to name Brugger as a party against whom he was asserting any claims. Accordingly, the Union's motion for a more definite statement of the alleged acts and omissions by David Brugger giving rise to his liability is denied as moot. *See* SCHWARZBAUER V. MENASHA, 33 WIS. 2D 61, 63, 146 N.W.2D 402, 403 (1966) (noting that a case is moot when "a determination is sought which, when made, cannot have any practical effect upon an existing controversy").[2]

[2] While there are exceptions to the mootness doctrine, none of them applies herein. *See* STATE V. GRAY, 225 WIS. 2D 39, 66, 590 N.W.2D 918 (1999) (noting that a reviewing court may decide a moot issue if: 1) the issue is of great

Complainant states in his response to the Union's motion that Gowey's name should have appeared in the Complaint, which does include specific allegations regarding Gowey's acts and omissions. However, the alleged acts and omissions of Gowey – in essence, that Gowey disregarded Mr. Endres during settlement negotiations and settled his claim for an arbitrary amount that made him far less than whole – relate only to Gowey's conduct as a representative of the Union. Accordingly, the Commission initially interpreted the Complaint to identify only the Union and the City as the Respondents. Notwithstanding Complainant's statement in his response to the Union's motion that Gowey's name should have appeared in the Complaint, the Examiner continues to view only the Union and the City – and not David Brugger in his individual capacity – as the only Respondents in this case.[3]

II. City's Motion to Dismiss

Chapter ERC 12, Wis. Adm. Code, "governs the general procedure relating to complaints of prohibited practices as defined in s. 111.70(3), Stats." Sec. ERC 12.01, Wis. Adm. Code. The City has moved to dismiss the Complaint pursuant to Sec. ERC 12.04(2)(f), Wis. Adm. Code, which provides:

> A motion to dismiss shall state the basis for the requested dismissal. A motion to dismiss shall not be granted before an evidentiary hearing has been conducted except where the pleadings, viewed in the light most favorable to the complainant, permit no interpretation of the facts alleged that would make dismissal inappropriate.

When applying this standard,

> the Commission is generally reluctant to dismiss complaints prior to an evidentiary hearing on the merits. To this end, "the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief." UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, DEC. NO. 15915-B (HOORNSTRA WITH FINAL AUTHORITY FOR WERC, 12/77) AT 3; WAUSAU INSURANCE COMPANY, ET AL., DEC. NO. 30018-C (WERC 10/03) AT 7.

CITY OF MEDFORD AND IBEW LOCAL 953 (PERNSTEINER), DEC. NO. 30537-B (WERC, 2/04).

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public importance; 2) the constitutionality of a statute is involved; or 3) the issue is likely to arise again and a court decision would alleviate uncertainty).

[3] Even if Complainant's statement that Gowey's name should have appeared in the Complaint were interpreted as an attempted amendment to the Complaint, such an amendment would not be properly before the Examiner and accordingly would be denied. Section ERC 12.02(4)(a), Wis. Adm. Code provides in relevant part, "Any complainant may request permission to amend its complaint at any time prior to the issuance of a final order by the commission or examiner." Here, Complainant did not move, or otherwise request permission, to amend his Complaint. He simply asserted in his response to the Union's motion that Gowey should have been named.

In addition, the Commission has recognized that

> [a]s an agency, we are highly protective of the interests of *pro se* litigants, who are often unfamiliar with legalisms such as "stating a claim" or the difference between evidence and argument. The Commission has previously endorsed a "strong preference . . . for affording litigants a day in court and a trial on the issues." PRAIRIE HOME CEMETERY, DEC. NO. 22316-B (WERC, 10/85).

PARAPROFESSIONAL TECHNICAL COUNCIL, ET AL. (BENZING), DEC. NO. 30023-D (WERC, 10/03).

These standards are applicable to the City's motion to dismiss Mr. Endres' claims against both the Union and the City.

