



Laborers International Union of North America

National Guard District Council

June 24, 2012

Via US Mail

Major General David Baldwin

Adjutant General

California National Guard

Dear Sir,

Please accept this letter as our review of Mrs. Kathryn Lindberg's Equal Employment Opportunity (EEO) case, a review in response to your request that we provide an independent 3rd party opinion as to the merits of Mrs. Lindberg's complaints. Our intent is to provide you with an unbiased opinion as to whether the actions of the CNG were appropriate, and whether Mrs. Lindberg's allegations support her contention that the CNG, through its representatives, violated EEO law. We believe this letter meets that intent.

It is important to emphasize that the request to review this case was initiated by you, the Agency Head, in March of 2012. In spite of that fact, our requests for release of the case file were initially ignored and ultimately not fully granted by the responsible departments within the CNG, particularly the J1 Directorate of Manpower and Personnel and the Human Resources Office (HRO). Aside from a handful of copies of SF50 and SF52 Personnel Action forms which the employee already had access to, the Union did not receive any official documents from CNG representatives, and so this review is based solely on information provided to us by the complainant, Mrs. Lindberg. In the end, the J1 and HRO placed sole burden for informational release on the employee, a fact we can neither understand nor explain since the request to investigate the case was initiated by you, the Agency Head. Based on this lack of cooperation, the Union moved forward based on the assumption that the CNG stipulates to the accuracy of the documents provided to us by the employee, and that they do not dispute the contents of said files.

Also, before getting into specific details and recommendation, it should be stated that this is merely a cursory review, not an investigation. Having said that, it becomes obvious early on that this is a complicated case, and these complications arise out of the continual gross mishandling of the case by CNG representatives. This reviewer did not have an adequate amount of time, access to required documents or key personnel, or the necessary resources to properly examine each allegation of wrongdoing on behalf of Mrs. Lindberg, or each instance where CNG representatives may have failed to do their jobs. Simply stated, this case requires the assignment of a dedicated investigator, preferably an expert in the EEO field, someone assigned by the Equal Employment Opportunity Commission (EEOC) Office of Inspector General (OIG) to review documents, interview key personnel, and conduct a forensic-type examination of the entire case in order to properly articulate to you the who, what, when, where, and why things went wrong, and how to correct them. This is extremely important because based on this case the undersigned has little faith in the CNG's ability to properly process employee EEO complaints. It is also important to note that this lack of confidence in the EEO Program was the primary opposition to your appointment as Adjutant General (AG). The majority of the witnesses who testified against

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you during your Confirmation Hearing, including Mrs. Lindberg herself, raised concerns about the CNG's EEO case handling practices, and of rampant retaliation against those employees who did raise EEO Complaints. These concerns are readily evident in the Lindberg case.

Based on our review of documents provided to us by the complainant, and after speaking with Mrs. Lindberg regarding her allegations, we believe there is clear and ample evidence within the record to support Mrs. Lindberg's allegations that her rights were violated. It is important to point out early on that the way the CNG has dealt with Mrs. Lindberg's case can only be described as grossly negligent, fraudulent, and abusive. This negligence extends to matters arising out of both civilian and military employment matters. There is an overt systemic failure by almost every responsible individual within each responsible CNG Human Resources function, past and present, to do their job and provide appropriate guidance to both the employee and her supervisors. Based on the documents made available to us, and based on the lack of resolution to date, it would appear that both CNG and National Guard Bureau (NGB) representatives are more intent on dismissing charges based on technicality than on actually investigating whether these allegations are true or not and seeking appropriate remedy, and more importantly ensuring that these practices cease to occur.

The mishandling of this case by CNG representatives began very early on, and it initiated a chain reaction of events that has resulted in a case so intertwined (civilian and military) and complicated that the only way to correct the record may be to halt everything where it stands and start over from the very beginning. Further complicating and delaying proper resolution of this case is the fact that CNG and NGB representatives continue to take advantage of their own negligence and incompetence by muddying the waters of this case and trying to claim that Mrs. Lindberg's allegations are "inherently military" and saying they should be dealt with via the Military Equal Employment (MEO) Complaint System. It is true that some of Mrs. Lindberg's allegations over the last four years stem from her employment as an M-Day soldier; however the catalysts for all those complaints/violations that are inherently military in nature can be easily traced to her initial EEO complaint beginning in January of 2008 as a civilian employee. In any event, regardless of the venue, CNG and NGB representatives should be striving to resolve the complaints rather than attempting to dismiss them based solely on technicalities.

