

**IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.15064 of 2015**

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Dr. Pankaj Kumar Mishra S/o Sri Chandra Shekhar Mishra, resident of village- Jagdishpur Baghnagri P.S. Sakara, District- Muzaffarpur, Bihar.

.... **Petitioner**

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Department of Health Government of Bihar, Patna.
3. The Joint Secretary of Bihar, Department of Health, Government of Bihar, Patna.
4. The Principal, Patna Medical College, P.S. Pirbahore, Patna, Bihar.
5. Dr. Rohit singh, Assistant Professor, Department of urology, Patna Medical College, Patna, Bihar

.... **Respondents**

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Appearance :

For the Petitioner/s : M/s Binod Kumar Jha,
Bhairaw Nand Sharma

For the State : Mr. AAG15

For Respondent No.5 : Mr. Ashok Kumar Singh,
Sr. Advocate
M/s S.S. Mishra, Prem
Rajnan Raj,
Shyam Nandan Thakur

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**CORAM: HONOURABLE MR. JUSTICE
SAMARENDRA PRATAP SINGH
ORAL ORDER**

21 27-07-2017 The petitioner seeks a direction to the respondents to select and to post him to the post of Assistant Professor on Super Specialty Post in the department of Urology in Patna Medical



College, Patna on the basis of merit-cum-choice in pursuance of the advertisement/notice, dated 5.3.2014, as contained in Annexure-7, published by the Health Department, Government of Bihar. The petitioner in effect has challenged the selection and post of respondent No.5, Dr. Rohit Singh, on the said post in preference to his claim.

2. The very basis of prayer of the writ petitioner is misplaced as selection to the post of Assistant Professor in Super Speciality, Department of Urology vide notification, dated 27.8.2015, contained in Annexure-10 was not made pursuant to advertisement, dated 5.3.2014 (Annexure-7), but was out-come of advertisement, dated 24.5.2014 (Annexure-R/5/A, at page 156 of the brief). Furthermore, the selection of Assistant Professor in other Super Speciality published vide notification, dated 16.4.2015, contained in Annexure-9 at page 92 was again not pursuant to advertisement, dated 5.3.2014 (Annexure-7) but advertisement, dated 11.8.2014, contained in



Annexure-B to the State's counter affidavit. On these score alone, the writ application was liable to be dismissed, but without going into the technicality, the Court decided to hear the case on merit, as the writ petitioner had also applied along with respondent No.5 and others for the post of Assistant Professor under Super Speciality of Urology, pursuant to advertisement, dated 24.5.2014.

3. The facts of the case in brief are that the writ petitioner passed MBBS Examination in the year 1996 and M.S. Examination in the year 2001 and Post Doctoral DNB Urology (Genito Urinary Surgery) in the year 2007. He was Senior Resident (General Surgery) from 11.5.2011 to 13.3.2014 in P.M.C.H., Patna. He applied for selection on contract basis for the post of Assistant Professor in the State Medical College pursuant to an advertisement, dated 5.3.2014 and was selected and appointed as Assistant Professor (General Surgery) at S.K.M.C.H., Muzaffarpur. Thereafter he also applied



for the post of Assistant Professor in Super Speciality, Department of Urology pursuant to the advertisement, dated 24.5.2014 (Annexure-R-5/A) and was placed at merit serial no.2 behind respondent No.5, Dr. Rohit Singh.

The respondent No.5, Dr. Rohit Singh, completed MBBS in the year 1998 from the Patna Medical College Hospital, Patna. He passed M.S. in 1991 Sessions from B.R.D. Medical College, Gorakhpur. He did M.Ch (Urology) in 1998-2000 sessions from the Institute of Medical Sciences, B.H.U. Varanasi. He served as Residency in the Department of Urology, IGIMS, Patna from May 1995 to March, 1998. Thereafter, he served in the NMCH, Patna in the Surgery Department from 14.11.2006 to 14.7.2009. He also served in the PMCH, Patna in the Urology Department, from 15.7.2009 to 8.3.2014. He applied for the post of Assistant Professor in Super Speciality, department of Urology and was selected ahead of the writ petitioner and is posted as Assistant Professor in



Super Speciality of Urology, P.M.C.H., Patna.

