

January 20, 2023

Brandon Bradley
Chief, Case Intake and Publication
Federal Labor Relations Authority
Docket Room
1400 K Street NW
Suite 200
Washington, DC 20424-0001.

Re: Miscellaneous and General Requirements, FLRA Docket No. 0-MC-33

Mr. Bradley,

The Freedom Foundation is a nonprofit organization organized under 26 U.S.C. § 501(c)(3). Founded in 1991 in Olympia, Wash., the organization's mission is to promote individual liberty, free enterprise and limited, accountable government through policy advocacy, public interest litigation, and public education.

In recent years, the Foundation has opened additional offices in Oregon, California, Ohio, Pennsylvania, and Texas, and devoted much of its attention to supporting reforms to make labor unions representing public employees more transparent and accountable to their members and taxpayers. As part of this effort, the Freedom Foundation seeks to educate union-represented public employees of their First Amendment right, as recognized by the U.S. Supreme Court in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018), to refrain from union membership and dues payment.

Unfortunately, the Freedom Foundation has learned through its interactions with millions of union-represented public employees around the country how many labor unions have implemented various schemes and policies arbitrarily limiting employees' ability to disassociate from their union. Freedom Foundation attorneys have represented countless public employees in litigation against their union and/or employer for violating their right to cancel unwanted dues deductions from their paychecks. Three such federal lawsuits are currently pending before the U.S. Supreme Court.¹

In light of the Freedom Foundation's extensive expertise on labor union operations and support for public employees' civil rights, the Freedom Foundation strongly opposes the Federal Labor Relations Authority's (FLRA) legally unsupported proposal to rescind *Office of Personnel Management (OPM)*, 71 FLRA 571 (2020), and to rescind or revise 5 CFR § 2429.19, adopted

¹ *Kristine Kurk v. Los Rios Classified Employees Association, et al.*, U.S. Sup. Ct. Docket No. 22-498.
Cindy Ellen Ochoa v. Public Consulting Group, Inc., et al., U.S. Sup. Ct. Docket No. 22-576.
Jodee Wright v. Service Employees International Union Local 503, et al., U.S. Sup. Ct. Docket No. 22-577.

by the FLRA in July 2020, and thereby arbitrarily and without justification restrict federal employees' right to stop the unwanted deduction of labor union dues from their pay.

The FLRA's notice of proposed rulemaking comes in response to a petition filed by the National Treasury Employees Union (NTEU) to amend 5 CFR § 2429.19.² The FLRA determined that the NTEU petition "raises several legal and policy reasons for rescinding the policy statement in *OPM*, which led to the promulgation of current § 2429.19, and for rescinding or amending § 2429.19 to return the Authority to its prior interpretation of Section 7115(a) of the Statute."

However, the NTEU's arguments, as adopted by the FLRA, are legally flawed and factually unsupported.

The Federal Service Labor Management Relations Statute permits federal employees to revoke their authorization for dues withholding after paying dues for one year.

The statute at issue, 5 U.S.C. § 7115(a), provides:

"If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment... Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year."

(Emphasis added).

The statute establishes a single, distinct period when an employee is prohibited from revoking a dues deduction authorization: the year after authorizing the deductions. As the statute is silent on any further restrictions, an employee may cancel dues deductions at any and all times other than the one-year period following their authorization.

As adopted by the FLRA in 2020, 5 CFR § 2429.19, reflects the plain language of the statute by explicitly stating its corollary, namely, that a federal employee may cancel dues deductions from their pay any time after having paid dues for one year:

"Consistent with the exceptions in 5 U.S.C. 7115(b), after the expiration of the one-year period during which an assignment may not be revoked under 5 U.S.C. 7115(a), an employee may initiate the revocation of a previously authorized assignment at any time that the employee chooses. After the expiration of the one-year period of irrevocability under 5 U.S.C. 7115(a), upon receiving an employee's request to revoke a previously authorized dues assignment, an agency must process the revocation request as soon as administratively feasible."

(Emphasis added).

² FLRA Case No. 0-MC-33.

In stark contrast to the statutory language, the FLRA now proposes to revise 5 CFR § 2429.19 to read, “Authorized dues assignments under 5 U.S.C. 7115(b) may be revoked only at intervals of one year.”

The FLRA’s proposed rule, however, converts the statute’s limited prohibition into a limited permission, establishing rare occasions when an employee may revoke their dues deduction authorization and prohibiting revocations at all other times. In short, the FLRA’s proposed regulation is the *opposite* of the statute it purports to construe.

