NTEU
National Treasury Employees Union

August 8, 2019

VIA EMAIL (FedRegComments@flra.gov)

Emily Sloop
Chief, Case Intake and Publication
Federal Labor Relations Authority
Docket Room, Suite 200
1400 K Street NW
Washington, D.C. 20424-0001

RE: Office of Personnel Management (Petitioner), Case No. 0-PS-34

Dear Ms. Sloop:

The National Treasury Employees Union (NTEU) submits these comments in response to the Authority's Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Revoking Union-Dues Assignments, 84 Fed. Reg. 33,175 (July 12, 2019). The notice describes a request from the Office of Personnel Management (OPM), asking the Authority to overturn decades of precedent interpreting 5 U.S.C. § 7115(a). OPM would have the Authority re-interpret the statute as requiring an agency to process a

dues revocation request as soon as administratively feasible after an employee's initial year of union membership.

As explained more fully below, OPM's reliance on Janus v. AFSCME, 138 S. Ct. 2448 (2018), to support its request is completely baseless.[1] Simply put, Janus, a case concerning the rights of nonmembers, has no application to federal-sector union members. It provides no basis for the Authority to disturb its longstanding ruling that § 7115 "must be interpreted to mean that authorized dues allotments may be revoked only at intervals of 1 year." U.S. Army Materiel Dev. and Readiness Command, Warren, Mich., 7 F.L.R.A. 194, 199 (1981).

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[1] Specifically, OPM asked the Authority to issue a general statement of policy or guidance holding,

1. The constitutional principles clarified in Janus have general applicability to agencies and labor organizations in the area of federal employees' requests to revoke union-dues assignments under Section 7115(a) of the Statute; and

2. Consistent with Janus, upon receiving an employee's request to revoke a previously authorized union-dues assignment, an agency should process the request as soon as administratively feasible, if at least one year has passed since the employee initially authorized union-dues assignment from the employee's pay.

84 Fed. Reg. 33,175.

Further, the policy statement that OPM seeks would undermine unions and cause chaos for parties to collective-bargaining agreements negotiated in reliance on the Authority's well-settled precedent. For these reasons and others explained below, the Authority should deny OPM's request.

I. OPM's Reliance on Janus Is Unfounded.

OPM asks the Authority to jettison 40 years of precedent based on the Supreme Court's interpretation of the First Amendment in Janus. Janus, however, does not support this about-face.

A. Janus Has No Application to Union Members, Including Those Who Pay Dues Under § 7115(a).

The Court in Janus was confronted with a single question concerning the right of nonmembers to be free of compulsory payments to unions. Because no such payments are possible in the federal sector, Janus has no application whatsoever to the relationship of dues-paying members to their unions.

In Janus, the Court was asked to decide the validity of an Illinois law requiring a nonmember to pay "agency fees" to a union. The Court found this requirement wanting under the First Amendment because it

constituted "compelled subsidization" of the union's "private speech." 138 S. Ct. at 2464. The fees were "compelled" because they were "automatically deducted from nonmembers' wages," and "[n]o form of employee consent [was] required." Id. at 2486. "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages," the Court held; "nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." Id. at 2486 (emphasis added).

This holding, by its plain terms, applies only to nonmembers. OPM thus makes a drastic, unsupported leap when it asserts that "[t]he same constitutionally protected rights that applied to the nonmember employees in Janus would attach" to union members who authorized dues assignments. Memorandum from Mark A. Robbins, General Counsel, Office of Personnel Management, to Emily Sloop, Chief of Case Intake and Publication, Federal Labor Relations Authority (March 19, 2019), at 2.[2] OPM can provide no authority supporting this assertion because there is none. Courts encountering Janus-based challenges to

[2] OPM's full Request for General Statement of Policy or Guidance is included as an attachment to these comments.