4. The claim of the petitioner is founded on the premise that the respondents have illegally lowered his marks of experience from 10 to 6, thus causing reduction of his total marks from 54 to 50, while enhancing the marks of respondent No.5, Dr. Rohit Singh, against journal columns, from 2 to 12, thus, raising his total marks from 43 to 53 placing him at Sl. No.1 and pushing him to the second spot. It has been further contended that respondent No.5, Dr. Rohit Singh, obtained Post Graduate Degree from the Gorakhpur University, which is not a recognized degree as per the Medical Council Act. He also contended that neither provisional merit list/final list was published nor objection invited and the selection was made on pick and choose basis without following the guidelines, circulars or relevant laws.

5. The State as well as respondent No.5 have justified the selection and have denied the allegations that the marks of writ petitioner under



experience column was illegally lowered from 10 to 6 and that of the contesting respondent was wrongly enhanced by 10 points/marks under Journal section or for that any manipulation or favouritism was shown in selection. They refuted the claim that the Post Graduate degree obtained by Dr. Rohit Singh, respondent No.5, from the Gorakhpur University, was not a recognized degree as per the Medical Council Act. They also denied the assertion of the writ petitioner that the selection was made in violation of guidelines, circulars or laws. The respondent No.5 additionally claimed that the petitioner apart from teaching eligibility gained while pursuing his D.N.B. Course, does not have any additional teaching experience in Urology.

6. From the claims and counter claims, the following issues arise for consideration of this Court:

- (i) Whether the marks of respondent No.5 under journal column were illegally



raised by 10 points/marks?

(ii) Whether the marks of the writ petitioner under experience column were illegally reduced from 10 to 6?

(iii) Whether the Post Graduate degree obtained by respondent No.5 from the Gorakhpur University in the year 1994 for the Sessions 1991-94 was a recognized degree or not?

(iv) Whether the respondent State flouted the guidelines and showed any favour to respondent No.5?

7. Before I consider the rival submissions of the parties, it would be apt to notice the relevant provisions governing the appointment of Assistant Professor, particularly in super speciality department. Prior to 1997, the Bihar Health Service was an integrated cadre consisting of both teaching and non-teaching post. The Junior teaching post comprised of the Resident/Registrar and the senior teaching post comprised of Assistant Professor,



Associate Professor, Professor and Principal. In 1997, the State Government came out with Bihar Medical Education Service Cadre and Appointment to its Cadre Rules, 1997. The post of Residents, and Registrar were amalgamated as Lecturer and referred as Junior teaching post, whereas the posts of Assistant Professor, Associate Professor, Professor and Principal, were referred as senior teaching posts. The 1997 Rules underwent amendment in 2003 and 2004 and was finally repealed in the year 2008 vide Senior Resident/Tutor and Bihar Medical Education Service Cadre Recruitment, Appointment and Promotion Rules, 2008.

8. Chapter- 2 of the Rules, 2008 dealt with constitution of Service Cadre, which comprised as under:

- (a) Assistant Professor
- (b) Associate Professor
- (c) Professor
- (d) Medical College Hospital Superintendent
- (e) Principal



(f) Any other post which may be included in the cadre by issuance of notification by the State Govt. from time to time;

(g) Posts of Directorate to be filled from the Medical Education Cadre.

(i) (a) Deputy Director-Medical Education

(b) Deputy Director-Administration

(c) Deputy Director-Training

(ii) Additional Director-cum-Controller of Examination

(iii) Director (Medical Education)

9. Chapter 3 of the Rules, 2008 dealt with the post of Senior Resident/Tutor. Rule 6 under Chapter-3 states that the post of Senior Resident/Tutor in the Government Medical College will be tenure teaching post of four years duration, out of which one year will be spent on rural posting.

