BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN, LOCAL 108

and

ST. CROIX COUNTY, WISCONSIN

Case 201
No. 63681
MA-12671

Appearances:

Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the Labor Association of Wisconsin.

Stephen L. Weld, Weld, Riley Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of St. Croix County.

ARBITRATION AWARD

The County and the Association are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint one of three members of its staff to serve as Arbitrator to hear and decide this grievance and, pursuant to this request, Coleen A. Burns was so appointed. Hearing on the matter was conducted on September 9, 2004 in Hudson, Wisconsin. The hearing was not transcribed and the record was closed on November 30, 2004, following receipt of the parties' post-hearing briefs.

ISSUES

The parties did not stipulate the issues for decision. The Association frames the issues as follows:

> Did the Employer have just cause to suspend the Grievant for three days without pay on April 2, 6 and 7, 2004?

If so, what is the appropriate remedy?

The County frames the issues as follows:

Did the County violate Article 7, Section 1, of the collective bargaining agreement when it issued Investigator Richard a 3-day suspension without pay?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHTS

Section 1: The County possesses the sole right to operate County government and all management rights repose in it. The County agrees that in exercising any of these rights it shall not violate any provisions of this Agreement. These rights include, but are not limited to, the following:

. . .

4. To suspend, discharge, or take other disciplinary action against employees for just cause as hereinafter provided.

. . .

ARTICLE 7 – DISCHARGE-SUSPENSION

Section 1. No employee covered by this Agreement shall be disciplined without just cause. (The question as to what conduct constitutes "just cause" is a proper subject for the grievance and arbitration provisions of this Agreement.)

BACKGROUND

On the evening of March 18, 2004, County Sheriff's Department Investigator Jim Richard and Deputy Brent Standaert transported an individual to the Dunn County Sheriff's Department in Menomonie, Wisconsin using Deputy Standaert's County squad car. The transport was for the purpose of providing assistance with a matter involving an inter-agency task force. Prior to returning to the County, Investigator Richard removed two cases of windshield washer fluid from the Dunn County Sheriff's Department garage and placed the two cases in Deputy Standaert's squad car. Subsequently, Deputy Standaert and Investigator Richard each placed one case of this windshield washer fluid in their personal garages.

On March 23, 2004, the Dunn County Sheriff telephoned St. Croix County Sheriff, Dennis Hillstead. Following this telephone conversation, Sheriff Hillstead checked the

County Sheriff's Department garage to see if this windshield washer fluid was there. Sheriff Hillstead did not find the windshield washer fluid and, thereafter, asked Chief Deputy Ron Volkert to investigate.

On March 31, 2004, following this investigation, Sheriff Hillstead issued Investigator Richard a letter that includes the following:

> Disciplinary Action, 3 day suspension without pay. April 2, and 6th, 7th
>
> Disciplinary Action taken for violation of St. Croix County Sheriffs Department Policy, PP21, Standard of Conduct. Specifically paragraph (1)(i)(b)(1), Conduct Unbecoming an officer.
>
> Also for insubordination for failing to follow written order of the Sheriff issued December 16th, 2003, acceptance of any form of gratuity or free merchandise.

Thereafter, a grievance was filed alleging, *inter alia*, that the County did not have just cause to discipline the Grievant by imposing a 3-day suspension without pay. The grievance was denied at all steps and submitted to arbitration.

POSITIONS OF THE PARTIES

Association

Prior to removing the windshield washer fluid from the Dunn County Sheriff's Department garage, the Grievant asked an unknown individual, assumed to be a Dunn County Sheriff's Department employee, where the boxes of windshield washer fluid had come from and was advised that it had been donated by Wal-Mart as an overstocked item. When the Grievant responded that they could really use some, this unknown individual stated "if they needed some to go ahead and take a couple of boxes."

The Grievant and Deputy Standaert intended to transport the windshield washer fluid to the County Sheriff's Department for use by the Department. The windshield washer fluid was removed from their squads to provide room for needed Department equipment and stored in their personal garages.

Due to a busy workload, the Officers forgot to bring the windshield washer fluid to the Department. When the Officers were ordered to bring in the windshield washer fluid they brought in the unopened boxes and the partially full bottle that had been used to fill the squad.