union members' dues-withholding agreements have recognized that "the relationship between unions and their voluntary members was not at issue in Janus." Cooley v. Cal. Statewide Law Enf't Ass'n, 18-cv-02961-JAM-AC, 2019 U.S. Dist. LEXIS 12545, at *7 (E.D. Cal. Jan. 25, 2019). In other words, "Janus says nothing about people who join a Union, agree to pay dues, and then later change their mind about paying union dues." Belgau v. Inslee, No. 18-cv-5620-RJB, 2018 U.S. Dist. LEXIS 175543 (W.D. Wash. Oct. 11, 2018). Smith v. Bieker, No. 18-cv-05472-VC, 2019 U.S. Dist. LEXIS 99581, at *4 (N.D. Cal. June 13, 2019) ("Smith contends that Janus entitles him to elect to stop paying dues to the union at the drop of a hat. But Janus did not concern the relationship of unions and members; it concerned the relationship of unions and non-members.").

B. Even if Janus Applies, the Existing Dues-Withholding Regime Is Valid.

Even if Janus applies to dues-paying union members, which it does not, the existing dues-withholding regime comports fully with the standard set out in the decision for evaluating claims by nonmembers. The Court recognized that even nonmembers may waive their First

Amendment right to be free from compelled subsidies to a union by "affirmatively consent[ing] to pay." Janus, 138 S. Ct. at 2486.

Under the plain text of § 7115(a), an employee must provide "a written assignment which authorizes the agency" to withhold dues. In practice, employees provide such authorization by signing a Standard Form 1187. On that form, employees affirmatively consent to pay dues for one-year periods. The SF-1187 provides clear notice to those who are asked to sign it (a) that "completing this form is voluntary," and (b) that if they sign but later wish to cancel the dues deductions, "such cancellation will not become effective . . . until the first full pay period which begins on or after the next established cancellation date of the calendar year after the cancellation is received in the payroll office." OPM Standard Form 1187. This language is not hidden in fine print; like other public-sector dues-withholding agreements that courts have found enforceable despite First Amendment challenges, the SF-1187 is a "simple one-page form, well within the ken of unrepresented or lay parties." Fisk v. Inslee, 759 Fed. Appx. 632, 634 (9th Cir. Jan. 9, 2019).

Members who sign the SF-1187 not only give "affirmative consent," but they do so under circumstances where it is clear that their

consent to provide financial support to the union for intervals of one year is "freely given." Janus, 138 S. Ct. at 2486. Employees are in no way compelled to sign an SF-1187, as the form itself states on its face. See supra. Indeed, many employees choose not to sign it, opting either to pay dues with cash, credit card, or check, or to forego union membership entirely.

Not only does OPM ask the Authority to distort Janus beyond recognition, but it neglects to recognize this fundamental component of the federal dues-withholding system. By omitting any mention of the fact that, by executing an SF-1187, employees consent to having dues withheld from their paychecks and agree to one-year revocation intervals, OPM overlooks the obvious answer to its own misguided question. That is, even if there were a reason to apply Janus, the federal-sector system includes the consent that the Court found missing in the Illinois statute. NTEU commends the Authority for its decision to solicit comments and not limit submissions on this topic to the misleading analysis provided by OPM.

C. Janus Does Not Give Union Members a Right to Renege on Their Contractual Promises to Pay Dues for One-Year Periods.

Section 7115 is not the first statute under which Congress provided for and regulated the payment of union dues by payroll deduction from employees who authorize such deductions. To the contrary, in the private sector, by enacting Section 302(c)(4) of the Labor Management Relations Act of 1947, Congress had earlier established a quite similar regulatory framework governing the deduction of union dues. Section 302(c)(4) provides that unions may collect dues via payroll deduction from those employees who tender to their employer a "written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner." 29 U.S.C. § 186(c)(4). In 1970, Congress adopted a similar regime applicable to Postal Service employees. See 39 U.S.C. § 1205 (providing for payroll deduction of dues for Postal Service employees "if the . . . Postal Service has received from each employee . . . a written assignment which shall be irrevocable for a period of not more than one year").