10. Chapter-4 of the Rules, 2008, deals with appointment in service cadre. Rule 7(i) of Chapter-4 states that permanent entry into Bihar Medical Service Cadre shall be on the post of Assistant Professor as per conditions and criteria laid down



by the State Government from a panel prepared by the Bihar Public Service Commission in accordance with the procedure laid down in Annexure-B to this Rule. Rule 7(iii) under Chapter-4 deals with eligibility criteria for appointment to the post of Assistant Professor, which is quoted herein below for easy reference:

"7(iii) - Eligibility-

- (a) For appointment to the post of Assistant Professor, it shall be essential for the candidates to have P.G. Degree in specified subject and three years teaching experience as Senior Resident or Tutor in specified subject after post graduation.
- (b) In super speciality department/units the duration of DM/MCh degree course shall be counted against the eligibility period as prescribed in the sub-rule-above.
- (c) xx xx xx xx
- (d) xx xx xx xx

11. Annexure-B of Rules, 2008 lays down the criteria for appointment of Assistant Professor at



Medical College and allotment of marks. Clause 5 of Annexure-B, provided for additional marks subject to a maximum of 2 marks in State Journal plus 10 marks in All India Medical Journal or a Foreign Medical Journal. Clause 5 of Annexure-B is quoted herein below:

"5. Additional marks to a candidate will be allotted as indicated below for original publication as principal author in Recognized Journals as detailed below. A candidate will be treated to be the Principal author of a publication if he/she produces a certificate to this effect from the Professor-in-charge or Head of the Department of the subject under whom he/she has prepared the paper.

- (a) 1(One) marks for each publication in Bihar State Medical Journal subject to a maximum of 2(Two) marks.*
- (b) 2(Two) marks for each publication in an All India Medical Journal which is the official organ of an All India Society or an Association or a Foreign Medical Journal which is the official organ of a similar national or international Society or association, subject to a maximum of 10 marks".*



12. The Rule 2008 was amended in 2013 being Senior Resident/Tutor and Bihar Medical Education Service Recruitment, Appointment and Promotion (Amendment) Rules, 2013. The amendment was made in Rule 6 of Chapter 3, Rule 7 of Chapter-4, Rule 9 of Chapter 6 as well as Annexure-A & B of 2008 Rules. Only two of the amendments; one relating to Rule 7, clause (a) of sub-rule (iii) and the other Annexure-B concerns Assistant Professor, which are quoted herein below:

"Rule 7(iii)(a)- For appointment to the post of Assistant Professor, it shall be essential for the candidates to have post-graduation degree in specified subject and thereafter three years teaching experience as Senior Resident or Tutor, in hospitals recognized by the Medical Council of India. Such officers of the Bihar Health Service Cadre, who have post-graduation degree in the concerned subject and minimum three years teaching experience as Resident/Senior Resident/Tutor in hospitals recognized by the Medical Council of India, shall be eligible to apply for the post of Assistant Professor".



"Annexure-B"

Criteria for appointment of Assistant Professor at Medical College

- (1) Assistant Professor being the first permanent teaching post, selection is to be made very carefully.
- (2) Such officers of the Bihar Health Service Cadre, who have post-graduation degree and thereafter minimum three years teaching experience as Resident/ Senior Resident/ Tutor in hospitals recognized by the Medical Council of India, shall be eligible to apply for the post of Assistant Professor.
- (3) Candidates will be allotted valuation marks as indicated below for determining their comparative merits:

	Above 70%	Above 65%	Above 60%	Above 55%	Above 50%
(a)Aggregate Of marks Obtained as the three MBBS University Examination	5	4	3	2	1

Note.- In case of failures in one or more MBBS Examinations, the aggregate of marks for the particular MBBS Examination shall be calculated by obtaining the mean of the failure and the success marks in the concerned subjects.

Above	Above	Above	Above	Above
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	70%	65%	60%	55%	50%
(b)Marks obtained in the subject of the speciality Or subject group applied for as per Recommendation of the Medical Council Of India.	5	4	3	2	1

Note.-In case of any failure in the subject of speciality or speciality group applied for the mean of the failure and the success marks will be deemed to be the marks obtained in the subject.

- (c) M.D./M.S. or qualification deemed to be at par by the Medical Council Of ndia, in the speciality

10 marks
- (d) Ph.D., D.M., M.Ch. in the Same speciality

10 marks
- (e) Interview

06 marks
- (f) Work experience in government Sector (2 marks per year, Maximum 10 marks)

10 marks

Note.- No marks will be allowed for such, MRCP., FRCS., etc which have been obtained after 11.11.1978 and onwards.