After painstakingly reviewing all of the documents provided to us by Mrs. Lindberg, especially her almost daily account of incidents covering a four year period, which she claims are violations of her rights, it becomes clear that the CNG failed to protect Mrs. Lindberg from discriminatory retaliation. This is the essence of the case. Basically, it's irrelevant whether Mrs. Lindberg's hundreds of allegations have merit so long as she reasonably believed that they were a violation of her rights; and it is not important whether those complaints are civilian or military in nature; this case is ultimately about how CNG representatives reacted and processed, or failed to process, those allegations. The documents clearly show that Mrs. Lindberg experienced adverse treatment in March of 2008, immediately following her initial contacts with the CNG EEO office. As such, these adverse employment actions taken against Mrs. Lindberg based on her reporting suspected violations of her rights are textbook examples of retaliation or reprisal for her protected activity, as described in 5 USC 2302(b)(8). We have no doubt that the initial violations of Mrs. Lindberg's rights occurred while in her capacity as a Federal civilian

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employee, and it is that venue in which her complaints should be adjudicated. In fact, the evidence in support of retaliation is so overwhelming that, again, the only conclusion one can reach is that the CNG is legally negligent in the way this case has been handled from the onset, and that in addition to making the complainant whole, the CNG should attempt to identify the person or persons that allowed this case to get so out of hand, and then take appropriate disciplinary action against them if they are still employed. This includes the extraordinary amount of time it has taken to process the complaint. This proverbial dragging of feet has rendered the CNG's EEO program ineffective.

We did not have to delve too deep into the file to find direct evidence of unlawful retaliation against Mrs. Lindberg based on her protected EEO activity as a civilian employee of the CNG. The unlawful retaliation occurred so early on in the review that we did not feel the need to address, in detail, events which took place after the initial violations. What we can say, with confidence, is that this initial retaliation began a slippery-slope of unwarranted and illegal personnel actions against the employee, on both the military and civilian sides of the house, all of which resulted in a negative impact on her overall employment, and eventually marginalized and dead-ended both her military and civilian flying career. The violations were so obvious and egregious that the CNG EEO Office, had they been doing their job, should have acted immediately to stop it, and if they did attempt to stop it then it would behoove the CNG to find out who prevented them from stopping it. Mrs. Lindberg's case highlights the systemic deficiencies that have plagued not only the CNG's EEO Office, but the entire organization for the last several years. This acknowledged lack of confidence in the system should be enough justification for you to open and review not just Mrs. Lindberg's case, but every other case that has been handled by that office for the last seven years up to and including today. In any event, based on the initial violation of EEO law in this particular case, we strongly urge the CNG to revisit the entire case from the beginning, and take affirmative action to correct the record in order to ensure Mrs. Lindberg experiences no further harm.

NGB has also been deficient in the way they have handled this case, and in the way they have advised the CNG on how to handle this case. NGB's tactic of claiming that Mrs. Lindberg's entire complaint is "integrally related to military activities" is laughable. Their attempt to revert Mrs. Lindberg's case to the Military Equal Opportunity (MEO) process based on legal technicalities is plain wrong and a delay tactic; a tactic they use time and again to avoid legal liability. As we have said, Mrs. Lindberg's initial complaints were based on events that took place while on a civilian status during the course of her civilian duties as a GS-2181-12 Supervisory Maintenance Test Pilot, and the initial retaliation taken against her had an immediate negative impact on that civilian position, not on her military assignment. How NGB can justify their stance on this case is disturbing considering that they retain final review authority on all EEO cases raised within the National Guard. From a common sense perspective, NGB's actions don't even pass the smell test. Rather than actually trying to address the concerns raised by this employee regarding retaliation against protected activity, NGB's approach is to hide behind legal technicalities by splitting hairs over whether Mrs. Lindberg's entire case is "integrally related to military activities," and whether it should be processed using the MEO process. We wholeheartedly disagree. Their insistence that cases like Mrs. Lindberg's belong in the MEO process only serve to cloud the issue, and take advantage of the fact that the National