As the Officers testified, they did not have any intent of taking the washer fluid for their own use and they were not accepting any gratuity. The Grievant did not accept a gratuity if his intent was to take the boxes of windshield washer fluid back to the Department for Department use.

The Officers returned the windshield washer fluid to the Dunn County Sheriff and apologized for their error in judgment. The County has not shown that the Grievant's error in judgment brought discredit upon Grievant or the County's Sheriff's Department, or that the Grievant's conduct impaired the efficient and effective operation of the Department.

Arbitrator Carroll Daugherty reduced the common law definition of just cause into seven independent questions. If, as in this case, at least one of the answers to any of these questions is no, then just cause for discipline does not exist.

Department Policy PP-21 is constitutionally vague. Accordingly, the County did not give the Grievant forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct and the policy is not reasonably related to the orderly, efficient and safe operations of the County's business.

The email of December 16, 2003, was only disseminated to Investigators and patrol personnel and, thus, was not a policy. Assuming *arguendo*, that the Grievant had accepted a gratuity in violation of a policy, the entire Department accepted gratuities from a local merchant in the form of boxes of candy and no one was disciplined. Previously, another employee charged with insubordination received a one-day suspension. The County has not enforced the policy/rule evenhandedly and without discrimination.

The County interviewed the Grievant for only five minutes and most of the interview was accusatory. The County based its disciplinary decision solely upon the internal investigation and gave no consideration to the Grievant's interpretation of events. The Grievant was not provided with an opportunity to defend his behavior during the investigation. The County relied upon the written statement of Chippewa Falls Investigator Brettingen stating that she had not given the Grievant permission to take two cases of windshield washer fluid, but did not interview any of the other officer's who were in the immediate area of the garage.

The investigation was not conducted fairly and objectively and did not provide substantial evidence or proof that the Grievant was guilty as charged. Additionally, inasmuch as the alleged witnesses were not presented at hearing, the Association could not cross-examine them.

The decision to suspend was, in fact, based upon a charge of theft. When the County realized that such a charge could not be proven, the County concocted the charges of conduct unbecoming and insubordination. The County has not proven the offense of conduct unbecoming or insubordination.

Except for a suspension received in July of 1994, the Grievant's service record is unblemished. The issues involved in this suspension are not germane to this case. After receipt of this suspension, the Grievant was promoted to Investigator.

The County does not have just cause to suspend the Grievant for three days without pay. The Association requests that the Arbitrator make the Grievant whole for all lost wages and benefits due to the unjust suspension and expunge the Grievant's personnel records of all documentation relating to the April 2, 6 and 7, 2004 suspension.

County

On March 23, 2004, the Dunn County Sheriff telephoned St. Croix County Sheriff Hillstead to inform him of the missing windshield washer fluid. Subsequently, Sheriff Hillstead asked Chief Deputy Volkert to investigate. Following this investigation, Sheriff Hillstead issued a 3-day suspension to the Grievant.

Neither Article 3, Section 1, which gives the County the right to discipline the Grievant for just cause, nor any other contract provision defines the term "just cause." Recent arbitrators have not relied upon the Daugherty seven standards, but rather, have relied upon a more simplified analysis wherein "just cause" simply means that an employer has a reason for disciplining an employee and that this reason is supported by the evidence. (cites omitted)

The Union faults the County for not presenting any witnesses to the events of March 18, 2004. It is undisputed, however, that the Grievant removed two cases of windshield washer fluid from the Dunn County Sheriff's Department garage.

Investigator Brettingen did not tell the Grievant to take a "couple of boxes," but rather said "help yourself" because she assumed that the Grievant intended to fill his reservoir. Investigator Brettingen's comment cannot be reasonably construed to mean that the Grievant could take a case of window washer fluid home for his personal use. The Grievant's claim that he took the fluid for the use of the St. Croix County Sheriff's Department, rather than for his personal use, is belied by the record evidence.