- (4) 1(one) mark shall be deducted for each failure at any of the three MBBS University Examination. Such candidates, who have failed for more than three occasions in these examinations, shall not be eligible.
- (5) Additional marks to a candidate will be allotted as indicated below for original publication as principal author in recognized journals as detailed below. A



candidate will be treated to be the Principal author of a Publication if he/she produces a certificate to this effect from the Professor-Incharge or Head of the Department of the subject under whom he/she has prepared the paper.

- (a) 1(one) mark for each publication in a Bihar State Medical Journal, subject to a maximum of 2(two) marks*
- (b) 2(two) marks for each publication in an All India Medical Journal which is the official organ of an All India Society or Association or a foreign Medical Journal which is the official organ of a similar national or International Society or association, subject to a maximum of 10 marks.*
- (6) To be eligible for appointment as an Assistant Professor, candidate should have minimum of 19(eighteen) marks”.*

13. It would be relevant to notice that prior to 20th February, 2009, DNB qualification was not treated as a requisite qualification for appointment to the teaching post of Assistant Professor in Medical College. It was for the first time in the year 2009 by making necessary amendment in the 1st Schedule, Diplomate National Board (DNB) qualification was included and was treated equivalent to M.D., M.S., D.M. and M.Ch.



qualifications of the respective specialty or super specialty, for all purposes including appointment to the teaching posts in the medical institutions. The relevant extract of the gazette notification is quoted herein below:

*" Ministry of Health and Family Welfare
(Department of Health and Family Welfare)
Notification
New Delhi, the 20th February, 2009*

S.O. 522(E).- In exercise of the powers conferred by sub-section (2) of the Section 11 of the Indian Medical Council Act, 1956 (Act 102 of 1956), the Central Government, after consulting the Medical Council of India, hereby makes the following further amendments to the First Schedule to the said Act, namely:-

2. In the Medical Council Act, 1956, in First Schedule "National Board of Examination", after the entry "Diplomate National Board of Examination", after the entry "Diplomate National Board (Pharmacology) (Diplomate in N.B.(Pharm))", the following note shall be inserted, namely:-

"Note:- 1. The Diplomate National Board (DNB), qualifications included in



this Schedule shall be treated as equivalent to M.D., M.S., D.M. and M.Ch. qualifications of the respective specialty or super specialty, as the case may be, for all purposes including appointment to the teaching posts in the medical institutions.

2. The teaching experience gained while pursuing DNB courses shall be treated as teaching experience for appointment to the teaching posts in the medical institutions”.

14. In light of the provisions of law, I would now examine the issues involved in this case one by one:

Issue No.1: Whether the marks of respondent No.5 under journal column were illegally raised by 10 points/marks?

Clause 5 of Annexure-B of the Rules, 2008 provides for additional marks to be allotted to a candidate for publication of Journals as original



author, is in pari-materia with Clause 5 of 2013 Rules, which provides one mark for each publication in a Bihar State Medical Journal subject to a maximum of 2 marks. Similarly, 2 marks is earmarked for each publication in an All India Medical Journal subject to a maximum of 10 marks. The respondents in their affidavit stated that due to inadvertence 10 marks obtained by respondent No.5 under National Journal column was wrongly mentioned in the State Journal column, as the maximum marks in the State Journal Column was '2'. It was submitted that the error is apparent and the mistake was bonafide. The State has even annexed photo copies of the relevant extract of records relating to journals submitted by respondent No.5 as Annexure-C series. Paragraphs 8 and 9 of the supplementary counter affidavit filed by respondent Nos.2 and 3 at page 136 of the brief are quoted herein below:

"8. That it is further clarified that there is no error in total marks of Dr. Rohit Singh but due to inadvertence 10 marks obtained



under column of journal section has wrongly been mentioned in the State Journal Column. In fact, the said 10 marks has been awarded to Dr. Rohit Singh against national journal column.

9. That this Hon'ble Court may appreciate that inadvertence and unintentional mistake does not affect the total marks of 53 awarded to Dr. Rohit Singh and therefore, the said 10 marks may be read as under the column of national journal and 2 marks under State journal which is also supported by the records".

