LIUNA National Guard Council Local 1776
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LiUNA! 1776 National Guard Council

*"…a **well organized**…militia" Th. Jefferson*

November 8, 2017

Via Email

MG Gregory J. Vadnais
Adjutant General
Michigan National Guard
Joint Forces Headquarters
3411 N. Martin Luther King Blvd.
Lansing, MI 48906

Re: Response to Grievance – Failure to Implement Section 1084 (Sec. 1084) of FY17 NDAA

Dear Sir:

1. In regard to your October 30, 2017, response, and for the following reasons, the Union rejects your arguments:

a. **Inherent Management Rights.** The remedy sought by the Union is that the Agency follow Federal law. We find it difficult to understand how demanding that an Agency follow Federal somehow interferes with Management's Rights under 5 USC 7106(a). Your Agency was mandated by Sec. 1084 to convert not fewer than 20 percent of your 32 USC § 709 (T32) dual status technician positions to positions filled by individuals employed under 5 USC § 3101 (T5). As of today, your Agency has not complied with Federal law. This is the essence of the grievance.

b. **Overbroad.** The grievance has never sought class status. The mere fact that the letter identifies multiple Agency-bargaining units represented by LIUNA does not and should not be interpreted to mean that the Agencies, as a group, are named in a single grievance. Rather, we simply decided to notify each Agency simultaneously about the fact that we were prosecuting individual grievances in each state or territory, we represent. Your Agency was notified of the Union's intent to file a grievance…against your Agency. The language used throughout the letter speaks to each state/territory singularly, as 'your Agency.' Any other interpretation is erroneous, and is something any Judge Advocate on your staff, or first year law student for that matter, should be able to discern from the plain language used.

As to the allegation that the grievance notice is not in compliance with the Party's collective bargaining agreement (CBA) because it 'fails to cite which provision(s) under' the CBA have been violated, I would point to 5 USC § 7103(a)(9)(C)(ii), which states in part:

(9) "grievance" means any complaint—

> *(C) by any employee, labor organization, or agency concerning—*
>
> > *(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;*

Clearly, since your Agency has failed to implement the requirements of Sec. 1084, you are thus in violation of a law affecting conditions of employment. We don't think this needs further clarification.

c. **Failure to Comply with CBA Grievance Processes.** Our CBA, at Section 12.6(1), states in part that 'a grievance must be taken up with the…lowest level of Management within thirty (30) days after the occurrence of the matter generating the grievance.'

As stated in paragraph (a), your Agency was mandated by Sec. 1084 to convert not fewer than 20 percent of your 32 USC § 709 (T32) dual status technician positions to positions filled by individuals employed under 5 USC § 3101 (T5). 10 USC § 10508(3) places the responsibility for implementation of Sec. 1084 on you, the Adjutant General, as the 'head of the agency and the National Guard of the jurisdiction (state or territory) concerned.' It also names that National Guard jurisdiction (state or territory) as the defendant of 'any…grievance' filed against it. As such, since you, as the Adjutant General of Michigan, are considered the Agency Head of the Michigan National Guard, and are also entrusted as the administrator of 'all personnel actions,' you are the 'lowest level of management' able to provide relief (emphasis ours):

> *(3) Administrative actions.— Notwithstanding the Intergovernmental Personnel Act of 1970 (42 U.S.C. 4701 et seq.) and under regulations prescribed by the Chief of the National Guard Bureau,* ***all personnel actions or conditions of employment, including adverse actions under title 5, pertaining to a person appointed, employed, or administered by an adjutant general under this subsection shall be accomplished by the adjutant general of the jurisdiction concerned****; For purposes of any administrative complaint, grievance, claim, or action arising from, or relating to, such a personnel action or condition of employment:*
>
> > *(A)* ***The adjutant general of the jurisdiction concerned shall be considered the head of the agency and the National Guard of the jurisdiction concerned shall be considered the employing agency of the individual and the sole defendant or respondent in any administrative action.***
> >
> > *(B)* ***The National Guard of the jurisdiction concerned shall defend any administrative complaint, grievance, claim, or action, and shall promptly implement all aspects of any final administrative order, judgment, or decision.***
> >
> > *(C) In any civil action or proceeding brought in any court arising from an action under this section, the United States shall be the sole defendant or respondent.*

> *(D) The Attorney General of the United States shall defend the United States in actions arising under this section described in subparagraph (C).*
>
> *(E) Any settlement, judgment, or costs arising from an action described in subparagraph (A) or (C) shall be paid from appropriated funds allocated to the National Guard of the jurisdiction concerned.*

