LIUNA National Guard Council Local 1776
PO Box 1794, Abita Springs, LA 70420
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"…a **well organized**…militia" Th. Jefferson

November 8, 2017

Via Email

MG Kenneth A. Nava
Adjutant General
New Mexico National Guard
Department of Military Affairs
10 Bataan Blvd.
Santa Fe, NM 87508-4695

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

Dear Sir:

1. In regard to your November 2, 2017, response, we are encouraged that you intend to fully comply with your legal obligation, and that 'to the fullest extent practicable' you intend to 'eliminate and/or minimize any potential adverse impacts' to employees as a result of the Title 5 conversion. However, and for the following reasons, the Union rejects your arguments. We'll try to frame and address each one below the best we can:

a. **LIUNA Local 1776 is not the exclusive representative of employees.** 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 1636 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.

Section 6.1(4) of the Party's current CBA (2017) requires that the Agency recognize all Officers and Representatives designated by the Union, as follows (emphasis ours):

> *4. The Agency shall recognize **all Officers and Representatives** designated by the Union, **to include National Representatives**. Upon request, the Union will provide the Agency, in writing, a list of all current Officers and Representatives, to include Stewards.*

And, while the Union outright rejects your argument that Local 1776 has no standing to either represent or negotiate on behalf of New Mexico employees as absurd, we'll humor you and your staff by citing the previous CBA in effect (2011), Section 6.1(a):

> *a. Management **agrees to recognize LIUNA National Officers and Representatives**, the local president, elected officials, and individual stewards as specified in this agreement.*

In addition to the above, your Agency has recognized the undersigned as a representative of bargaining unit employees in New Mexico 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 (2017), which shows the undersigned as a representative of the Union in New Mexico. Not to mention, that the Agency is currently arguing an unfair labor practice (ULP) in front of the Federal Labor Relations Authority's Dallas Regional Office, 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 New Mexico bargaining unit. For you to allege otherwise would fly in the face of nearly seven (7) years of history between the parties.

b. **Interference with Management's 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.

c. **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.

d. **Failure to Comply with CBA Grievance Processes.** Your repudiation of our properly negotiated 2017 CBA is improper, and your refusal to recognize or abide by the processes agreed to within that document are and will be the subject of a separate ULP. Those facts notwithstanding, our 2017 CBA, at Section 12.6(1), states in part that 'a grievance must be submitted to the lowest level of the Agency with the ability to resolve the matter.

As stated in paragraph (b), 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 New Mexico, are considered the Agency Head of the New Mexico 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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e. **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.

f. **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 (d) and (f), above.

g. **Refusal to Recognize Local 1776.** See paragraph (a).

2. Section 12.9(2) provides that the Union must notify the Agency of its intent to invoke arbitration within fifteen (15) days of the Adjutant General's final decision. We're considering your November 2, 2017, reply as your final decision. We calculate the fifteenth (15th) day as being November 17, 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.

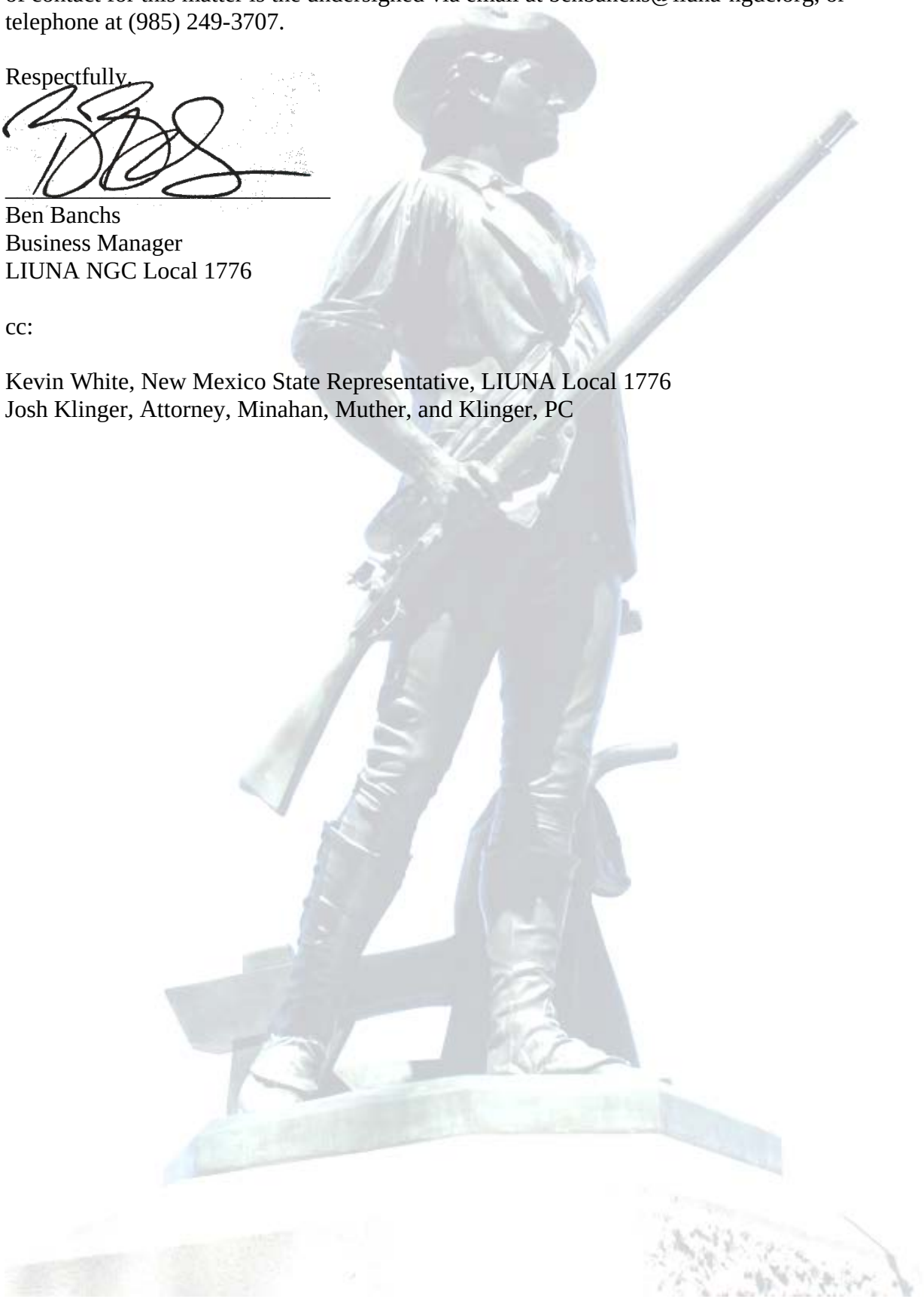
4. Failure to respond by November 15, 2017, will result in the Union invoking arbitration. Point of contact for this matter is the undersigned via email at benbanchs@liuna-ngdc.org, or telephone at (985) 249-3707.

