



**SHEEHAN GREENE CARRAWAY
GOLDERMAN & JACQUES LLP**

Attorneys at Law

54 State Street • Suite 1001 • Albany, NY 12207
p: 518.462.0110 • f: 518.462.5260 • www.SGCGJLAW.com

MEMORANDUM

TO: NYSCOPBA Executive Assembly
FROM: Sheehan Greene Carraway Golderman & Jacques LLP
DATE: February 13, 2008
SUBJECT: Legal Report

This report is to update you on some of the major cases SGCGJ is handling for NYSCOPBA and its members.

NEGOTIATIONS

Negotiations with the State have been continuing at a regular pace. Since the last Executive Assembly meeting in December, we have conducted negotiations on the following dates: December 19, January 7 and 8 and February 5 and 6. Further negotiations are scheduled for February 15 and March 6 and 7. During these meetings, all aspects and articles of our proposals are being presented and discussed. The State has presented various aspects of its proposals with more planned in upcoming sessions.

We have established a health insurance subcommittee to deal with health, dental and vision insurance. This committee met on February 5, and the next meeting is scheduled for February 15.

CONTRACT ENFORCEMENT

Full Arbitrations

Great Meadow Correctional Facility

A hearing was scheduled before Arbitrator Zonderman regarding whether DOCS violated Article 14 of the Agreement when it changed the Sergeants' vacation leave policy at Great Meadow Correctional Facility. Prior to the hearing, the parties favorably resolved the grievance whereby Great Meadow Correctional Facility will provide each Sergeant with the opportunity to select six (6) weeks (thirty (30) days) of block vacation per year. The Sergeants will continue to receive days off in accordance with Article 14.2 of the Collective Bargaining Agreement between the parties.

The vacation schedule has been implemented, and NYSCOPBA has withdrawn this grievance without prejudice.

Hudson Correctional Facility

NYSCOPBA filed a grievance when the State refused to pay a member overtime compensation for travel to and from an outside post. A hearing was held in the matter, and written closing briefs were submitted. The member was a resource officer at Hudson Correctional Facility, ("Facility"). The State assigned him to work at an outside post, Corcraft Warehouse ("Warehouse") for four (4) days. The member used his personal vehicle to drive back and forth between his home and the Warehouse each day. The drive from the member's home to the Warehouse took about an hour. Normally, the drive from the member's home to the Facility took about fifteen (15) minutes. Therefore, NYSCOPBA filed a grievance seeking six (6) hours of overtime compensation representing forty-five (45) minutes of driving time each way between the Facility and the Warehouse.

Among other things, the State argued that it did not violate the law or the Parties' Agreement when it refused to pay the member overtime compensation for travel because the member "volunteered" to work that outside post. The State maintained that a resource officer "volunteered" to work a post and was not entitled to overtime pay for travel to and from that post when he submitted a list of preferred assignments based upon the Facility's list of vacant posts. The State acknowledged, however, that a resource officer, who did not submit a list of preferred posts and was instead "stuck" to a post, would be paid at an overtime rate for his involuntary travel to and from that post.

NYSCOPBA primarily argued that so long as the member worked in excess of his normal forty (40) hour work week including travel time to and from his outside post, then that excess time was compensable at an overtime rate. NYSCOPBA also noted that the member was entitled to overtime compensation because the labor he provided was the same labor that any other officer would have provided even if that other officer had not submitted a list of preferred posts. Arbitrator Rinaldo issued his Award on February 4, 2008, finding in favor of NYSCOPBA and holding that the State violated Article 15 of the Agreement when it refused to pay the member overtime pay. The Arbitrator reasoned that the State acted irrationally in paying one officer overtime if he was "stuck" at a post and refusing to pay another overtime pay if he submitted a list of preferred posts because the labor of both officers was identical. The member will receive six (6) hours of overtime compensation.

Mt. McGregor Correctional Facility

A grievance was filed at Mt. McGregor Correctional Facility because management changed the reposting of vacations for officers who have worked at Mt. McGregor for various reasons, including transfers and promotions. An analysis of the case indicated that Mt. McGregor has gone back to its original practice of allowing members to repost vacations for promotions, terminations and transfers. Additionally, all of the other items set forth in the Statement of Facts of the grievance were resolved. Because the remedy sought in the grievance has been implemented, NYSCOPBA withdrew this grievance without prejudice. In the event that Mt.