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d. **Ripeness.** We concede that, as of this instant, the Union is not officially aware of any individual who is being harmed by the Agency's failure to implement the law. However, the Agency's failure to implement Sec. 1084's is the essence of this grievance. We only need prove that the Agency is failing to follow the law in order to satisfy the requirements of 5 USC § 7103(a)(9)(C)(ii). Neither Sec. 1084 nor 5 USC § 7103 require that employees be presently experiencing 'harm' for the grievance to have merit.

e. **National Coordination Required.** This is irrelevant to our case. Our level of recognition lies with your Agency, and 10 USC § 10508(3) places the responsibility for implementation of Sec. 1084 on the Adjutant General as the 'head of the agency and the National Guard of the jurisdiction (state or territory) concerned.' It also places liability on your Agency. We feel confident this is the correct complaint venue.

f. **Agency Compliance.** See paragraphs (c) and (e), above.

g. **Lack of Standing.** On February 3, 2015, I sent a letter (Attachment 1) to NGB as well as your state's Labor Representative on record, notifying your Agency that, effective January 1, 2015, LIUNA HQ had merged all National Guard Local Unions into one single entity, Local 1776. We also notified you that the exclusive recognition previously accorded to LIUNA Local 2132 would now be exercised by Local 1776. A Union has the authority to manage the administrative and representational functions accorded to their Locals as they see fit.

Furthermore, Section 6.1(3) of the Party's CBA requires that the Agency recognize Union Officers and Representatives, as follows (emphasis ours):

> *b. The Agency acknowledges that the Union's primary point of contact for all Union matters is the LIUNA Local State Representative for the State of Michigan,* ***or any other representative designated by the LIUNA****.*

In addition to the above, your Agency has recognized the undersigned as a representative of bargaining unit employees in Michigan since as early as January of 2011. If the Agency wishes, the Union is prepared to turn over every…single…email that has been exchanged between the Agency and the undersigned since January of 2011 to confirm an ongoing and voluntary recognition of my authority to act on behalf of your employees. We would also point to the signature page of the current CBA, which shows the undersigned as a representative of the Union in Michigan. Not to mention, that the Agency is currently arguing an unfair labor practice in front of the 6th Circuit, which was brought forth by the undersigned. We feel confident that the record would clearly demonstrate the Agency recognizes LIUNA Local 1776, and the previous National Guard

> District Council, as a designated LIUNA representative of the Michigan bargaining unit. For you to allege otherwise would fly in the face of nearly seven (7) years of history between the parties.

2. Section 12.8(2) provides that the Union must notify the Agency of its intent to invoke arbitration within fifteen (15) working days of the Adjutant General's final decision. We're considering your October 30, 2017, reply as your final decision. We calculate the fifteenth (15th) day as being November 20, 2017. As such, were offering your Agency the opportunity to resolve this matter one last time. The Union is prepared to sit down with your representatives to discuss the offer made in Paragraph 5 of our original grievance:

> *5. If circumstances beyond your control prevent immediate implementation of the law, we're asking that your Agency agree to delay or cancel any and all adverse administrative actions against employees stemming from said failure to properly implement Federal law. Specifically, that your Agency not take any adverse employment action based on expired military conditions of employment against incumbents whose employment authority should have otherwise been converted from Title 32 to Title 5 effective October 1, 2017. This includes any and all separations covered by NGB Technician Personnel Regulation (TPR) 715, Chapter 3, Paragraphs 3-1, 3-2, and 3-3. These military requirements no longer apply to those identified for conversion in any of the tranches submitted to NGB, whether that be the 4.8%, 10%, 12.6%, or 20%.*

3. In order to have a meaningful discussion as proposed above, the Agency would need to release the list of employees already identified for conversion, as provided to NGB earlier this year. That list contains a list of employees identified in support of the four tranches proposed by NGB.

4. Failure to respond by November 17, 2017, will result in the Union invoking arbitration. Point of contact for this matter is the undersigned via email at benbanchs@liuna-ngdc.org, or telephone at (985) 249-3707.

Respectfully,

Ben Banchs
Business Manager
LIUNA NGC Local 1776

cc:

James Sweat, Michigan State Representative, LIUNA Local 1776
Josh Klinger, Attorney, Minahan, Muther, and Klinger, PC

DEPARTMENT OF THE ARMY AND THE AIR FORCE
MICHIGAN NATIONAL GUARD JOINT FORCE HEADQUARTERS
3411 N. Martin Luther King Blvd.
Lansing, MI 48906

October 30, 2017

LIUNA National Guard Council Local 1776
P.O. Box 1794
Abita Springs, LA 70420

Dear Mr. Banchs:

This letter is the formal reply of the Michigan National Guard, (hereafter "Agency"), to your October 3, 2017 formal notice of grievance.