In contravention of the statute’s plain text, NTEU contends that § 7115(a) actually only permits federal employees to revoke authorization for dues deductions during unspecified “one-year intervals.” In so doing, the NTEU urges a return to the FLRA’s interpretation of the statute first adopted in *U.S. Army, U.S. Army Materiel Development & Readiness Command, Warren, Michigan*, 7 F.L.R.A. 194 (1981).

In *U.S. Army*, the FLRA concluded that, “The language in Section 7115(A) that ‘any such assignment may not be revoked for a period of 1 year’ must be interpreted to mean that authorized dues allotments may be revoked only at intervals of 1 year.” To reach this conclusion, the FLRA rejected the view of § 7115(a) advocated by the respondent that relied on “the plain language of the statute” and instead examined the provision “in the context of relevant legislative history and federal labor relations policy.”

The FLRA noted: (1) that Executive Order 11491 permitted employees to revoke dues deduction authorizations at six-month intervals; (2) that the House version of the legislation that succeeded the executive order and established § 7115 was more favorable to unions and the Senate version less favorable; and (3) that the version of the legislation that emerged from the conference committee was a “compromise” that “intended to provide a more effective form of union security than previously existed, without going so far as to authorize an ‘agency shop.’”

By ignoring the statute’s plain language and turning first to an analysis of legislative history, the FLRA turned the principles of statutory interpretation on their head. When a statute’s meaning is clear, no further analysis is necessary, and a statute’s legislative history should not be used to needlessly complicate a clear law. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (“In statutory interpretation disputes, a court’s proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop. Even those of us who sometimes consult legislative history will never allow it to be used to ‘muddy’ the meaning of ‘clear statutory language.’”)

Yet this is precisely what the FLRA’s holding in *U.S. Army* did. Simply observing that legislative compromise occurred and resulted in a dues deduction system more favorable to unions than they had previously enjoyed does not allow the FLRA to substitute an interpretation of § 7115 that alters its plain meaning.

Further, nothing in the legislative history analysis directly addressed the issue at hand; the FLRA admitted that “the conference committee did not address the revocability of assignments of dues

allotments.”

The statute clearly and unambiguously provides that dues assignments “may not be revoked for a *period* of 1 year.” It does not state that assignments may not be revoked “only at intervals of 1 year.” The interpretation supported by NTEU that the FLRA proposes to adopt inappropriately rejects and alters the statute’s plain meaning.

While the FLRA has rulemaking authority, its regulations cannot contravene the plain meaning of a statute, and any regulation that does so is invalid. *See Eisenger v. Fed. Labor Relations Auth.*, 218 F.3d 1097, 1105-6 (9th Cir. 2000).

The NTEU also raised three arguments in its petition, adopted by the FLRA, that limiting federal employees’ ability to revoke dues deduction authorizations to “intervals of one year” would be good policy.

Given the incongruence of the FLRA’s proposed rule with 5 U.S.C. § 7115, the NTEU’s policy arguments are unavailing and simply not relevant. Legal considerations aside, however, the NTEU’s practical arguments are also unsound and unsupported by fact.

The FLRA’s proposal would not make the processing of dues revocation requests more efficient but would dramatically limit employees’ control over their paychecks.

The FLRA adopts NTEU’s contention that imposing annual revocation windows would “restore financial security and predictability for unions” because it would allow unions and agencies to efficiently “process revocations all at once,” rather than “one by [one] throughout the year,” and thereby allow unions to “know, with a reasonable degree of certainty, how much dues revenue will be available.”

That might be true if the revocation windows negotiated between unions and federal agencies were standardized and universally applicable to bargaining unit employees. Unfortunately, however, this is very often not the case.

The Freedom Foundation’s review of the dues revocation provisions in the 1,032 federal collective bargaining agreements included in the Office of Personnel Management’s collective bargaining agreement online database uncovered hundreds of contracts which create individualized dues revocation windows generally calculated based on the anniversary date of the employee’s dues deduction authorization.³

The following are just a few examples of the kinds of arbitrary revocation restrictions — ranging from 30 days per year to as few as one — common in federal collective bargaining agreements across agencies and unions:

³ Available online at: <https://www.opm.gov/policy-data-oversight/labor-management-relations/collective-bargaining-agreements/>

1. *Department of Agriculture, Agricultural Research Service, National Center for Agriculture Utilization Research, and American Federation of Government Employees (AFGE) Local 3247, Art. 27, Sec. 5:*