Notably, the courts have held that employee dues assignments made pursuant to these provisions—assignments no different in nature from the assignments that federal employees make when they submit an SF-1187—are binding contracts and must be analyzed as such. For example, the Seventh Circuit held just last year that under Section 302(c)(4), "[d]ues-checkoff authorizations are optional payroll deduction contracts between employers and individual employees, similar to health insurance premium payroll deductions or retirement savings arrangements." Int'l Ass'n of Machinists Dist. 10 v. Allen, 904 F.3d 490, 506 (7th Cir. 2018).

The Ninth and Sixth Circuits have said the same thing about dues assignments made by union members working for the Postal Service. See N.L.R.B. v. U.S. Postal Serv., 827 F.2d 548, 554 (9th Cir. 1987) (stating that a "dues-checkoff authorization is a contract" and holding that "[a] party's duty to perform even a wholly executory contract is not excused merely because he decides that he no longer wants the consideration for which he has bargained"); N.L.R.B. v. U.S. Postal Serv., 833 F.2d 1195, 1200 (6th Cir. 1987) (same). See also Burse v. Penn. Labor Relations Bd., 425 A.2d 1182, 1184 (Pa. Commw. Ct. 1981)

(describing "dues deduction agreement[]" as "a simple contract" in applying a state public-sector labor-relations statute).

Once it is understood that the SF-1187 is a contract that contains a voluntary promise by the employee to pay dues for the stated period, it follows that there is no First Amendment obstacle to enforcing the promise according to its terms. The Supreme Court has held that "the First Amendment does not confer . . . a constitutional right to disregard promises that would otherwise be enforced" under contract law or promissory estoppel. Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991). Janus did not overrule Cohen. Thus, an employee has no First Amendment right to renege on a promise, entered into by signing an SF-1187, to have union dues deducted from his pay until at least the next one-year interval.

The promise a federal-sector union member makes in signing the SF-1187 is supported by valuable consideration in that it both eliminates the inconvenience of having to write frequent checks to stay current with the member's financial obligations to the union and allows a member who otherwise would have to pay dues in annual or quarterly sums to make smaller, biweekly installment payments. And the

promise is enforceable not only for this reason, but for the independent reason that it induces reliance: the union bases its budgeting and planning decisions on the premise that members who signed up for payroll deduction will, as promised, continue paying through the next established annual cancellation date.

Relying on these principles, courts have unanimously and summarily rejected First Amendment challenges to similar dues-withholding arrangements for employees of state governments. See generally Cooley, 2019 U.S. Dist. LEXIS 12545; Smith, 2018 U.S. Dist. LEXIS 196089; Belgau, 2018 U.S. Dist. LEXIS 175543; Fisk v. Inslee, No. 16-cv-5889-RBL, 2017 U.S. Dist. LEXIS 170910 (W.D. Wash. Oct. 16, 2017), aff'd 759 Fed. Appx. 632 (9th Cir. Jan. 9, 2019). As one court explained:

> [O]nce [a public employee] joins [the union] voluntarily, in writing, she has the obligation to perform the terms of her agreement. The freedom of speech and the freedom of association do not trump the obligations and promises voluntarily and knowingly assumed. The other party to that contract has every reason to depend on those promises for the purpose of planning and budgeting resources. The Constitution says nothing affirmative about reneging legal and lawful responsibilities freely undertaken.