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Guard Dual-Status technician program is already difficult to understand, and that even Agencies such as the EEOC have a hard time making heads or tails of it. The actions taken against this employee clearly fall into the EEO process, not MEO, since the protected activity stemmed from her duties as a civilian employee, and the initial retaliation occurred during the course of, and had a direct casual connection to, her civilian duties. It is important to note that even if Mrs. Lindberg's case was inherently military, that there is no tolerance for retaliation in that venue either.

As was stated in the beginning of this letter, this is not an investigation. This review does not take into account complaint process timelines or any other sort of technical or regulatory procedure. We only attempt to address whether Mrs. Lindberg's right were violated or not. We'll defer to the CNG and NGB as to how to proceed and correct the record, but we feel strongly that action is warranted. Therefore, we will make a copy of this review available to the employee and to the California Senate Rules Committee since the topic was part of the record of your confirmation hearing.

Retaliation

In order to explain how Mrs. Lindberg was retaliated against, in a legal sense, we need to explain what the EEOC considers as unlawful retaliation. *EEOC Compliance Manual Section 8: Retaliation* states that there are three essential elements of a retaliation claim. This is sometimes referred to as the "Acid Test" in the inspector general community:

1. **Protected Activity**: Did the employee engage in protected activity; meaning did the employee oppose discrimination or did they participate in the statutory complaint process?
2. **Adverse Action**: Did an agency representative subsequently take an adverse action against the employee? In regards to retaliation, the terms "adverse action" are not limited to discipline. In cases of retaliation, adverse actions include denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. Other types of adverse actions include threats, reprimands, negative evaluations, harassment, or other adverse treatment.
3. **Casual Connection between Protected Activity and Adverse Action**: Is there direct or indirect proof of a causal connection between the protected activity and the subsequent adverse action? According to the EEOC Complain Manual Section 8(E)(1), in part:

If there is credible direct evidence that retaliation was a motive for the challenged action, "cause" should be found.

Direct evidence of a retaliatory motive is any written or verbal statement by a respondent official that s/he undertook the challenged action because the charging party engaged in protected activity. Such evidence also includes a written or oral statement by a respondent official that on its face demonstrates a bias toward the charging party based

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on his or her protected activity, along with evidence linking that bias to the adverse action. Such a link could be shown if the statement was made by the decision-maker at the time of the adverse action.

Examination of Events

In order to come to the conclusion that Mrs. Lindberg was retaliated against we chronologically examined her case to determine if there were any instances which met the three elements above. According to the documents provided to LIUNA, Mrs. Lindberg documented an extensive record of conversations and events with superiors and co-workers concerning practices she felt constituted unfair treatment. The first of these relevant chains of events began to take place in December 2007. According to these accounts, she repeatedly attempted to address a number of concerns with her immediate supervisor at the time, Lieutenant Colonel (LTC) Van Dyke, during late 2007 and early 2008. Although the events raised by Mrs. Lindberg may not have all met the burden of legal discrimination, and while Mrs. Lindberg may not have necessarily articulated to LTC Van Dyke that she was being “discriminated against,” her concerns are still considered opposition to discrimination because the law only requires that an employee believe the actions to be reasonably discriminatory, even if they never communicate an explicit or implicit belief that the practice constitutes unlawful employment discrimination. This opposition is what constitutes protected activity under the law.

Again, the record clearly shows Mrs. Lindberg raised numerous concerns to LTC Van Dyke about her treatment at the hands of her supervisors and peers, all of which LTC Van Dyke appears to have dismissed and subsequently taken adverse action against Mrs. Lindberg for raising. It is important to note that the EEOC requires that if there’s direct evidence of a casual connection between the protected activity and the adverse action then the Agency has to determine there’s cause. Essentially, the law requires a finding of fault on behalf of the respondent Agency representative. With that said, we will identify two examples of specific instances of retaliation which occurred immediately after Mrs. Lindberg engaged in protected activity.

