

November 8, 2017

Via Email

MG Jefferson S. Burton  
Adjutant General  
Utah National Guard  
Joint Forces Headquarters  
12953 Minuteman Dr.  
Draper, UT 84020-9286  
(801) 432-4400

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, 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 11-6, states in part that 'an informal meeting will be held between the Union official and the supervisor concerned.' For the reasons stated below, the Adjutant General is the supervisor concerned.

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 Utah, are considered the Agency Head of the Utah 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.*

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 1724 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, Article 4 of the Party's CBA requires that the Agency recognize Union Officers and Representatives, as follows (emphasis ours):

*4-1. The Union is the exclusive representative of the Employees in the bargaining unit and is entitled to act for these Employees.*

*4-2. The primary point of contact for Management is the President, Local 1724, or in his/her absence, a designated Representative. The Local President may authorize the NFFE National Office to act on its behalf in any dealings with Management.*

*4-3. The properly designated Officers or Representatives of NFFE, Local 1724, have the right to represent the Employees within the entire bargaining unit in the UTARNG.*

In addition to the above, your Agency has recognized the undersigned as a representative of bargaining unit employees in Utah 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 most recently negotiated CBA (currently at DCPAS pending approval), which shows the undersigned as a representative of the Union in Utah. 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 Utah bargaining unit. For you to allege otherwise would fly in the face of nearly seven (7) years of history between the parties.

2. Section 12-1 provides that the Union must notify the Agency of its intent to invoke arbitration within ten (10) working days of the Adjutant General's final decision. We're considering your November 2, 2017, reply as your final decision. We calculate the tenth (10<sup>th</sup>) working day as being November 16, 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](mailto:benbanchs@liuna-ngdc.org), or telephone at (985) 249-3707.

Respectfully,



Ben Banchs  
Business Manager  
LIUNA NGC Local 1776

cc:

Derek Washburn, Utah State Representative, LIUNA Local 1776  
Josh Klinger, Attorney, Minahan, Muther, and Klinger, PC





Gary R. Herbert  
Governor  
MG Jefferson S. Burton  
The Adjutant General

# State of Utah

## UTAH NATIONAL GUARD

12953 MINUTEMAN DRIVE  
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(801) 432-4400

2 November 2017

Mr. Bienvenido Banchs  
LIUNA National Guard Council Local 1776  
PO Box 1794, Abita Springs, LA 70420

**SUBJECT:** Utah Response to Grievance for failure to implement Section 1084 of the FY17 NDAA

Dear Mr. Banchs:

This letter is the formal reply of the Utah 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 per the local collective bargaining agreement between the Agency and LIUNA Local 1724 from 2009. 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 rights pursuant to 5 U.S.C. §7106(a) and 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 Utah 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, breath, 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.

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SUBJECT: Utah Response to Grievance for failure to implement Section 1084 of the FY17 NDAA

**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. Moreover, members who have so petitioned have had their positions converted in order to accommodate, or, as the case may be, to continue, their career progression. This demonstrates the Agency's good faith in implementing conversion.

**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 1724. 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 1724'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 Utah National Guard, this Agency declines the Union's demands.

NGUT-JAG

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### **ADDITIONAL INFORMATION**

This Agency receives its implementing guidance for strictly National Guard matters from the National Guard Bureau (NGB). The conversion of military technicians from Title 32 to Title 5 is such a matter requiring NGB implementing guidance. In order for an orderly transition of military technicians from Title 32 to Title 5, procedures must be put in place to guide the Agency in this process. As you are already aware, the Chief of the National Guard Bureau has drafted Chief National Guard Bureau Notice (CNGBN) 140X. This draft CNGBN is currently before your Union, along with the other 2 unions who represent military technicians, for review under your national consultation rights (NCR). However, it's my understanding your Union has requested additional time to review and comment on this document. This further delays the process of conversion. As you also know after the CNGBN is published, the Agency must give the Union the opportunity to negotiate the impact and implementation (I & I) of the CNGBN guidance, IAW 5 U.S.C. §7106(b)(2) and the CBA. To immediately convert individual military technicians from Title 32 to Title 5 without implementing guidance from NGB would be reckless on the part of the Agency. To file a grievance against this Agency before the procedures are in place for the conversion is premature and without merit.

The POC is the undersigned at 801.432.4438 or Phillip.e.lowry4.mil@mail.mil.

PHILLIP E. LOWRY  
MAJ, JA  
Deputy State Judge Advocate