McGregor Correctional Facility decides to change its reposting policy, NYSCOPBA reserved its right to reassert any and all claims it had stated in the grievance.

Willard Drug Treatment Center

A hearing was held before Arbitrator Prosper regarding an officer from Willard Drug Treatment Center who had been overpaid. The State, however, recouped the overpayment. The issue before the arbitrator was whether the recovery was appropriate pursuant to the *State Finance Law* where the officer did not know he had been overpaid. Briefs have been submitted, and we are awaiting a decision by the arbitrator.

Resolution Conferences

Since December, grievances were resolved at five (5) Resolution Conference hearings. The more significant resolutions are as follows:

Five (5) Awards were signed in which the State agrees to pay the grievants their contractual Workers' Compensation benefits for the injury that gave rise to the grievance upon a determination by the New York State Workers' Compensation Board that the grievants are eligible to receive Workers' Compensation benefits for the injuries and upon the Board's issuance of a credit to New York State.

A member from **Adirondack Correctional Facility** filed a grievance when in one instance the State changed his shift without forty-eight (48) hours notice and in another instance the State changed his regular day off ("RDO") to avoid the payment of overtime. The Arbitrator ordered that the grievant be paid eight (8) hours of overtime compensation for the shift change and eight (8) hours of overtime compensation for the RDO change.

A member from **Bare Hill Correctional Facility** filed a grievance when the State carried him as absent without leave ("AWOL") for a period of time and did not allow him to use personal sick leave accruals to cover an absence. The Arbitrator ordered that the grievant be allowed to charge sick leave accruals for a period of his absence to the extent that he had accruals to charge and further ordered that the State remove the AWOLs for the entire period.

A member from **Orleans Correctional Facility** filed a grievance when the State carried him as AWOL for one (1) day when his swapping partner had reported to work but was sent home sick. The Arbitrator ordered that the grievant be allowed to charge vacation accruals for four (4) hours of the absence and ordered that the AWOL and counseling memo be removed. The award also stated that the parties acknowledge that all employees working swaps are responsible for fulfilling their commitment and that the employee originally scheduled for the shift remains responsible for coverage of the shift.

A member from **Watertown Correctional Facility** filed a grievance when the State recovered \$43 in travel expenses and twelve (12) hours of accruals even though the member already signed a disciplinary settlement agreement related to his actions on the day in question which did not include recouping the \$43 and twelve (12) hours. The issue before the arbitrator was simply the

\$43 because the member was retired and had already cashed out his maximum amount of accruals. Just before the hearing, the parties agreed to a consent award which reaffirms the integrity of disciplinary settlements and states that the parties will abide by them in the future. The parties also agreed that the State does not waive its right to recoup monies pursuant to the *State Finance Law*.

DISCIPLINARY GRIEVANCES

Beacon Correctional Facility

On October 30, 2007, we appeared before Arbitrator Arthur Jacobs regarding a correctional officer at Beacon Correctional Facility. The officer was charged with misconduct for allegedly engaging in a physical confrontation with another employee and being AWOL. The arbitrator dismissed the first charge but was not clear with his decision on the second charge. The arbitrator, however, did award the officer's return to duty. We are currently in discussions with the Department about remanding this matter to the arbitrator for clarification of his award. If the Department fails to respond to NYSCOPBA's request, we may seek vacatur of the award.

Eastern Correctional Facility

We represented a member out of Eastern Correctional Facility who was charged with misconduct. A hearing was held at Eastern CF on February 7, 2008. A second day of hearing is tentatively scheduled for April 2, 2008.

Fishkill Correctional Facility

We represented a member who was charged with misconduct for failing to properly and safely secure an off-duty weapon at the facility. Additionally, the Department alleged that the officer failed to properly register the weapon. The arbitrator found that the proposed penalty of dismissal was not appropriate and that the appropriate penalty would be a suspension without pay from October 9, 2007, through January 20, 2008. The arbitrator also implemented a one-year probationary period for same or similar conduct.

The arbitrator did, however, find that the grievant was not guilty of Charge 3 regarding the registration of the weapon.