15. Respondent No.5 too in his affidavit stated that he was entitled to and subsequently also awarded 10 marks for publishing papers in national medical journal and 2 marks for State journal, but earlier due to inadvertence in the Chart at Annexure-A to the counter affidavit filed on behalf of respondent Nos.2 and 3, in the State journal column 10 marks and in the National journal column 2 marks have been shown. He submits that respondent Nos.2 and 3 by way of supplementary counter affidavit



has also clarified the error.

16. From the pleadings of the parties and the documents annexed thereto, it appears that respondent No.5 was inadvertently allotted 10 marks in State journal column in place of national journal column and again wrongly allotted 2 marks in national journal column in place of State journal column. The error is apparent as no one could have been allotted more than 2 marks under State journal column and it was a mistake on part of the respondents to have shown 10 marks in State journal column and accordingly errors cropping undue journal sections were corrected. Thus, I am of the considered view that the marks of respondent No.5 was not illegally enhanced in journal section rather it was an error which has subsequently rectified. Such rectification cannot be said to be unfair and unreasonable. As such, this issue is decided against the petitioner and in favour of respondent No.5.

17. **Issue No.(ii):** Whether the marks of the writ



petitioner under experience column were illegally reduced from 10 to 6?

(a) The instant issue appears to be the main issue in this case. The respondents have earmarked '10' marks under work experience column. For every year of work experience, one was entitled to '2' marks subject to maximum of '10' marks. As such, irrespective of number of years of work experience beyond 5 years, one would not get more than '10' marks. The writ petitioner was initially allotted full 10 marks under experience column on consideration of fact that he gained three years of teaching experience while pursuing his Post Doctoral DNB (Urology) degree from IGIMS, Patna from 3.3.2003 to 2.3.2006 and three years teaching experience while working on the post of Senior Resident (General Surgery) in P.M.C.H. from 11.5.2011 to 13.3.2014.

(b) Subsequently, '6' marks earlier granted to the writ petitioner against teaching experience while pursuing his D.N.B. Course from 3.3.2003 to



2.3.2006 was withdrawn as inadmissible under the column 'Work Experience' in government sector of 2013 Rules.

(c) The case of the writ petitioner is that by virtue of 2009 amendment in First Schedule of Medical Council of India Act, 1956, contained in Annexure-19, he would not only be entitled to 10 marks for doing D.N.B. being equivalent to M.S., MD., D.M., M.Ch but also '6' marks for gaining teaching experience while pursuing his D.N.B. Course.

(d) The case of the State is that the writ petitioner was already granted '10' marks for doing his M.S. and '10' marks for doing his D.N.B. treating it equivalent to D.M./M.Ch in same speciality by virtue of 2009 amendment in First Schedule. However, he would not be entitled to additional '6' marks under 'work experience' which he was initially granted as it is not the additional experience. The State contended that the teaching experience gained by the writ petitioner while



pursuing D.N.B. course shall be treated as teaching experience for the purpose of eligibility for appointment to the teaching post in medical institution.

18. I have heard learned counsel for the parties on this issue. As per rule 7 of 2013 Rules, it was necessary for the candidate to possess Post Graduate degree in a specified subject and thereafter three years teaching experience as Senior Resident/Tutor in hospital recognized by the Medical Council of India. D.M., M.Ch was recognized qualification for appointment to the post of Assistant Professor for which 10 separate marks was earmarked apart from 10 marks for M.S., M.D. course. In order to make competition wider for the teaching post, D.N.B. course for the first time since 20.2.2009 was also treated at being par with M.S. M.D., D.M. and M.Ch courses with further stipulation that the teaching experience gained will be treated as teaching experience for appointment to the teaching post in



medical institution. In my view, the teaching experience gained by the applicant while pursuing his D.N.B. Course is only for the purpose of making him eligible for the post of Assistant Professor and not for the purpose of any additional experience under the column work experience in government sector under 2013 Rules. The petitioner had relied upon order, dated 20.6.2012 passed by this Court in C.W.J.C. No.9877 of 2011 and order, dated 4.10.2012 passed in C.W.J.C. No.9250 of 2011. The said orders would not help the petitioner as 10 marks have already been awarded for D.N.B. qualification at par with Post Doctoral degree of D.M., M.Ch. Furthermore, the orders relied upon were passed prior to coming into force the 2013 Rules. As such, I do not find any infirmity in the stand of the State in not allowing the additional marks under the column 'work experience' in government sector to the petitioner as 10 marks have already been granted to him for his D.N.B. Course, apart from 10 marks for doing his M.S.



course. The State, accordingly, cannot be faulted for lowering the marks granted to the petitioner under the column 'work experience' in government sector from 10 to 6 and thus lowering his total marks from 54 to 50.