The only plausible explanation for splitting up the boxes of windshield washer fluid was that each intended to take the fluid home for their own use. If there had been intent to give the fluid to the Department, both boxes would have been placed in the Grievant's squad to be dropped off when the Grievant returned the informant or left in Deputy Standaert's squad to be dropped off when he reported to work for the search. The claim that the two were too busy to drop off the windshield washer fluid at the Department is refuted by the fact that, between March 18 and 24, each had three days off from work.

The investigation was extensive. The Grievant had ample opportunity to defend his actions during this investigation. The disciplinary decision was not reached prior to interviewing the Grievant.

The Grievant's responses during the investigation were less than candid. The Grievant's prior suspension, involving reporting to dispatch that he had started work at 7:00 a.m. when he did not actually leave his house until 30 minutes later, provided the County with reason to question the Grievant's forthrightness.

The Grievant did not acknowledge, or accept responsibility for, his misconduct (as evidenced by his excuses, explanations, and laughing about the incident). Arbitrators have upheld discharges for thefts of even less value and have commented upon the reasonableness of requiring absolute honesty from those charged with enforcing laws against theft and dishonesty. (cites omitted)

County Policy PP-21 prohibits officers from engaging in any conduct or activities that reflect discredit on the officers or bring the agency into disrepute and requires all officers to be accurate, complete, and truthful in all matters; to accept responsibility for their actions without attempting to conceal, divert, or mitigate their true culpability; and to truthfully acknowledge and explain their actions and decisions when requested to do so. The Grievant's conduct constitutes a violation of County Policy PP-21.

Contrary to the Union's claim, "conduct unbecoming an officer" is not a vague standard. A number of other law enforcement professionals were able to discern a problem with the Grievant's removal of the windshield washer fluid. Not only did Brettingen report the missing windshield washer fluid to Dunn County law enforcement officials, but also, Sergeant Cragin questioned the Grievant about the missing fluid and the Dunn County Sheriff questioned the St. Croix County Sheriff about the missing windshield washer fluid. The Union's claim that the Grievant did not bring discredit upon the Grievant or the County is not accurate.

On December 16, 2003, Sheriff Hillstead issued a departmental policy prohibiting all officers from accepting "any form of gratuity" or "any type of discount on meals, coffee or merchandise." Additionally, Section 6 of Policy PP-21 requires all County law enforcement officers to "report any gifts or other items of value that they receive" and to "provide a full report of the circumstances of their receipt if directed." The Grievant has violated these policies on receiving and reporting gratuities and other items of value. "Forgetfulness" or "not getting around to it" are not valid excuses for a failure to report his appropriation of the windshield washer fluid. The policy is not unenforceable because it applied only to deputies, investigators and patrol personnel.

Deputy Standaert and the Grievant received the identical discipline. The candy was accepted for the Department and not the personal use of an individual officer. If the windshield washer fluid had been taken to the Department for use in County vehicles, then it would also have been appropriate. The County has applied its rules, orders and penalties evenhandedly and without discrimination.

There is widespread agreement that, in applying the just cause standard, an arbitrator should not substitute his or her own judgment for that of the employer. Given the nature of the Grievant's misconduct; the lack of record evidence establishing that the County has tolerated inappropriate conduct from its police officers; the County's consistent practice in meting out serious discipline for its standards of conduct; and the Grievant's work record, the County had just cause to discipline by imposing a three day unpaid suspension.

Any modification of the discipline will send a message to Deputy Standaert that he erred in accepting the imposed three day suspension and would lead to all future disciplines being challenged in the hope that an arbitrator will reduce the penalty.

The County has just cause to discipline the Grievant by imposing a three day unpaid suspension. The grievance should be dismissed in its entirety.

DISCUSSON

Issue

The Association has framed the issue that was raised in the grievance and processed through grievance arbitration. Accordingly, the undersigned has adopted the Association's statement of the issue.

Merits

As the County argues, the parties' collective bargaining agreement does not define the term "just cause." Nor is there other record evidence that establishes that the parties have mutually agreed that "just cause" is determined by the application of the seven standards of Arbitrator Daugherty. Accordingly, the undersigned rejects the Association's assertion that these seven standards must be applied in this case. Absent a stipulation otherwise, the undersigned is persuaded that "just cause" for discipline exists when the employer is able to demonstrate that the Grievant engaged in conduct in which the employer has a disciplinary interest and that the discipline imposed reasonably reflects the employer's disciplinary interest.