Great Meadow Correctional Facility

This case involved an officer who was alleged to have used illegal drugs. As a result, the officer was ordered to submit to a urinalysis test by facility administrators. The officer refused to follow the order, was summarily suspended from service and locked out of the facility. The Department issued a Notice of Discipline and proposed a penalty of termination for the grievant.

On behalf of the grievant we argued that the State failed to follow the provisions of Directive 2115 which governs the testing of State Correctional Officers for the use of illegal substances. We argued that the grievant had an absolute right to be made fully aware of the allegations

against him, including an explanation as to the time, date and places of the alleged illegal drug use. On behalf of the grievant, we also argued that the source of information relating to the allegations which led to the order was non-credible and required corroboration per Directive 2115. As a result, we argued that although the grievant failed to follow the order given, the proposed penalty of termination from service was clearly inappropriate.

The arbitrator issued an Opinion and Award in which he found the grievant guilty of the alleged misconduct (i.e., refusal to submit to a urinalysis test) but held that the proposed penalty of termination from service was clearly inappropriate. As such, the arbitrator suspended the officer for three (3) months and ordered his reinstatement immediately thereafter.

Greene Correctional Facility

We represented a correctional officer who was charged with misconduct for allegedly leaving his post without seeking proper relief, failing to properly supervise the inmates, failing to be alert on the dorm, failing to recognize an inmate injury, making a false and inaccurate statement to the Sergeant and failing to properly document inmate movements.

A hearing was held on January 18, 2008. The arbitrator, after hearing the evidence, dismissed four (4) of the six (6) specifications. The arbitrator reinstated the grievant effective February 14, 2008. Although, the suspension was from October 4, 2007, through February 14, 2008, the arbitrator also found that the State inappropriately suspended the member pursuant to Article 8.4 of the Agreement because it did not prove its theory of the case.

IMPROPER PRACTICES

U-26734 (Division of Parole – Warrant Officers) – retaliation for union activities

When the Division of Parole brought disciplinary charges against a NYSCOPBA steward for, among other things, advising his members of their right to work and claim holiday compensation on State recognized holidays, we filed an improper practice charge. Two hearings were held, and the parties have submitted written closing briefs. We are awaiting the decision of the administrative law judge.

U-26780 (Division of Parole – Warrant Officers) – change in past practices

This improper practice case involves a second set of changes to the Division's practice regarding the use of home fax machines. We requested that the matter be scheduled for hearing, but the administrative law judge has scheduled a conference call for February 21, 2008, to discuss the impact of a prior decision in a similar case regarding the Division.

U-25461 (Elmira Correctional Facility)

This improper practice charge was filed in 2004 in response to extensive plot plan changes at Elmira Correctional Facility that arose out of the escape that occurred there in July of 2003. Because the job changes primarily concerned the non-mandatory subject of staffing, PERB

would have dismissed the charge; however, the Department has agreed to resolve the charge by assuring NYSCOPBA that before future job changes (that is, changes in hours, duties or days off) are made at Elmira, the administration will notify local union officials and provide them with an opportunity to offer input with respect to those changes. Letters reflecting these understandings have been exchanged.

Improper Practice (Great Meadow Correctional Facility) – probationary employee

DOCS, Inspector General's Office recently went to Great Meadow Correctional Facility to question staff about a suicide attempt and subsequent death of an inmate. A correctional officer, who was serving a probationary term and is one of the targets of the investigation, was denied his request to have union representation during the interrogation. On February 8, 2008, we filed an improper practice charge challenging the refusal of union representation. We seek a PERB order stating that (a) the respondents cease and desist from subjecting NYSCOPBA members to investigative interrogations in the absence of union representation, and (b) that the respondents cease and desist from taking any adverse employment and/or disciplinary action against the correctional officer as a result of conducting an investigatory interrogation without union representation.

We are waiting for the State to answer the improper practice charge.

U-27199 and U-26978 (Statewide) – Change in practice – medical documentation

When DOCS issued a fully revised version of Directive 2202 subsequent to the interest arbitration, two (2) new changes were imposed with regard to members' obligations regarding medical documentation. Specifically, Directive 2202 now requires that medical documentation for *all pre-approved sick leave*, regardless of duration, provide the start time, completion time and the location of the medical appointments. The prior practice of the parties has been to only require information regarding the time and place of medical appointments for absences of "more than four hours." Accordingly, the revised directive increases the amount of information to be included on medical documentation for pre-approved absences of four (4) hours or less, without negotiations with NYSCOPBA. Further, the Revised Directive 2202 now requires that medical documentation for long term absences be submitted every two (2) weeks. The prior practice of the parties has been to require medical documentation in connection with long term absences on a monthly basis.