A. Mr. Endres' Unsigned Complaint and Subsequent Signature Submission

Before addressing the City's arguments specifically relating to the claims against the Union and City, respectively, I note that the City has moved to dismiss all claims against both Respondents based on Mr. Endres' failure to sign the Complaint. Section ERC 12.02(1), Wis. Adm. Code, provides in relevant part:

> The Complaint . . . shall include the signature or a facsimile of the signature of the party or representative filing the complaint. . . . A Complaint is not filed unless it contains the required signature or signature facsimile . . . .

Despite Complainant's initial failure to comply with the signature requirement, I reject the request for dismissal on this ground as unnecessary and unduly harsh. As noted, "the Commission is generally reluctant to dismiss complaints prior to an evidentiary hearing on the merits", CITY OF MEDFORD AND IBEW LOCAL 953 (PERNSTEINER), DEC. NO. 30537-B (WERC, 2/04), and "[is] highly protective of the interests of *pro se* litigants". Moreover, the Commission received Complainant's signature after the City alerted him to the deficiency, and Respondents were not prejudiced by this defect or Complainant's curing of it. The deficiency and subsequent cure only delayed the filing date and did not impact or delay the notice to Respondents of Complainant's allegations against them.

B. Complainant's Duty of Fair Representation Claim Against the Union

It is undisputed that the Union settled Complainant's grievance prior to arbitration. However, "the mere fact that a union settles a grievance short of arbitration does not, without more, mean that it has breached its duty of fair representation and thus permit the employee to sue". MAHNKE V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 66 WIS. 2D 524, 532, 225 N.W.2D 617, 622.

Mr. Endres must "come forward with sufficient proof to establish the union breached its duty of fair representation to him before he [can] pursue his claim [against the City] based upon a violation of the collective bargaining agreement." ID., 66 WIS. 2D AT 533, 225 N.W.2D AT 623 (1975). Moreover, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." ID., 66 WIS. 2D AT 531, 225 N.W.2D AT 622, *quoting* VACA V. SIPES, 386 U.S. 171, 190, 87 S. CT. 903, 916.

Accordingly, I must decide whether the Complaint, construed liberally in favor of the Complainant, alleges facts which, if proved, would establish that the union's conduct was "arbitrary, discriminatory, or in bad faith." ID. MAHNKE and VACA identify factors to consider in determining whether a union's decision not to arbitrate is arbitrary:

> *Vaca*, *supra*, provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. *Vaca* also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. Absent such a good-faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.
>
> This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination.

MAHNKE, 66 WIS. 2D AT 534, 225 N.W.2D AT 623.

As noted, Mr. Endres alleges *inter alia* that prior to the meeting between Union representative Gene Gowey and City management, the Union failed to telephone or meet with him; had union stewards instruct him to sit in the hallway for two hours prior to the scheduled hearing time; failed to consider all portions of his grievance; and chose an arbitrary date in January as the cut-off point for calculating the City's repayment obligations. Complainant also alleges that although the Union settled his claims for about $4,000, his compensable damages were approximately $27,000. When viewing these allegations in a light most favorable to the Complainant, recognizing that the Commission is "highly protective of the interests of *pro se* litigants", and giving "strong preference . . . for affording litigants a day in court and a trial on the issues", the allegations state a claim against the Union for breach of its duty of fair representation. The allegations so construed suggest that the Union completely disregarded the Complainant and his interests before settling his claims for an arbitrarily low amount, without any consideration of the monetary value of his claims (which Complainant alleges to be nearly seven times the settlement sum), the likelihood of success in arbitration, or the effect of the Union's actions on Mr. Endres.