Example 1: Indirect Retaliation

1. Protected Activity

27 December 2007: Mrs. Lindberg indicates that she was having problems being placed on the training rotation for UH-60 aircraft. The complaint file shows the following entry:

“I emailed CW4 Clark and CW2 Smith and asked them to put me on the flight training schedule since I was not given permission access rights to access the schedule...They did not reply” (exhibit 52).

8 January 2008: Mrs. Lindberg recalls being “bumped” from the training schedule in favor of two senior officers:

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I wrote a memorandum for record (MFR) identifying the problems I was having getting training in the UH-60 helicopter... The memorandum stated that I spoke with CW4 Gatewood yesterday about scheduling a flight with him, he agreed. However, when I came in the next morning, CW4 Gatewood and CW2 Smith told me I was “bumped” because LTC Gereski and MAJ Breeze were put on the schedule last night at 10:23pm and that they had priority over me (exhibit 53).

2. Adverse Action

11 January 2008: Mrs. Lindberg recalls an extensive conversation with LTC Van Dyke. The essence of which is LTC Van Dyke informing Mrs. Lindberg that she was being tasked with a military deployment to Kosovo, and Mrs. Lindberg protesting the timing and affect to her flying career. He goes on to inform her that he is “planning on reassigning” (management directed reassignment) Mrs. Lindberg in her civilian capacity from a Supervisory Maintenance Test Pilot to that of just Aircraft Pilot without Supervisory responsibilities, essentially a demotion. LTC Van Dyke remarks about Mrs. Lindberg’s inability to prepare for the UH-60 Maintenance Test Pilot Course, to which Mrs. Lindberg reminds him of the barriers that were present to her training, and how he allowed them to take place. He does not address her concerns, and only reiterates his intent to demote her in her civilian capacity, that an SF-52 Personnel Action Request would be presented to her initiating the demotion, and that she would have 30 days to sign it and accept the demotion or face termination from her civilian employment. When Mrs. Lindberg asks him “*what did I do wrong,*” LTC Van Dyke replies “*it wouldn’t do any good to tell you*” (exhibit 54). In Mrs. Lindberg’s Official Personnel Folder there is a Standard Form (SF) 50 Notification of Personnel Action reassigning her from GS-2181-12 Supervisory Maintenance Test Pilot to a GS-2181-12 Aircraft Pilot, dated March 16, 2008, two months after this event.

3. Casual Connection

Mrs. Lindberg’s reassignment on March 16, 2008 lends credibility to her recounting of these events, and demonstrates an indirect casual connection between her protected activity and an adverse employment action. This would support a finding of retaliation against the employee during the course of her civilian duties, and would thus fall under the EEO category.

4. Analysis

a. Did Mrs. Lindberg oppose discrimination?

Yes. She articulated to LTC Van Dyke in no uncertain terms that others under his command, and in a position to influence her career, took deliberate action to negatively impact her job. She raised her concerns both verbally and in writing.

b. Was Mrs. Lindberg’s opposition reasonable?

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Yes. Mrs. Lindberg made overt efforts to make the offending parties and their supervisor aware of her concerns. She did not cause a disruption or hinder the employer's ability to do business.

c. Did Mrs. Lindberg have a reasonable and good faith belief that the practices she was opposing violated the law?

Yes. Mrs. Lindberg felt that the personnel action being proposed by LTC Van Dyke was a demotion and would deny her of potential future earnings (evidence is contained within record).

Example 2: Direct Retaliation

1. Protected Activity

17 January 2008: Mrs. Lindberg indicates she complained to LTC Van Dyke about an incident that took place with an instructor pilot, CW4 Gatewood, in which she felt he was abusing his authority. LTC Van Dyke responds by saying "*he treats everyone the same...*" (Exhibit 58)

25 January 2008: Mrs. Lindberg recalls a meeting with LTC Van Dyke in which she articulates directly to him that she feels she's in a "*hostile working environment.*" (Exhibit 59)

30 January 2008: Mrs. Lindberg states that she emailed LTC Van Dyke "*to advise him of (her) concerns, they were: (she) did not accept...reassignment from Supervisory Maintenance Test Pilot to Aircraft Pilot...*" (Exhibit 61)

21 February 2008: LTC Van Dyke confirms knowledge of Mrs. Lindberg's protected activity when he asks her if she knew that the EEOC Investigator was interviewing CW4 Clark and CW4 Johnson. He then informs her that "*no good can come from an EEOC complaint.*" (Exhibit 63)

27 February 2008: Mrs. Lindberg receives a copy of a "Basis/Issue Statement" from the CNG EEO Office which she signs and dates. The statement summarizes 6 individual incidences that Mrs. Lindberg alleged were discriminatory in nature involving 6 other members of the CNG, one of them being her supervisor, LTC Van Dyke.