However, I am not in agreement with the submission of respondent No.5 that 2009 amendment in First Schedule to Medical Council of India Act treating D.N.B. qualification equivalent to M.S., M.D., D.M. and M.Ch would not be applicable in petitioner's case, as he had obtained D.N.B. qualification much prior to 2009, on the ground that the amendment is not retrospective in nature. In my view, the submission of respondent No.5 is misplaced. The 2009 amendment is not retrospective in the sense that the D.N.B. qualification at par with M.S., M.D., D.M. and M.Ch can be claimed only from the day the amendment came into force and not from any date, prior to the date of amendment i.e. 20.2.2009. In other words, the only embargo is that the person possessing



D.N.B. qualification prior to 2009 amendment can not claim any benefit prior to it. In the instant case, the petitioner had applied for the post of Assistant Professor pursuant to an advertisement made after 2009 and as such he would be entitled to benefit of D.N.B. qualification though he obtained the same prior to the amendment and rightly the said qualification was treated as a requisite qualification for the post of Assistant Professor.

19. Respondent No.5 had argued that the IGIMS, Patna was not a recognized teaching institution by the Medical Council of India in the year 2007 while the petitioner was pursuing his D.N.B. Course and as such in any view of the matter the writ petitioner was not entitled to any marks under the column work experience in government sector. The contesting respondent has not placed any material on record in support of his contention save and except bald assertion made in that context. In absence of any material, it would



not be safe to draw any definite conclusion on the issue, which is left open.

20. The other submissions made by respondent No.5 is that the petitioner would not be entitled to any marks under the column 'experience' for working as Senior Resident (General Surgery) in P.M.C.H., from the years 2011 to 2014 as the same cannot be treated as work experience for super speciality of Urology for the post of Assistant Professor. As the contesting respondent and the State has succeeded on the first point, I need not go into the issue whether the writ petitioner would be entitled to marks for working as Senior Resident (General Surgery) and not as Senior Resident in Urology.

21. Issues Nos.(iii) & (iv):

(iii) Whether the Post Graduate degree obtained by respondent No.5 from the Gorakhpur University in the year 1994 for the Sessions 1991-94 was a recognized degree or not?



(iv) Whether the respondent State flouted the guidelines and showed any favour to respondent No.5?

The writ petitioner argued that the degree obtained by respondent No.5 from Gorakhpur University was not a recognized degree. Both the State and Respondent no.5 have controverted the submissions of the writ petitioner. The State in paragraph 10 of the supplementary counter affidavit has stated that the Post Graduate Degree obtained by respondent No.5 from the Gorakhpur University is duly recognized since 1982. In support of submission, the State has also annexed the records of affiliation contained in Annexure-D. As such, I find no substance in the submission of the writ petitioner that the Post Graduate degree obtained by respondent No.5 is not a recognized degree. I also do not find any merit in the submission of the writ petitioner that the selection was made in violation of relevant guidelines, circulars or laws. As such, I find no reason to



interfere with the selection of respondent No.5.

22. The petitioner by referring to his supplementary affidavit filed on 26.4.2016 submits that pursuant to the order passed by this Court on 4.2.2016, it was assured that the necessary steps are being taken to accommodate him on the post of Assistant Professor in Super Speciality department of Urology in P.M.C.H., Patna as two posts have got vacant on promotion of one Dr. Ashok Kumar Malviya and Dr. Dinesh Kumar Das as Associate Professors.

23. In backdrop of the submissions, the respondent-State would consider the case of the petitioner for appointment in super speciality department of Urology against the existing vacancy, as he was second to respondent No.5 in the merit list.

24. With the aforesaid observations and directions, this writ application stands disposed of.

(Samarendra Pratap Singh, J)



Md.Jamaluddin Khan

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