This grievance was generated by the disciplinary action imposed upon the Grievant by the Sheriff's letter of March 31, 2004. In this letter, the Grievant was advised that the Sheriff was suspending the Grievant for three days without pay. The Sheriff identified two charges. The first charge is that the Grievant engaged in Conduct Unbecoming an Officer, in violation of PP21, Paragraph (1)(i)(b)(1). The second charge is that the Grievant was insubordinate when he failed to follow a "written order of the Sheriff issued on December 16th, 2003, acceptance of any form of gratuity or free merchandise."

Although the County argues that the Grievant also violated PP21, Section 6, by failing to report a gratuity, the disciplinary notice does not reference such a charge. Nor does the record otherwise establish that such a charge was a basis for the Grievant's discipline.

As the Association argues, the phrase "Conduct Unbecoming an Officer," is vague. However, PP21 provides a more specific definition:

> i) Officers shall not engage in any conduct or activities on or off duty that reflect discredit on the officers, tend to bring the agency into disrepute, or impair its efficient and effective operation.

Given the Department's need for public trust, the Department has a legitimate disciplinary interest in conduct that brings discredit on its officers or tends to bring the Department into disrepute. The Department also has a disciplinary interest in conduct that impairs its operations.

The referenced written order is contained in an e-mail dated December 16, 2003, which states as follows:

> Effective 12-16-03: No deputy, investigator, or supervisor employed by the St. Croix County Sheriff's Department will accept any form of gratuity or accept or request any type of discount on meals, coffee or merchandise. I realize that it has become common practice over a long period of years to accept discounted service at certain establishments. However, it stops not, for everyone. Sheriff Hillstead.

The Department's need for public trust provides the Department with a disciplinary interest in the acceptance of gratuities and the request or acceptance of discounts on meals, coffee or merchandise. Notwithstanding the Association's argument to the contrary, the fact that the order contained in this e-mail does not apply to Department employees other than Deputies, Investigators and supervisors does not mean that the order is unreasonable, or otherwise unenforceable against the Grievant.

Having concluded that the employer has a disciplinary interest in the conduct for which the Grievant was disciplined, the undersigned turns to the question of whether the employer has demonstrated that the Grievant engaged in this conduct. Although the disciplinary notice does not identify the employee conduct that was judged to be "conduct unbecoming," Sheriff Hillstead's letter of April 13, 2004 provides clarification with the following conclusions:

> This washer fluid was donated for use by the Dunn County Sheriffs Department, not by its individual deputies in their personal vehicles. There was no permission given by Dunn County authorities to take and remove the fluid from their property.
>
> There is a clear violation of St. Croix County Sheriff's Policy PP21, standards of conduct. Specifically paragraph (1)(i)(b)1. Conduct unbecoming an officer. Deputies are insubordinate in that on December 16th, 2003, I, Sheriff Hillstead, published an order stating that no member of this department would accept any form of gratuity or accept any merchandise for free or at a reduced price.

Given the above, as well as the fact that Employer Exhibit #2 states that the Grievant was disciplined for theft (windshield wiper fluid), the undersigned is persuaded that the first charge includes, as the primary allegation, that the Grievant engaged in theft by removing windshield washer fluid from the Dunn County Sheriff's Department without permission. The Association asserts that the Grievant was given permission to remove windshield washer fluid

from the Dunn County Sheriff's Department by an individual whom the Grievant reasonably believed to be a Dunn County Sheriff's Department employee and, thus, there has been no theft.

It is undisputed that the Grievant removed two cases of windshield washer fluid from the Dunn County Sheriff's Department and placed them in Deputy Standaert's squad. The Grievant claims that he had been given permission to remove the windshield washer fluid by Investigator Brettingen.