It is Agency's position that this grievance is invalid, because it fails to comply with the requirements for a grievance in accordance with the local collective bargaining agreement between the Agency and LIUNA Local 2132 dated September, 2015. LIUNA 1776 lacks standing to file this grievance. This grievance also interferes with inherent management rights, is overbroad, fails to state a claim upon which relief can be granted, and is otherwise without merit.

a. Inherent Management Rights. This grievance is improper because it encroaches on inherent management right pursuant to 5 U.S.C. §7106(a) and section 4.2 of the CBA. The Agency firmly supports working within its legal authority to accomplish its mission of generating combat ready units to conduct state and federal military operations. It is the position of this Agency that pursuant to 5 U.S.C. §7106(a) the mission, budget, organization, numbers of employees, and internal security practices are management rights. The remedy requested by this grievance directly interferes with these inherent management rights.

b. Overbroad. The grievance improperly names a class involving separate states and is therefore overbroad. This grievance names not only the Adjutant General for the Michigan National Guard, but also names the adjutants general of nine other states and Guam. Similarly, because this notice was sent to states and territories other than just this Agency, this formal notice fails to comply with the CBA the local union has with this Agency. Your October 3, 2017 letter fails to cite which provision(s) under our local CBA have been violated. Accordingly, the Agency is unable to discern the scope, breadth, and veracity of your claims.

c. Failure to Comply with CBA Grievance Processes. Because the notice was sent directly to the Adjutant General, it does not comply with the requirements of

the grievance process required in our CBA. Therefore, the October 3, 2017 formal notice is invalid.

d. Ripeness. The issue of this grievance is not ripe for arbitration. This grievance fails to identify any Union member who has been adversely harmed by any action or inaction taken by this agency related to implementing §1084(a)(1) of the National Defense Authorization Act for 2017. Your notice does not allege or identify that there has been tangible harm to any bargaining unit member. In this case the Union is arguing that there is potential harm to its members in the future. Potential harm to unnamed members at some possible future date is not a grievance that can be decided by an arbitrator.

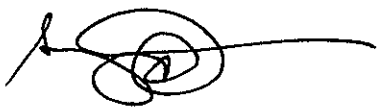
e. National Coordination Required. The 2017 NDAA required the Secretary of Defense to convert a certain percentage of National Guard Title 32 Dual-status Technicians (DSTs) to Title 5 employees. Neither the Secretary of Defense, nor the National Guard Bureau has informed this Agency how many of this Agency's DSTs will need to convert to meet this national requirement. The implementation of the law requires a nation-wide coordination that can only be accomplished at the federal level. To put it another way, this Agency is unable to determine whether converting 5%, 10%, 15%, or 20% of its DSTs would accomplish this federal requirement that has been placed upon the Secretary of Defense.

f. Agency Compliance. Section §1084(a)(1) placed no mandate on this agency. Rather, it placed requirements on the Secretary of Defense. That section states that, "By not later than October 1, 2017, the Secretary of Defense shall convert no fewer than 20 percent of all military technician positions to positions filled by individuals who are employed under section 3101 of Title 5 ..." In order to assist the Secretary of Defense in meeting this requirement, NGB required this Agency to submit a list of positions in order to meet the 20 percent requirement. The Agency met this requirement from NGB prior to October 1, 2017.

g. Lack of Standing. This agency has engaged with collective bargaining with LIUNA Local 2132. It has not collectively bargained with LIUNA 1776. Therefore, it is not clear to this agency whether LIUNA 1776 has standing to file this grievance. This Agency does not have any information to suggest that LIUNA Local 1776 has been certified by the FLRA or designated as the Local 2132's representative. Additionally, even if LIUNA Local 1776 were properly designated as the Local's representative, they have impermissibly tried to file a comprehensive grievance for all 11 states and Guam, verses filing individual grievances for each CBA. As for the substance of the grievance, because the conversion is required by a federal statute, it is excluded from collective bargaining. Under 5 U.S.C. §7103(a)(14)(c), it is not a condition of employment.

For the foregoing reasons, your formal notice of filing a grievance fails to comply with the CBA this Agency has with the Union. This grievance interferes with inherent management rights, it is overbroad, it fails to state a claim for which relief can be granted, and it is otherwise without merit. Therefore, on behalf of the Michigan National Guard, this Agency declines the Union's demands.

Sincerely,



GREGORY J. VADNAIS
Major General
The Adjutant General