In addition, the Complaint alleges that the Union treated Mr. Endres as an adversary by asking questions designed to minimize his grievance and loss and by threatening twice to withdraw his grievance. These allegations, when interpreted liberally in favor of the Complainant, arguably intimate not merely arbitrary conduct but also bad faith by the Union.[4]

Finally, the allegations viewed as a whole suggest that the Union settled Mr. Endres' claims over his objection. In WEST SALEM SCHOOL DISTRICT (RADTKE), DEC. NO. 32696-D (WERC, 10/09), the Commission found that the Complaint had satisfied the "liberal interpretation" pleading standard regarding his allegation that the union breached its duty of fair representation, where the Complainant "alleged that his collective bargaining representative settled the suspension and non-renewal over his objection". Similarly, Mr. Endres has satisfied the liberal pleading standard by alleging the Union settled his grievance not only without his input and for an arbitrarily low sum compared to his actual damages, but also against his will.

In concluding that dismissal of this claim is inappropriate, I am nonetheless mindful of the salient distinction between a complainant setting forth allegations of a breach of the duty of fair representation sufficient to survive a motion to dismiss, and the "exceedingly difficult" task of prevailing on the merits of such a claim. *SEE* MILWAUKEE PUBLIC SCHOOLS AND SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 150 (BISHOP), DEC. NO. 31602-C, (WERC, 1/07).[5] I only conclude that the allegations in the Complaint regarding the breach of

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[4] The Complaint also contains allegations suggesting that both the Union and the City may have violated Mr. Endres' rights under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). It is unclear whether Complainant is asserting a cause of action based on alleged HIPAA violations against the City and/or the Union. If so, any such claim(s) must be, and are, dismissed. In STATE V. STRAEHLER, 2008 WI APP 14, ¶ 10, 307 WIS. 2D 360, 366-367, 745 N.W.2D 431, 435, the court of appeals observed, "HIPAA and its accompanying regulations, including the privacy rule, apply to express 'covered entities:' health plans, health care clearinghouses, and health care providers who transmit health information electronically. *See* 45 C.F.R. §§ 160.102(a), 164.104(a)." STRAEHLER instructs that HIPAA does not apply to the City or the Union, because they are not "covered entities" under 45 C.F.R. §§ 160.102(a), 164.104(a). Second, I question whether the Commission would have subject matter jurisdiction over any claims based on HIPAA. Federal authority suggests that HIPAA does not provide for a private cause of action. *See* ACARA V. BANKS 470 F.3D 569, 572 (5TH CIR. 2006) (holding in part that "there is no private cause of action under HIPAA . . .") Moreover, the Wisconsin Court of Appeals has observed,

> the subject matter jurisdiction of administrative agencies – that is, their authority to hear certain subject matters in general – is conferred and specified by statute. *See* STATE V. DILHR, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977) (powers of an administrative agency are limited to those expressly authorized or fairly implied by the statute under which it operates) . . . .

STERN V. WERC, 2006 WI APP 193, ¶ 24, 296 WIS. 2D 306, 324-325, 722 N.W.2D 594, 603 (FOOTNOTE OMITTED). I am unaware of any statute expressly or impliedly authorizing the Commission to adjudicate claims based on alleged HIPAA violations.

[5] The Commission's discussion of the difficulty of prevailing on the merits of such claims in MILWAUKEE PUBLIC SCHOOLS is noteworthy:

> It is exceedingly difficult for an individual bargaining unit member to establish a breach of the duty of fair representation, and properly so. Decades of experience under federal and state labor relations laws have demonstrated the wisdom and necessity of maintaining this exceptionally high

the Union's duty of fair representation, when liberally construed in favor of the Complainant, cannot be dismissed on the City's motion.

C. Complainant's Prohibited Practice Claim Against the City

The City correctly notes that the Complaint does not identify any provisions of a collective bargaining agreement in force and effect during the relevant time period when Mr. Endres was relieved of his duties, let alone any violations of such provisions. By acknowledging in his response to the City, "[t]here may not be any written provisions in the contract" regarding the scheduling of an IME, Complainant nearly admits that no such provisions exist.