Fisk, 2017 U.S. Dist. LEXIS 170910, at *15.[3]

Just like the Janus-based challenges to dues-withholding arrangements in Cooley, Smith, Belgau, and Fisk, a Janus-based interpretation of § 7115(a) is destined for defeat in court. A policy statement grounded on Janus is an interpretation of the First Amendment, not § 7115(a). And although a court owes deference to the FLRA's interpretation of its organic statute, a court "owes no deference to the agency's pronouncement on a constitutional question." J.J. Cassone Bakery, Inc. v. NLRB, 554 F.3d 1041, 1044 (D.C. Cir. 2009). See also Negusie v. Holder, 555 U.S. 511, 516, 521-24 (2009) (declining to defer to agency interpretation of the statute it administers and

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[3] Courts have also found Janus inapposite to union members' contractual obligation to pay dues when denying claims by employees who resigned from union membership after Janus was decided to recover their previously paid dues. Crockett v. NEA-Alaska, 367 F. Supp. 3d 996, 1008 (D. Alaska 2019) (reasoning that plaintiffs' "voluntary choice" to pay union dues "precludes an argument that they were compelled to subsidize the Union Defendants' private speech"); Babb v. California Teachers Ass'n, No. 8:18-cv-00994-JLS-DFM, 2019 U.S. Dist. LEXIS 79812, at *33 (C.D. Cal. May 8, 2019) (observing that plaintiffs "voluntarily chose to pay membership dues in exchange for certain benefits"); Bermudez v. SEIU Local 521, 18-cv-04312-VC, 2019 U.S. Dist. LEXIS 65182, at *3 (N.D. Cal. Apr. 16, 2019) ("[T]he decision to pay dues was not coerced and payment was a valid contractual term.").

remanding for reconsideration because agency erroneously believed its interpretation was compelled by a Supreme Court decision). A court similarly "owe[s] no deference to the FLRA's statutory interpretation where it has endeavored to 'reconcile its organic statute'" with another authority "not within its area of expertise." Dep't of Air Force v. FLRA, 648 F.3d 841, 846 (D.C. Cir. 2011).

Surely, then, a reviewing court would owe no deference to the FLRA's interpretation of Janus or the First Amendment. And, for the reasons described above, a court would be certain to reject, as patently unreasonable, the Authority's misguided adoption of OPM's Janus-based interpretation of § 7115(a).

II. The FLRA Should Continue to Apply Its Precedent on § 7115(a) Because That Precedent Is Well Founded.

The only basis that OPM provides for its request for the Authority to upend its longstanding precedent on § 7115(a) is Janus. We established in section I that Janus is inapposite, and for that reason alone, the Authority should reject OPM's request. For the sake of completeness, NTEU also explains why, Janus aside, the Authority's longstanding interpretation of § 7115(a) should remain undisturbed.

Section 7115(a) provides that an agency "shall honor" a written assignment from an employee authorizing the agency to deduct union dues from the employee's pay and must make the deduction "pursuant to" the assignment's terms. It further provides that "any such assignment may not be revoked for a period of 1 year." For 40 years, the Authority, and the Civil Service Commission before it, concluded that this revocation provision "must be interpreted to mean that authorized dues allotments may be revoked only at intervals of 1 year." U.S. Army, 7 F.L.R.A. at 199; see also id. at 199 n.16 (quoting Civil Service Commission Bulletin 711-48, Special Bulletin #10, Guidance to Agencies on Actions to Be Taken on or Before January 11, 1979, Regarding Labor Relations Provisions in the Civil Service Reform Act, at 4 (Dec. 28, 1978)).

OPM now urges the Authority to attribute an entirely different meaning to § 7115(a). But the Authority in 1981 specifically rejected the interpretation that OPM now proposes. And the Authority has reaffirmed its 1981 decision time and again when addressing disputes over applications of dues-withholding contract provisions. See, e.g., United Power Trades Org., 62 F.L.R.A. 493, 495 (2008); AFGE, AFL-