“An employee may cancel dues withholding once per year on their anniversary date by submitting the appropriate designated form to the Union.”⁴

2. *Department of Agriculture, Forest Service, National Forest of Mississippi, and AFGE Local 2543, Art. 33, Sec. 7(c):*

“Revocation by Employee: An SF-1188 may be filed by an employee with HRM during the thirty (30) calendar-day period beginning forty-five (45) days prior to the anniversary date of his/her first dues withholding and ending fifteen (15) days prior to the anniversary date.”⁵

3. *Department of Commerce, National Oceanic and Atmospheric Administration, National Climatic Data Center, Asheville, NC, and AFGE Local 446, Art. 40, Sec. 9:*

“A Union member may revoke his/her allotment for Union dues by submitting to the Union President a completed and signed Standard Form 1188 within ten (10) calendar days of their anniversary date maintained by the Union.”⁶

4. *Department of Health and Human Services, Centers for Medicare and Medicaid Services, National, and AFGE Local 1923, Art. 6, Sec. 2(e)(1):*

“Dues withholding may be revoked by submitting an SF-1188 or its equivalent within the 15-calendar day period prior to the anniversary date of signing the SF1187 or its equivalent.”⁷

5. *Department of Homeland Security, U.S. Coast Guard Aviation Logistics Center, Elizabeth City, NJ, and International Association of Machinists and Aerospace Workers Local 2203, Art. 36, Section 1(d):*

“Dues deductions which have been in effect for at least one (1) year may be terminated upon request of the employee during one (1) revocation period per year. The employee’s annual revocation period will be during the ten (10)

⁴ https://www.opm.gov/cba/api/documents/24a3a2d9-7e88-e911-9158-005056a577c8/attachments/1599_USDA%20ARS%20Peoria%20&%20AFGE%203247_03202024-redacted.pdf

⁵ https://www.opm.gov/cba/api/documents/23ee6c61-14bf-41fe-95ec-970ed65394df/attachments/2153_USDA%20FS%20Mississippi%20and%20AFGE%202543_CBA_09-06-2019.pdf

⁶ https://www.opm.gov/cba/api/documents/4107d1b1-4994-e911-915b-005056a577c8/attachments/2148_DOC%20NOAA%20NCDC_AFGE%20446_updated%20CBA_07312022-redacted.pdf

⁷ https://www.opm.gov/cba/api/documents/485d4ad3-15a4-e911-915b-005056a577c8/attachments/2268_HHS-CMS%20National%20&%20AFGE%201923_07102020-redacted.pdf

calendar day period (exclusive of shutdown days) preceding the anniversary date of the employee's signing up for dues withholding.”⁸

6. *Department of the Treasury, U.S. Mint, Philadelphia, PA, and the Fraternal Order of Police, Art. 9, Sec. 5:*

“The revocation period for each employee will be during the ten (10) day period immediately preceding, to include the anniversary date of the effective date of the employee's dues withholding election.”⁹

7. *Department of Transportation, FMCSA, and AFGE Local 3313, Art. 6, Sec. 6:*

“Union members who have authorized Union dues withholding may revoke their payroll deduction of dues once a year on the anniversary date of the first withholding by submitting Standard Form 1188 to the Labor and Employee Relations Division.”¹⁰

8. *Federal Trade Commission and AFGE Local 2211, Art. 16, Sec. 4:*

“A revocation shall be effective as of the first full pay period after the anniversary of the first deduction. To revoke an allotment, the employee shall submit an SF-1188 to the Union during the thirty (30) day period beginning forty-five (45) calendar days before the anniversary date and closing fifteen (15) calendar days before that anniversary date.”¹¹

9. *Small Business Administration and AFGE Local 228, Art. 41, Sec. 4:*

“The SHRO will terminate dues withholding allotment... When an employee files a written revocation of authorization, SF-1188, Cancellation of Payroll Deductions for Labor Organization Dues, with the SHRO during the fifteen (15) calendar day pay period ending on the anniversary of the completion of the authorization of the allotment, SF-1187; such revocation will be effective not earlier than twelve (12) months after the employee's allotment was begun.”¹²

⁸ https://www.opm.gov/cba/api/documents/dffdc4a1-779c-e911-915b-005056a577c8/attachments/3485_DHS%20USCG%20&%20IAMAW_CBA.pdf

