January 20, 2023

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

RE: Comments on Federal Labor Relations Authority Docket Number 0-MC-33, regarding 5 C.F.R. Part 2429, "Miscellaneous and General Requirements" as it pertains to the revocation of assignments of payroll deductions for union dues, and a related policy statement.

Dear Mr. Bradley:

On behalf of the Goldwater Institute, I am submitting comments regarding the Federal Labor Relations Authority's ("FLRA") proposed rulemaking in Case Number 0-MC-033, a Notice of which was published in the Federal Register on December 21, 2022.[1] The proposal significantly—and unconstitutionally—restricts when federal employees may disassociate from a union and revoke their assignment of payroll deductions for union dues. Such restrictions are inconsistent with the underlying statutes and would violate the First Amendment as explained by the U.S. Supreme Court in its landmark *Janus v. AFSCME*, 138 S. Ct. 2448, 2459–60 (2018) decision.

Founded in 1988 in Arizona with Senator Barry Goldwater's blessing, the Institute is a nonprofit free-market public policy, research, and public interest litigation organization dedicated to advancing the principles of limited government, economic freedom, and individual liberty. We're committed to empowering all Americans to live freer, happier lives by working in federal and state courts, legislatures, and communities nationwide to advance, defend, and strengthen the freedom guaranteed by the constitutions of the United States and the fifty states.

The Goldwater Institute participated in the *Janus* case as *amicus curiae*.[2] It also litigates post-*Janus* free expression and associational rights cases, and it advocates nationwide for policies that respect American workers' fundamental rights to associate—or not associate—with

[1] 87 Fed. Reg. 78,014 (Dec. 21, 2022).
[2] Brief Amicus Curiae of Pacific Legal Foundation, et al., *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466), 2017 WL 6033572.

whatever private organizations they choose.[3] The FLRA's proposal would impermissibly curtail those rights and should be rejected.

FLRA's Proposed Amendment Is Inconsistent with the Underlying Federal Statutes

5 U.S.C. § 7115(a) states that, with limited exceptions, "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 . . . may not be revoked for ***a period*** **of 1 year**" (emphasis added).[4]

The FLRA's current Notice proposes to either amend or rescind 5 C.F.R. § 2429.19 "Revocation of assignments,"[5] as well as rescind a related policy statement in *Office of Personnel Management (OPM)*, 71 FLRA 571 (2020) (Member Abbot concurring; then-Member DuBester dissenting). The current regulation and policy interpret 5 U.S.C. § 7115(a)'s command that an assignment of union dues payroll deductions "may not be revoked for a period of 1 year" as meaning exactly what it states: that once an employee joins a union and authorizes payroll deductions for union dues, that authorization cannot be cancelled for *one* year.

Now, the National Treasury Employees Union ("NTEU") seeks to convince the agency to ignore the plain meaning of this statute and revert to a prior erroneous interpretation that creates a recurring annual interval in which dues deduction assignments cannot be revoked. Such an interpretation would allow unions to trap employees and siphon away dues from their paychecks for up to a year after an employee disassociates from the union, regardless of how many years have passed since they initially joined.

Although pre-*Janus* FLRA decisions cite congressional history and a prior practice of utilizing six-month intervals, *see U.S. Army, U.S. Army Materiel Development and Readiness Command, Warren, Michigan (Army)*, 7 FLRA 194 (1981), *recons. denied*, 8 FLRA 806 (1982), the word "interval" occurs nowhere in the statute. Nor does any indication that the one-year period should recur at all, let alone indefinitely.[6] The singular article "a," the singular noun

[3] *See, e.g.*, Timothy Sandefur, *Goldwater's Janus Follow-Up Case Goes to Court*, In Defense of Liberty Blog (June 6, 2019), https://www.goldwaterinstitute.org/goldwaters-janus-follow-up-case-goes-to-court/.

[4] *Compare* 29 U.S.C. § 186(a)(2), (c)(4) (limiting irrevocability of dues-checkoff authorizations for workers "employed in an industry affecting commerce" to a period of no more than one year or until the applicable collective bargaining agreement terminates, "whichever occurs sooner"). *See also Int'l Ass'n of Machinists Dist. 10 v. Allen*, 904 F.3d 490, 492–93 (7th Cir. 2018) (citing *Sea Pak v. Indus., Tech. & Pro. Emps., Div. of Nat'l Maritime Union*, 400 U.S. 985 (1971) (mem.)) (affirming preemption of state-imposed 30-day period).

[5] The regulation provides:

> 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.

[6] Indeed, in light of the Supreme Court's decision in *Janus*, the constitutionality of *any* period of time in which union dues cannot be revoked is highly questionable.