Respectfully,

Ben Banchs
Business Manager
LIUNA NGC Local 1776

cc:

Kevin White, New Mexico State Representative, LIUNA Local 1776
Josh Klinger, Attorney, Minahan, Muther, and Klinger, PC



STATE OF NEW MEXICO
Department of Military Affairs
10 Bataan Boulevard
Santa Fe, New Mexico 87508-4695

Susana Martinez
Governor

Kenneth A. Nava
Major General
The Adjutant General

November 2, 2017

Mr. Ben Banchs
LIUNA National Guard Council Local 1776
P.O. Box 1794
Albita Springs, LA 70420

Dear Mr. Banchs:

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

First, I want to assure you that it is the intent of the Agency to fully comply with all legal obligations to which it is subject. Further, to the fullest extent practicable, the Agency intends to eliminate and/or minimize any potential adverse impacts on any of our employees as a result of the Agency's implementation of the Title 5 conversion process.

That being said, it is Agency's position that this grievance is invalid for many reasons. Upon request, the Federal Labor Relations Authority (FLRA) provided their most current decisions regarding exclusive representation of New Mexico National Guard military technicians. Upon review of those documents and recent collective bargaining agreements negotiated by the Agency, the Agency concludes that your formal notice of grievance fails to comply with the requirements of 5 U.S.C. §7121, Grievance procedures, and 5 U.S.C. §7111, Exclusive recognition of labor organizations. According to documents obtained from the FLRA, LIUNA Local 1636 is the only labor organization with exclusive recognition certified by the FLRA to execute a valid collective bargaining agreement with the Agency. The Agency acknowledges it negotiated a new agreement, signed by you on July 5, 2017, however, the Agency is unaware of any action by the FLRA certifying LIUNA National Guard Council Local 1776, or LIUNA as the labor organization with the exclusive recognition to represent New Mexico National Guard military technicians in accordance with 5 U.S.C. §7111.

Upon further legal review, the Agency has determined that only the FLRA has the legal authority to certify exclusive recognition of any labor organization to negotiate on behalf of the Agency's military technicians. Therefore, you and your organization lack 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. While the collective bargaining agreement (CBA) signed by LIUNA Local 1636 and the Agency on January 8, 2008 is now expired, it is the Agency's position that the January 8, 2008 agreement represents the last legally executed agreement between a labor organization recognized by the FLRA and the Agency. Therefore, the Agency's response references its terms and not those of the 2017 agreement.

This grievance is improper because it encroaches on inherent management rights pursuant to 5 U.S.C. §7106(a) and Article 5, Section 5.1, Management rights in the January 8, 2008 agreement. 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.

The grievance improperly names a class involving separate states and is therefore overbroad. This grievance names not only the Adjutant General for the New Mexico 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 January 8, 2008 CBA that LiUNA Local 1636 executed 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, breath, and veracity of your claims.

Because the notice was sent directly to the Adjutant General, and was not made by the local union president or vice-president, it does not comply with the requirements of the grievance process required in our local CBA (Article 9 Grievance Procedures). Therefore, the October 3, 2017 formal notice is invalid.

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 (NDAA) 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.

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.

Section §1084(a)(1) of the 2017 NDAA 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.

In the past, this agency has engaged in collective bargaining with LIUNA Local 1636 in accordance with federal law. It has not done so with LIUNA NGC Local 1776. Therefore, it is not clear whether LIUNA NGC Local 1776 has standing to file this grievance. This Agency does not have any information to suggest that LIUNA NGC Local 1776 has been certified by the FLRA or designated as LIUNA Local 1636's representative. Additionally, even if LIUNA NGC Local 1776 were properly designated as the LIUNA Local 1636'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, and to the best of the Agency's knowledge, your formal notice of filing a grievance fails to comply with federal law. 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 New Mexico National Guard, this Agency declines the Union's demands.

Respectfully,

Kenneth A. Nava

KENNETH A. NAVA
Major General, NMARNG
The Adjutant General