⁹ https://www.opm.gov/cba/api/documents/0d3c0948-d1a4-e911-915b-005056a577c8/attachments/2376_Treasury%20Mint%20FOP_CBA%20updated_Redacted.pdf

¹⁰ <https://www.opm.gov/cba/api/documents/c4403be0-e798-433a-bd21-d33f1b1808ed/attachments/MLA-final-12-13-2013-508RedactedFINAL.pdf>

¹¹ https://www.opm.gov/cba/api/documents/c6d5af46-1599-e911-915b-005056a577c8/attachments/1204,1172,1126,1021,1253,1289_FTC%20&%20AFGE%202211_multiunit_03192022_Redacted.pdf

¹² <https://www.opm.gov/cba/api/documents/77d6df1f-78eb-49a0-955c-7c0347a78aa1/attachments/Small%20Business%20Administration%20Master%20Labor%20Agreement%202017-%20redacted.pdf>

10. Department of Justice, U.S. Marshals Service and AFGE Local 286, Art. 6, Sec. 12(a):

“Union members who have authorized Union dues withholding may revoke their payroll deduction of dues once a year on the anniversary date of the first withholding by submitting Standard Form 1188, ‘Cancellation of Payroll Deductions for Labor Union Dues’ to the USMS Office of Employee and Labor Relations.”¹³

11. Department of the Interior, U.S. Geological Survey, Great Lakes Science Center and AFGE Local 723, Art. 10, Sec. 4:

“UNION members who have authorized UNION dues withholding may revoke their payroll deduction of dues once a year on the anniversary date of the pay date of the first withholding by submitting a SF 1188.”¹⁴

12. Department of the Treasury, Bureau of Engraving and Printing, Washington D.C./Ft. Worth, TX, and National Treasury Employees Union Local 201, Art. 27, Sec. 4:

“The effective dates for actions under this Article are as follows... Revocation by employee: Beginning of the first pay period following the employee's anniversary date of payroll withholding of dues. In order to be effective at that time, the SF-1188 must be received by the Employer not more than 30 days prior to or on the anniversary date.”¹⁵

Because individual employees subject to restrictions such as these, and the many others like them, all have different window periods in which to revoke authorization for union dues deductions, these limitations do not produce the administrative efficiencies that may theoretically be had from annually processing a batch of revocations submitted during a standardized revocation window.

Under the FLRA’s proposed rule, such arbitrary limitations on federal employees’ rights would not just be permitted but, as past experience indicates, commonplace.

As Member Kiko pointed out in her dissent, 5 U.S.C. § 7115 “is designed *primarily for the benefit of employees, not unions.* *AFGE, Council 214, AFL-CIO v. FLRA*, 835 F.2d 1458, 1460-61 (D.C. Cir. 1987).” (Emphasis in original).

While the NTEU argues that repealing or revising 5 CFR § 2429.19 would “honor employee choice,” the reality is that it would continue the illegal practice of restricting federal employees’

¹³ https://www.opm.gov/cba/api/documents/ecd703f6-dba7-e911-915c-005056a577c8/attachments/1266_DOJ%20USMS%20&%20AFGE%202272_04232020-Redacted.pdf

¹⁴ https://www.opm.gov/cba/api/documents/6f146760-4894-e911-915b-005056a577c8/attachments/2564_DOI%20USGS%20Great%20Lakes%20&%20AFGE%20Local%20732_01262020.pdf

¹⁵ https://www.opm.gov/cba/api/documents/ad83de7a-bf8b-e911-9158-005056a577c8/attachments/1602_Treasury%20BEP%20&%20NTEU%20201_05012022.pdf

ability to end unwanted union dues deductions to annual periods as short as one day. While unions may appreciate and benefit from such restrictions, employees most certainly do not.

A one-month revocation period would be less harmful to employees, but still run afoul of § 7115.

Perhaps cognizant of just how draconian dues revocation restrictions can be, the FLRA notice solicits comments on whether to revise “§ 2429.19 to allow for an annual, one-month window period for revoking dues.”

Compared to the convoluted, individualized revocation windows that proliferate federal collective bargaining agreements, a universal, one-month revocation period would be less harmful to employees. However, even a standardized escape period would far exceed the limits tolerated by 5 U.S.C. § 7115(a).

Conclusion

Both legal and practical considerations demand that the FLRA abandon its proposal to arbitrarily burden federal employees’ right to revoke authorization for union dues deductions from their paychecks after one year and leave both *OPM* and 5 CFR § 2429.19 undisturbed.

Respectfully,



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