As the Association argues, Investigator Brettingen was not called as a witness and, thus, the Association had no opportunity to cross examine Investigator Brettingen regarding her written statement of April 2, 2004. However, the Grievant's testimony provides sufficient corroboration to persuade the undersigned that, on March 18, 2004, the Grievant asked Investigator Brettingen about the windshield washer fluid that was stored in the Dunn County Sheriff's Department garage; that Investigator Brettingen explained that it had been donated by Wal-Mart; that the Grievant indicated a need for "some;" and that Investigator Brettingen responded "help yourself."

According to the Grievant, he had met Investigator Brettingen once before; he knew her only as "Deb;" "Deb" had not identified herself as a member of the Chippewa Falls Police Department; and he thought that "Deb" worked for the Dunn County Sheriff's Department. The record provides no reasonable basis to discredit this testimony of the Grievant. In the absence of any apparent identifier as a Chippewa Falls Police Department employee, Investigator Brettingen's offer of the windshield washer fluid provides the Grievant with a reasonable basis to conclude that Investigator Brettingen had authority to make this offer.

The Grievant's claim that he believed that he had permission to remove windshield washer fluid is supported by the evidence of his March 22, 2004 telephone conversation with Sgt. Cragin. According to the Grievant, Sgt. Cragin asked the Grievant what he had done with the windshield washer fluid and the Grievant, with a laugh, responded that he had placed it in his garage. Sgt. Cragin is identified by the County as a Dunn County Sheriff's Department employee. Had the Grievant not believed that he had permission to remove windshield washer fluid from the Dunn County Sheriff's Department garage, it is unlikely that he would have responded to Sgt. Cragin in such a cavalier manner. It is not evident that, during this conversation, Sgt. Cragin expressed any concern regarding the Grievant's conduct.

In summary, as the Association argues and the Grievant claims, he had a reasonable basis to conclude that he had permission from a Dunn County authority to take and remove windshield washer fluid. The County argues, however, that Investigator Brettingen's remarks do not give the Grievant permission to use the windshield washer fluid for his own use.

To be sure, Investigator Brettingen's offer involved supplies that had been donated to the Dunn County Sheriff's Department and was made to the Grievant while he was working in his capacity as a St. Croix County Sheriff's Department employee. However, the evidence of the conversation which lead Investigator Brettingen to state "help yourself" is sufficiently ambiguous that the undersigned cannot reasonably conclude that the Grievant knew that he was being given permission to use the windshield washer fluid for use by his Department and not for his own personal use. Thus, regardless of whether or not the Grievant intended the windshield washer fluid for his own use, the Grievant has not engaged in theft.

The County argues that Investigator Brettingen's remarks do not give the Grievant permission to remove two cases of windshield washer fluid. The Grievant's claim that he removed the two cases while Investigator Brettingen and other officers were in the garage area was not rebutted by any witness at hearing and, thus, must be credited. However, given the Grievant's claim that Investigator Brettingen and these other officers were discussing where to go to eat, it is not clear that Investigator Brettingen was, in fact, paying any attention to the amount of windshield washer fluid being removed by the Grievant.

The record does not establish that Investigator Brettingen offered two cases of windshield washer fluid. Nor is it evident that she condoned the removal of two cases. Rather, she responded to a request for "some" by stating "help yourself." The word "some" is generally understood to mean "a little." By construing Investigator Brettingen's remarks to mean that he could take two cases of windshield washer fluid, the Grievant exhibited a lack of good judgment.

The Grievant's lack of good judgment reflects discredit on the Grievant and tends to bring the St. Croix Sheriff's Department into disrepute by giving the Sheriff of Dunn County a reasonable basis to question the competence of St. Croix County Sheriff Department employees. Thus, the Grievant has engaged in "Conduct Unbecoming an Officer" in violation of PP21.

The County's second charge is based upon the conclusion that the Grievant intended to keep the windshield washer fluid for his own use. The Grievant claims that he intended to bring the windshield washer fluid into the Department for Department use. It is undisputed that the Grievant did not bring in any windshield washer fluid until ordered to do so by Chief Deputy Volkert on March 26, 2004.