"period," the singular number "1," and the singular noun "year" all point to the conclusion that the initial restriction spoken of is, well, singular.

If Congress wanted the statute to create recurring intervals, it could have easily omitted the article and used the plural "*periods* of 1 year," or similar phrasing. It did not. Because "the statute is clear and unambiguous[,] 'that is the end of the matter; for … court[s], as well as the agency, must give effect to the unambiguously *expressed* intent of Congress.'" *Am. Fed'n of Gov't Emps., Council 214 v. Fed. Labor Rels. Auth.*, 835 F.2d 1458, 1460 (D.C. Cir. 1987) (emphasis added) (quoting *Bd. of Governors of the Fed. Rsrv. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986)); *see also Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

Moreover, an overly expansive reading of the blackout period in 5 U.S.C. § 7115(a) would contradict a related statute, 5 U.S.C. § 7102, which provides that "[e]ach employee shall have the right to form, join, or assist any labor organization, *or to refrain from any such activity, freely and without fear of penalty or reprisal,* and each employee shall be protected in the exercise of such right" (emphasis added). Locking an employee into a union for months after they decide to leave and deducting dues from their paycheck after consent to do so has been revoked is not compatible with the phrase "freely and without fear of penalty or reprisal." Just as employees may "form, join, or assist" the union at will and without repercussion, they must also be allowed to "refrain from any such activity" with the same expectation and protections—even if they engaged in union activity previously.

The FLRA Proposed Rule Would Unconstitutionally Abridge Federal Employees' Associational Rights as Explained in *Janus*

Restricting when an employee may terminate their union membership and rescind authorization for union dues deductions also violates key constitutional protections prohibiting such practices.

As you are likely aware, the U.S. Supreme Court in *Janus*, held that compelling public employees to subsidize a union violates the First Amendment. The Court observed that, "[t]he **right to eschew association** for expressive purposes is … protected." 138 S. Ct. at 2463 (emphasis added) (citing *Roberts v. U.S. Jaycees*, 468 U. S. 609, 623 (1984) ("Freedom of association … plainly presupposes a **freedom not to associate**.") (emphasis added), and *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U. S. 1, 12 (1986) (plurality opinion) ("[F]orced associations that burden protected speech are impermissible.")). Thus, the Court held that, "[n]either an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, *unless the employee* ***affirmatively consents*** *to pay*." *Janus*, 138 S. Ct. at 2486 (emphasis added). Such consent must be proven by "clear and compelling evidence." *Id.* (citation and internal quotation marks omitted).

The FLRA's proposal to rescind or amend its current applicable rule and policy would allow public-sector unions to force federal employees to remain union members and pay for

union dues through payroll deductions *even after they have revoked their consent*. This is not only wrong, unfair, and predatory—it is also unconstitutional. Once an employee expresses a desire to disassociate from a union, any subsequent dues deductions constitute compelled association and compelled subsidization of union speech in violation of the First Amendment.

Amending the rule to insert a recurring one-year restriction on the revocation of dues deduction assignments, imposing opt-out windows, or rescinding the rule and policy in their entirety to clear the way for unions to adopt such practices would each violate the Court's command in *Janus* that an employee must affirmatively consent to pay union dues, because any stated desire to *not* pay dues is, by definition, not affirmative consent. Instead, the FLRA should allow federal employees to freely and immediately revoke the assignment of union due payroll deductions once they sever ties with a labor organization and notify their employing agency—just as allowed under 5 C.F.R. § 2429.19 and current FLRA policy.[7]

The agency has not shown that its proposed amendments advance any compelling government interest, nor has it shown how the proposed amendments adequately protect workers' constitutional rights.

Conclusion

For the reasons set forth above, the Goldwater Institute respectfully requests that the FLRA abandon its proposed rulemaking. Amending or rescinding the rule and related policy to create recurring annual intervals in which federal employees cannot cancel their union membership and revoke their authorization of payroll deductions for union dues would contradict the underlying federal statutes and violate the First Amendment.

Thank you for your consideration of these comments. Please contact me if you have any questions or if I can provide you with additional information.

Sincerely,

Parker Jackson
Staff Attorney
Goldwater Institute

[7] *Council 214* is not to the contrary. 835 F.2d at 1460–61 ("The statute [5 U.S.C. § 7115(a)] clearly was designed for the primary benefit and convenience of *the employee*. The employee has the *right* to decide whether to opt for withholding *and to control the disposition of the funds so withheld* … and the withholding employer acts *solely* as the *employee's* agent." (emphasis added)).