CIO, 51 F.L.R.A. 1427, 1433 n.5 (1996); NAGE, SEIU, AFL-CIO, 40 F.L.R.A. 657, 688 (1991); AFGE, AFL-CIO, Dep't of Educ. Council of AFGE Locals, 34 F.L.R.A. 1078, 1081 (1990); Dep't of Navy, Portsmouth Naval Shipyard, Portsmouth, N.H., 19 F.L.R.A. 586, 589 (1991); Veterans Admin. Lakeside Med. Ctr., Chicago, Ill., 12 F.L.R.A. 244, 246 (1983); Dep't of Health & Human Servs., Soc. Sec. Admin., Office of Program Serv. Ctrs. & Ne. Program Serv. Ctr., 11 F.L.R.A. 618, 620 (1983); Dep't of Health & Human Servs., Bur. of Field Ops. (New York, N.Y.), 11 F.L.R.A. 600, 602 (1983). The U.S. Court of Appeals for the Fourth Circuit has also recognized the Authority's interpretation of § 7115(a). NTEU v. FLRA, 647 F.3d 514, 518 (4th Cir. 2011) ("[N]egotiated procedures may not infringe on the employees' right to 'remain free to revoke their dues authorizations at annual intervals.'").

The Authority arrived at this decades-held interpretation after a careful examination of the Statute and § 7115(a)'s legislative history. It observed that under Executive Order 11491, which governed dues allotments before the Statute's enactment, employees could revoke their authorization for dues allotments at six-month intervals. U.S. Army, 7 F.L.R.A. at 196 (quoting Exec. Order No. 11491 sec. 21, 34 Fed. Reg.

17605, 17614 (1969)). It also observed that the House Committee described the bill provision that became § 7115(a) as "a compromise between two sharply contrasting positions which the committee considered: no guarantee of withholding for any unit employee and mandatory payment by all unit employees ('agency shop')." U.S. Army, 7 F.L.R.A. at 197 (quoting Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Congress, 1st Session, Committee Print No. 96-7 (November 19, 1979), at 694).

"[T]o provide a more effective form of union security than previously existed, without going so far as to authorize an 'agency shop,'" the Authority concluded that "Congress intended in section 7115(a) of the Statute to maintain the procedure for revocation of assignments set forth in the Executive Order (i.e., only upon stated intervals of time), and to expand that interval under the Statute to a period of one year." Id. at 198-99.

OPM's proposed policy statement would scrap this sensible and repeatedly upheld understanding of Congress's intent in § 7115(a). Even if § 7115(a)'s language is read in isolation, without the

illumination provided by legislative history, it by no means supports OPM's proposed interpretation. To the contrary, it supports the Authority's longstanding interpretation. Section 7115(a) says that the terms of a written dues assignment must be "honored" by the government, except that the assignment "may not be revoked for a period of 1 year." Section 7115 does not remotely state that the government must dishonor the terms of a dues assignment like the SF-1187 that, while allowing the employee to revoke every year at a given cancellation date, also provides for automatic renewal for one-year intervals if the employee chooses not to revoke by the cancellation date. As explained above, that type of voluntary assignment had long been enforced without controversy both in the federal sector under the previous executive order and in the private sector under the LMRA. And, OPM offers no reason, apart from its mistaken reading of Janus, as to why the Authority should adopt the novel theory that § 7115 inexplicably imposed on the government a duty to dishonor that type of voluntary assignment.

In sum, the Authority should not accept OPM's invitation to abandon decades of well-settled precedent in favor of OPM's novel view of the statute, which lacks both textual and legislative-history support.

III. Under the Standards Set Forth in 5 C.F.R. § 2427.5, the Authority Should Not Issue the General Statement of Policy or Guidance Requested by OPM.

We have shown that OPM's request is founded on a misstatement of Janus and a distortion of § 7115(a). As such, OPM's request is not worthy of the Authority's consideration. If any additional reasons are needed to reject OPM's request, they can be found in 5 C.F.R. § 2427.5, which sets forth the standards governing the Authority's deliberations in this matter. Five out of six of those standards strongly weigh against issuing the statement requested by OPM.