A pre-hearing conference was held before the PERB administrative law judge on December 13, 2007, and we have been directed to file factual and legal offers of proof regarding the interest arbitration award. We have been asked to brief the issue of whether and to what extent the interest arbitration award impacts upon the violations we have alleged. Those offers and briefs will be submitted on February 21, 2008.

U-25595 (Butler Correctional Facility)

Butler Correctional Facility and NYSCOPBA Butler Sector entered into a labor/management agreement in May of 2002, concerning the impact of canceling a vacation less than sixty (60)

days prior to the start of vacation. Butler Correctional Facility changed the policy. A contract grievance was filed and heard before the Master Arbitrator. The arbitrator determined that Butler Correctional Facility did not violate the Agreement and that there was no evidence in the record to support a finding that the modification in vacation turn in rises to a level of a contractual violation.

On February 12, 2008, we attended a conference at PERB with Western Region Vice President Al Mothershed. The case has been placed on PERB's 60-day hold calendar to see if the parties can resolve the issues in this improper practice. If we are unable to do so, we will be back at PERB.

LITIGATION

Confirmation of Arbitration Decisions

We have filed four (4) separate special proceedings in Supreme Court seeking confirmation of four (4) favorable arbitration awards from the past year. Each special proceeding seeks to confirm the Award rendered by the arbitrator. Each of these special proceedings has been commenced, and we are awaiting Answer papers from the State.

Three (3) of the petitions were unopposed, meaning the State consented to confirm the arbitration awards. We are awaiting the Judges' signatures on the proposed consent Judgments which formally confirms the arbitration awards.

The fourth petition seeking to confirm an expedited arbitration award rendered by Arbitrator Douglas regarding a class of Safety and Security Officers at **Pilgrim Psychiatric Center** was opposed by the State. The State moved to vacate the arbitration award, arguing that the arbitrator exceeded his authority in determining that the State violated Article 14 of the collective bargaining agreement when it reduced certain employees' annual leave balances to forty (40) hours. We submitted reply papers on February 1, 2008, and are awaiting a decision by the Judge.

Enforcement of the Interest Arbitration Award

We filed a special proceeding in Supreme Court seeking confirmation of the award and interest on all monies payable pursuant to the award. We asked the court to order the State to calculate and pay interest from the date the Award was issued until the date that payments were actually made to members. The court issued its decision and order confirming the Award, but did not order the State to pay interest. We filed a notice of appeal on NYSCOPBA's behalf, limited to the issue of interest payments. We have perfected the appeal before the Appellate Division, Third Department. We presented our oral argument in support of the appeal before the Appellate Division on January 8, 2008. We are awaiting the court's decision.

H.R. 218

H.R. 218, formally titled the “Law Enforcement Officers Safety Act of 2004”, 18 U.S.C. §§926B and 926C, was signed into law on July 22, 2004. The bill allows a “qualified retired law enforcement officer” to carry a concealed firearm, both in New York and across state lines, without being “licensed” under state or federal law. A qualified retired law enforcement officer is an individual who retired in good standing as a law enforcement officer¹ and who possesses both a photographic identification issued by that agency and a certification from either that agency or the state in which he or she resides establishing that within the past year he or she qualified to carry a firearm under the standards for active law enforcement officers established by that agency or state, as the case may be.

To date, New York State agencies and officials, including the Department of Correctional Services (DOCS), have refused to implement the provisions of H.R. 218; that is, they have refused to set up a photographic identification card system or to establish a procedure under which retired members could be qualified. The Division of Criminal Justice Services (DCJS), which is coordinating the State’s position on this issue, contends that H.R. 218 does not require states or local agencies to issue identification cards or to certify retired officers under firearms training standards and that the State does not therefore intend to voluntarily do so.

H.R. 218 does not directly address whether a state or a law enforcement agency must establish a procedure for certifying retired law enforcement officers. The bill provides for such a procedure, but does not specifically mandate it. In the congressional debate leading to the passage of H.R. 218, however, the sponsors of the bill suggested, if not directly stated, that the bill was intended to compel the states to establish such a process.