According to the Grievant, on March 18th he removed one case from Deputy Standaert's squad and placed it in his own squad because Deputy Standaert stated that he needed room in his squad for tactical equipment. Deputy Standaert agrees that he needed room in his trunk for tactical equipment. Deputy Standaert and the Grievant each acknowledge that, thereafter, each removed the one case from his squad and placed it in his own garage.

In statements to Chief Deputy Volkert, the Grievant claimed that he removed the one case from his own squad because he needed space for evidence. (Jt. Ex. #5) At hearing, the Grievant stated that he did not bring in the window washer fluid because he did not think about it, he was too busy.

It is evident that the Grievant was busy between March 18 and 26, 2004. However, his claim that he was too busy to think about it is inconsistent with his testimony that, on March 22, 2004, he told Sgt. Cragin that the windshield washer fluid was in his garage. More significantly, however, the Grievant and Deputy Standaert's decision to split up the two cases and store one case in each officer's garage is not consistent with intent to bring the windshield washer fluid to the Department for Department use.

If the intent had been to bring in the windshield washer fluid to the Department, then it is more likely that the Grievant would have taken the two cases and brought them to the Department on the evening of March 18th or on March 19th, or that Deputy Standaert would have kept both cases and stored both cases in his garage until he had room in his squad to bring both cases into the Department. Additionally, if the Grievant had intended to bring the window washer fluid into the Department, it is likely that such intent would have been expressed to Sgt. Cragin during the telephone conversation of March 22, 2004.

The facts of this case warrant the conclusion that the Grievant intended the windshield washer fluid for his personal use. It is undisputed that the Grievant did not pay for this windshield washer fluid. Thus, the Grievant has accepted a gratuity or free merchandise in violation of the written order of December 16, 2003 and was insubordinate by not complying with the written order of December 16, 2003.

It is evident that, after the Sheriff issued the December 16, 2003 e-mail, Sheriff's Department employees ate candy that had been donated to the Sheriff's Department as a holiday gift. It is also evident that the employees who ate the candy were not disciplined for insubordination. As the County argues, given the evidence that the Grievant had accepted the windshield washer fluid for his own use, the two cases are factually distinct. The undersigned rejects the Association's argument that the written order of December 16, 2003 has been discriminatorily, or unreasonably, enforced against the Grievant.

In conclusion, the Grievant has engaged in Conduct Unbecoming an Officer, in violation of Standards of Conduct PP-21. Additionally, the Grievant has been insubordinate by failing to follow the Sheriff's written order of December 16, 2003. Thus, the Grievant has engaged in conduct in which the employer has a disciplinary interest. The undersigned turns to the issue of whether or not the discipline imposed reasonably reflects the employer's disciplinary interest.

The theft charge was the paramount charge in the decision to impose a three day suspension without pay. (Employer Ex. #2 and Jt. Ex. #4) Inasmuch as the record does not provide a reasonable basis to conclude that the Grievant has engaged in theft, the imposition of the three day suspension does not reasonably reflect the employer's disciplinary interest.

As the County argues, Deputy Standaert has accepted his three day suspension. That decision, however, is one for Deputy Standaert to make and is not relevant to the determination of whether or not the County has just cause to impose a three day suspension upon the Grievant.

The Grievant has one prior discipline, resulting from events that occurred in 1993. The undersigned considers this discipline to be too stale to be considered for purposes of progressive discipline. Balancing the Grievant's good work record against the severity of the Grievant's misconduct, and taking into account the evidence of other disciplines imposed by the Sheriff, including that another employee received a one day suspension for insubordination as well as failure to perform duties, the undersigned is persuaded that the County has just cause to discipline the Grievant by imposing a one day suspension.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer does not have just cause to suspend the Grievant for three days without pay on April 2, 6 and 7, 2004.

2. The Employer has just cause to suspend the Grievant for one day without pay on April 2, 2004.

3. To remedy the suspension without just cause, the Employer is to immediately:

   a) reduce the Grievant's suspension from three days without pay to one day without pay;

   b) make the Grievant whole for all wages and benefits lost as a result of the two day suspension without just cause; and

   c) expunge any reference to a charge of theft and the three day suspension without pay from the Grievant's personnel records.

Dated at Madison, Wisconsin, this 28th day of February, 2005.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

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