Complainant's near admission in this regard rests his prohibited practice claim against the City on the slenderest of reeds. This claim is based on the City's alleged failure "to schedule, in a timely manner, an independent medical exam . . .", in violation of Sec. 111.70(3)(a)5, Stats. That section provides in relevant part:

> It is a prohibited practice for a municipal employer individually or in concert with others:
>
> . . .
>
> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees . . . .

Absent the City's violation of "any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment . . .",

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bar. It acknowledges that unions have limited resources, that grievances may be handled by relatively unsophisticated fellow employees or union staff, who as human beings sometimes make mistakes of judgment or are negligent, that a union's resources come from dues and fees paid by employees, that the union is a collective enterprise that must serve the interests of the overall group, that serving those collective interests frequently comes at the cost of a particular individual's real or perceived interests, and that a union must have discretion to make these decisions without being subjected to expensive second-guessing by agencies or courts.

Thus, as the Examiner and the Union have pointed out, it is well-established that a union does not breach its duty of fair representation simply by negligently processing a grievance, simply by failing to communicate with a grievant, simply by making unwise or improvident decisions about the merits of a grievance, or simply by settling a grievance against the wishes of the grievant. Imperfections in representation are permitted the union, with one important caveat: " … *subject always to complete good faith and honesty of purpose in the exercise of its discretion.*" HUMPHREY V. MOORE, 375 U. S. 335, 349 (1964) (emphasis added).

ID.

Sec. 111.70(3)(a)5, Complainant cannot prevail on his prohibited practice claim against the City, and that claim must be dismissed.

Accordingly, Complainant should have identified in his pleadings the provisions of the collective bargaining agreement(s) in force and effect during the relevant time period that he alleges the City violated. Because he has not done so, I must decide whether to dismiss his claim or to afford him the opportunity to identify the contractual provisions the City allegedly violated.

Because Complainant does not concede outright that no such contractual provisions exist, and in light of the previously discussed legal standards applicable to motions to dismiss claims made by *pro se* litigants, I decline to dismiss Mr. Endres' prohibited practice claim against the City.

III. City's Motion to Make More Definite and Certain

While dismissal of this claim is not appropriate at this, the pleading stage, Complainant must nonetheless identify the provisions of the collective bargaining agreement(s) that he alleges the City violated. Section ERC 12.04(2)(b), Wis. Adm. Code, provides that "[a] motion to make a complaint more definite and certain shall comply with s. ERC 12.02(7)." Section ERC 12.02(7), Wis. Adm. Code, in turn, provides in relevant part:

> If a complaint is alleged to be so indefinite as to hinder a party in the preparation of its answer to the complaint, the party may, by motion, request the commission or examiner to order the complainant to file a statement supplying specified information to make the complaint more definite and certain. . . . The commission or examiner may require a complainant to clarify its complaint at any time the commission or examiner finds it necessary and appropriate to do so.

In accordance with Secs. ERC 12.04(2)(b) and ERC 12.02(7), Wis. Adm. Code, the Complainant must, within 15 days of the date of this Order, file a statement with the Commission identifying the language in the collective bargaining agreement(s) in force and effect from December 30, 2008, through May 1, 2009 (the period during which Complainant alleges the City relieved Complainant of his duties) that the Complainant believes Respondent City of Madison has violated. Such statement to the Commission shall also be copied to Respondents.

IV. Conclusion

For all of the foregoing reasons, I conclude the following:

1. Teamsters Union Local 695's Motion for More Definite Statement is moot and therefore denied;

2. The City of Madison's Motion to Dismiss is denied;

3. The City of Madison's Motion to Make More Definite and Certain is granted; and

4. Complainant Endres is directed, within fifteen days of the date of this Order, to file a statement with the Commission identifying the language in the collective bargaining agreement(s) in force and effect from December 30, 2008, through May 1, 2009 (the period during which Complainant alleges the City relieved Complainant of his duties) that the Complainant believes Respondent City of Madison has violated.

Dated at Madison, Wisconsin, this 15th day of April, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/
John C. Carlson, Jr., Examiner

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