The bill’s lack of clarity, together with concerns over what some states and localities see as an attempt by Congress to force an unfunded mandate upon them, has caused some states to fail or refuse to implement its provisions. New York is one of those states.

Recently, a mid-level New Jersey appeals court, in *Zarrelli v. Rabner*, 2007 WL 1284947, held that HR. 218 did not require states to qualify retired law enforcement officers, and that, even if it did, such a mandate would be unconstitutional as a violation of the separation of powers doctrine. The case in New Jersey arose under circumstances very similar to those we face in New York. The plaintiff in that case was a former New York State court officer who had received a disability retirement. As a New Jersey resident, he asked the State of New Jersey to certify him in accordance with the provisions of H.R. 218. The state refused, saying it had not chosen to implement H.R. 218. The plaintiff sued to compel the state to certify him. The New Jersey court, in upholding the state’s refusal, cited the U.S. Supreme Court case of *Prinzo v. United States*, 521 U.S. 898, which, in a 5 to 4 decision, found certain portions of the federal Brady Law to be unconstitutional because they compelled state officials to participate in the

¹ A “qualified retired law enforcement officer” must have had at least 15 years of service before retirement (or have received a disability retirement). Additionally, such officer must have been authorized to perform police duties or to engage in the incarceration of persons for violations of law, and must have had statutory powers of arrest. Correction officers who work for DOCS clearly do engage in the incarceration of persons for violations of law and, by virtue of Sections 2.10(25), 2.20 and 140.25 of the Criminal Procedure Law, they are peace officers with statutory powers of arrest.

administration of a federal regulatory program.

Several states have adopted state laws establishing procedures to implement the provisions of H.R. 218 (Pennsylvania, among others), but no court has required a state to do so.

We are continuing to prepare and research this matter in an effort to develop persuasive legal arguments supporting the implementation of H.R. 218. However, we want you to be aware of the significant legal obstacles that we face. You should also know that there is legislation proposed in Congress to amend H.R. 218 to address some of the problems identified above.

The proposed legislation, Senate bill number 376, known as the "Law Enforcement Officers Safety Act of 2007," was introduced by Senator Patrick Leahy of Vermont, Chairman of the Senate Judiciary Committee, on January 24, 2007. S. 376 provides that the certification currently required to be provided by the state or an officer's former employing agency could also be done by a "certified firearms instructor" qualified to conduct a firearms qualification test for active duty officers within that state. Should this bill become law, it will provide a means for NYSCOPBA's retired members to become certified without the State or the former employing agency having to conduct the test or provide the certification. However, retired officers would still be required to carry a photo ID issued by the agency from which they retired. S. 376 has not passed either house of Congress. We will monitor the progress of the bill.

NYSCOPBA v. Francis, et al.

We recently filed this Article 78 proceeding challenging the State's claim that the QWL money provided in the 2003-2007 Agreement actually sunset, and is therefore unavailable, because the contract was not reached and ratified until after the four-year term had expired. We contend that the contract explicitly provides QWL funding in each of the four (4) years of the Agreement and that merely because the contract is retroactive does not deprive NYSCOPBA of that funding. (Because the State extended the provisions of Articles 13 and 25 of the 2003-2007 Agreement for an additional year, that is, from April 1, 2007, to March 31, 2008, funding is provided for the current year.) This lawsuit is returnable in Albany County Supreme Court on March 14, 2008.

Parole

A second Article 78 petition was filed in Supreme Court against the **Division of Parole**, and the Department of Civil Service alleging that they violated *Civil Service Law* §65(2) by allowing a provisional appointment to Senior Warrant and Transfer Officer to continue for a period in excess of nine (9) months. This petition seeks to vacate the provisional appointment which the prior court declined to do because the employee holding the provisional appointment had not been made a party to the suit. The State moved to dismiss the second petition on grounds that it was untimely and that the issue had already been litigated. The court denied the State's motion to dismiss and required the State to answer. Just prior to the State's date to answer, the eligible list for the position of Senior Warrant & Transfer Officer was certified and a permanent appointment was made. Due to the permanent appointment, the litigation became moot, and NYSCOPBA consented to discontinue the suit. Although this litigation has ended, an appeal of the minimum qualifications for the position of Senior Warrant & Transfer Officer is pending before the Civil Service Commission.