2. Adverse Action

6 March 2008: LTC Van Dyke issues Mrs. Lindberg a desk memorandum with the subject "Authorized Crew Mixes for CW4 Lindberg." In the memo, LTC Van Dyke informs Mrs. Lindberg that he will not "*allow*" her to fly...with either CW4 Johnson or CW4 Clark until the EEO complaint "*initiated by you is adjudicated.*" He further

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indicates that CW4 Johnson and CW4 Clark were “*completely caught by surprise*” and that they were “*feeling betrayal and anger.*” He further informs her that he advised the State Aviation Officer (his supervisor) that Mrs. Lindberg would need to be assigned TDY “*on a part time or permanent basis to another facility*” in order for her to fulfill her training.

3. Casual Connection

LTC Van Dyke’s desk memo of 6 March 2008 had an adverse effect on Mrs. Lindberg’s career and employment because it severely hindered her ability to accumulate the training and flight hours necessary to progress in her civilian position as a Supervisory Maintenance Test Pilot. Based on LTC Van Dyke’s own words in the memo, his action was in direct response to Mrs. Lindberg’s communication with the CNG EEO Office. The memo shows a clear direct casual connection between the adverse action taken against Mrs. Lindberg and her protected activity, and in accordance with EEOC guidance, **cause must be found.** The memo also shows a clear bias by the respondent, LTC Van Dyke, against Mrs. Lindberg when he remarks that her coworkers were “*caught by surprise*” and that they were angry and felt betrayed. This would further support a finding of retaliation against the employee during the course of her civilian duties, and would thus fall under the EEO category.

4. Analysis

1. Did Mrs. Lindberg oppose discrimination?

Yes. Once again Mrs. Lindberg articulated to LTC Van Dyke in no uncertain terms that others under his command, and in a position to influence her career, took deliberate action to negatively impact her job. She raised her concerns both verbally and in writing, and she specifically indicated that she felt she was in a “*hostile working environment.*” She made concerns known about her reassignment directly to LTC Van Dyke, and she also sought remedy of her complaints via the CNG EEO Office, thus participating in the “statutory complaint process.”

2. Was Mrs. Lindberg’s opposition reasonable?

Yes. Mrs. Lindberg made overt efforts to make the offending parties and their supervisor aware of her concerns. She did not cause a disruption or hinder the employer’s ability to do business.

3. Did Mrs. Lindberg have a reasonable and good faith belief that the practices she was opposing violated the law?

Yes. Mrs. Lindberg felt that the behavior of her subordinate and superior personnel was contrary to law and she conveyed that to her supervisor and to the CNG EEO Counselor

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and she also made clear that the action being proposed by LTC Van Dyke was a demotion and would deny her of potential future earnings.

The two instances of retaliation documented in the previous pages were merely the beginning of what would become a chain of adverse effects on Mrs. Lindberg's civilian employment, which would eventually spill over into her military career. It is interesting to note that CNG EEO representatives failed to protect Mrs. Lindberg's anonymity, and failed to warn management representatives not to take actions which were, or would appear to be, retaliatory, both of which are standard operating procedures for any EEO function. Then, after learning of her complaint, rather than attempt to address her concerns, LTC Van Dyke and other in Mrs. Lindberg's chain of command marginalized Mrs. Lindberg and treated her as the problem.

It is extremely important to note that LTC Van Dyke's memo was especially damaging, and would set tone for Mrs. Lindberg's treatment from that moment forward. As is stated in the EEOC Manual:

Direct evidence of a retaliatory motive is any written or verbal statement by a respondent official that s/he undertook the challenged action because the charging party engaged in protected activity. Such evidence also includes a written or oral statement by a respondent official that on its face demonstrates a bias toward the charging party based on his or her protected activity, along with evidence linking that bias to the adverse action. Such a link could be shown if the statement was made by the decision-maker at the time of the adverse action.

Based on the excerpt above, LTC Van Dyke's memo provides clear and unmistakable evidence of a direct causal connection. First and foremost it is a written document by a respondent official that undertook a challenged action. Second, it demonstrates a clear bias towards Mrs. Lindberg (the charging party) and her protected action (the complaint) by indicating that the other individuals named by Mrs. Lindberg were "surprised" and felt betrayed and angry. LTC Van Dyke then proceeds to comment on his concerns regarding "trust and teamwork," and the fact that "most aircraft accidents are a result of poor communication or coordination," in a way saying that because of this complaint that Mrs. Lindberg was a hazard or jeopardy to all of these.

These types of comments, in and of themselves, are extremely adverse because a pilot's reputation and safety record is extremely important to their success and career, some would argue these are the cornerstones of a flying career. LTC Van Dyke's memo was calling both Mrs. Lindberg's reputation and safety into question, essentially serving to marginalize and end her career as an aviator.

The bias is especially obvious because nowhere does LTC Van Dyke state that he is equally concerned with the safety of the other two individuals. This is particularly strange since part of Mrs. Lindberg's complaints (contained within the detailed record) stem from what she believes were questionable flying practices on the part of the instructor pilots under LTC Van Dyke's command. Mrs. Lindberg was a Master Aviator with 4000 hours of flying to her credit in both military and civilian capacities. Based on her experience and flying record one would expect that

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LTC Van Dyke would have looked into Mrs. Lindberg's concerns. However, neither CW4 Johnson nor CW4 Clark ever experienced a negative impact to their flying duties. Adding further injury to Mrs. Lindberg was the fact that LTC Van Dyke shared this particular memo with the two individuals whom Mrs. Lindberg had also complained against/about. This would have only served to indicate to both CW4 Johnson and CW4 Clark that LTC Van Dyke was on their side.

In any event, it is clear that LTC Van Dyke was the decision maker in regards to the adverse actions taken against Mrs. Lindberg. In fact, not only did he essentially ground her from flying, he also demoted her in her civilian capacity from Supervisor Maintenance Test Pilot to just an Aircraft Pilot. That decision became effective on 16 March 2008, just ten days after this memo was written. One could argue that, even though that reassignment had been in the pipeline since at least January 2008, that its effective date was no coincidence.

Conclusion

It is important to note that there is no record of a formal investigation having been conducted by anyone on behalf of the CNG or NGB between December 2007 and November of 2010. Basically, almost three years elapsed from the time Mrs. Lindberg began raising concerns of discrimination until someone from the CNG looked into the matter. Even then, the investigation was not conducted by an expert in EEO or even MEO matters. Rather, the duty to investigate was assigned to a regular line officer of the CNG. The process used (US Army 15-6 Investigation) was also not ideal.

The narrative of that investigation leaves much to be desired. As has already been explained, it did not take this reviewer long to find evidence of retaliatory behavior on behalf of the respondent. In contrast, the investigating officer assigned to the 15-6, Colonel William Snow, found no evidence of any wrongdoing on the part of agency representatives. Unfortunately, as with every other representative of the CNG that has dealt with this case, instead of unbiased fact-finding, Colonel Snow seems more intent on discrediting the complainant rather than trying to get to the bottom of the case.

In closing, Mrs. Lindberg did raise many allegations of wrongdoing. Not all of her allegations would have technically or legally risen to the level of discrimination. However, the issue is not whether they did or not, rather it is whether Mrs. Lindberg reasonably thought they did, and how the agency chose to deal with these allegations. The responsibility for this case falls back on the CNG EEO Office, and the Agency as a whole. Had the CNG EEO staff been up to the task this case would have never gotten so out of hand, and more importantly Mrs. Lindberg's rights would have been protected as required by law. It is our recommendation that the CNG request an IG investigation be conducted by the EEOC to determine how to make Mrs. Lindberg whole.

Bienvenido Banchs

Business Manager-Secretary Treasurer
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