Wilson v. DiNapoli (New York State Comptroller)

This is an Article 78 proceeding filed on behalf of an officer from **Marcy Correctional Facility** who seeks "reinstatement" to Tier 1 based on his employment with the local highway department prior to becoming a correctional officer. After his initial application was denied by the Comptroller's office, we requested a hearing. Subsequently, following a hearing at which we produced evidence indicating that the member held a municipal position for which membership in the retirement system was mandatory, the designated hearing officer found in the member's favor and recommended that the application be approved. However, the Comptroller rejected the recommendation and denied the application. We subsequently filed an Article 78 proceeding in State Supreme Court in Albany, challenging the Comptroller's determination as arbitrary and capricious. The Supreme Court transferred the case to the Appellate Division for disposition, as is required in such cases. The appeal to the Appellate Division has been perfected, and we are waiting for the court to schedule oral arguments on the matter.

CIVIL SERVICE ISSUES**Minimum Qualifications for Senior Warrant and Transfer Officers**

We submitted a formal request to the Division of Staffing Services at the Department of Civil Service to change the minimum qualifications for the Senior Warrant and Transfer Officer title (Division of Parole). Currently, the minimum qualifications are one (1) year of service as a Warrant and Transfer Officer and instructor training (General Topics Instructor and Firearms Instructor). In our request, we stated that one (1) year of service as a Warrant and Transfer Officer is not adequate. We also stated that instructor training is not necessary to perform the duties. The Division of Staffing Services responded by stating that they reviewed our request and continue to find that the original minimum qualifications are appropriate. Subsequently, we filed a formal appeal with the Civil Service Commission. We received a formal response to the appeal from the Division of Staffing Services and have submitted our formal pre-hearing memorandum to the Commission. We appear before the Civil Service Commission to present our case on March 11, 2008.

MISCELLANEOUS**Disability Retirement Cases**

There are currently thirteen (13) cases at various stages pending before the Retirement System.

Interrogations by Inspector General's Office at Albany

Since December, we have represented approximately twenty-nine (29) officers at interrogations at DOCS Building 2.

Labor Management

We attended Labor Management meetings for SHTA's and SSO's at the Office of Mental Health and Office of Mental Retardation and Developmental Disabilities.

New York State Commission of Correction

We represented five (5) members from Mid-State Correctional Facility who were subpoenaed to appear before the New York State Commission of Correction in Albany, New York.

UPCOMING SCHEDULE

Listed below are some of the cases upon which we will be working over the upcoming months:

Disciplinary Cases

March 5, 2008 – Greene Correctional Facility
March 12, 2008 – Greene Correctional Facility
March 19, 2008 – Bedford Hills Correctional Facility
March 20, 2008 – Taconic Correctional Facility
March 21, 2008 – Taconic Correctional Facility
March 25, 2008 – Sing Sing Correctional Facility
March 25, 2008 – Adirondack Correctional Facility
March 27, 2008 – Taconic Correctional Facility
March 31, 2008 – Fulton Correctional Facility
April 2, 2008 – Eastern Correctional Facility
April 4, 2008 – Metro New York DDSO
April 18, 2008 – Orleans Correctional Facility
April 24, 2008 – Metro New York DDSO
May 20, 2008 – State Education Department - Albany

Full Arbitrations

March 3, 2008 – Marcy Correctional Facility

This grievance concerns Sergeants' incidental leave. A hearing will be held before Arbitrator Prosper.

April 8, 2008 – Upstate Correctional Facility

This grievance involves the use of personal leave on a holiday. A hearing will be held before Arbitrator Rinaldo.

April 14, 2008 – Hudson Correctional Facility

This grievance involves Sergeant's incidental leave. A hearing will be held before Arbitrator Pohl.

April 21, 2008 – Washington Correctional Facility

This grievance involves Sergeant's incidental leave. A hearing will be held before Arbitrator Pohl.

Expedited arbitrations

February 14, 2008 – Creedmoor Psychiatric Center

February 22, 2008 – Albion Correctional Facility

March 7, 2008 – Coxsackie Correctional Facility

March 20, 2008 – Groveland Correctional Facility

Please do not hesitate to contact our office if you have questions regarding any of the cases or issues discussed in this report.

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