A. Under § 2427.5(a), the Question Presented Can More Appropriately Be Resolved by Other Means.

The first standard that the Authority must consider in deciding whether to issue a general statement of policy or guidance is "[w]hether the question presented can more appropriately be resolved by other means." 5 C.F.R. § 2427.5(a). The question presented here is whether the Supreme Court's decision in Janus requires a re-interpretation of 5

U.S.C. § 7115(a) to allow federal-sector union members to revoke their authorization for dues allotments any time after the first year. This question can more appropriately be resolved in a concrete dispute between a union and an agency, if or when one arises.

To date, NTEU has encountered no dispute with any agency counterpart over the application of Janus to § 7115(a). Unless or until any concrete dispute that raises this question materializes, there is no indication that the labor-management community needs the Authority's guidance on the question at all. By ignoring OPM's misleading request, the Authority can devote its resources to matters more deserving of its attention.

B. Under § 2427.5(b), an Authority Statement Would Not Prevent the Proliferation of Cases Involving the Same or a Similar Question.

The Authority must also consider whether a policy statement "would prevent the proliferation of cases involving the same or similar question." 5 C.F.R. § 2427.5(b). Because it would generate countless unfair-labor-practice proceedings and negotiability appeals, the issuance of a policy statement re-interpreting § 7115(a) would

encourage, not prevent, the proliferation of cases involving the statute's meaning.

While NTEU is aware of no concrete controversies involving this question, the issuance of the guidance sought by OPM is certain to prompt many disputes over the enforceability of existing contract provisions that were negotiated in reliance with the Authority's longstanding interpretation of § 7115(a). All of NTEU's 26 collective-bargaining agreements contain such provisions. NTEU's contract with the IRS, for example, provides that "[r]evocation notices for employees who have had dues allotments in effect for more than one (1) year must be submitted to the payroll office during USDA pay period fifteen (15) each year," and "[r]evocations will become effective during USDA pay period eighteen (18)." NTEU's contract with the Federal Election Commission contains another example. It provides that "[r]evocations are processed once a year, effective the first pay period after September 1st."

Because contract provisions that are inconsistent with law are unenforceable, see U.S. Dep't of Def. Educ. Activity, Arlington, Va., 56 F.L.R.A. 119, 121-22 (2000) (involving a provision inconsistent with the

Statute and the Appropriations Clause of the Constitution), the issuance of a new interpretation § 7115(a) would provide a basis for agencies to attempt to repudiate existing contract provisions that conflict with the new interpretation immediately. Because bargaining proposals that are inconsistent with law are non-negotiable, see 5 U.S.C. § 7117(a)(1), the issuance of a new interpretation § 7115(a) would also provide a basis for agencies to refuse to bargain over these provisions during future negotiations. In response to these agency actions, unions are sure to have to initiate unfair-labor-practice proceedings and negotiability appeals involving the interpretation of § 7115(a). This flood of litigation can easily be avoided if the Authority declines to issue guidance giving unwarranted credence to a meritless request.

C. Under § 2427.5(d) and (e), the Question Presented Here Does Not Confront Parties in Labor-Management Relationships Currently, Nor Was It Presented by Parties Jointly.

Two additional standards that the Authority is required to consider are "[w]hether the question currently confronts parties in the context of a labor-management relationship" and "[w]hether the question is presented jointly by the parties involved." 5 C.F.R. §

2427.5(d), (e). The answer to both questions is no: OPM alone presented this question to the Authority, without any evidence that it confronts any party to a collective bargaining agreement. Thus, these standards strongly weigh against issuing a general statement of policy or guidance on the question.

D. Under § 2427.5(f), the Issuance of a Policy Statement Would Not Promote Constructive and Cooperative Labor-Management Relationships, Nor Would It Promote the Purposes of the Statute.

1. The fifth standard that militates against issuing a general statement of policy or guidance here is "[w]hether the issuance . . . would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the Federal Service Labor-Management Relations Statute." 5 C.F.R. § 2427.5(f). As noted above, a re-interpretation of § 7115(a) would instigate the attempted repudiation of contract provisions and trigger declarations of non-negotiability. Thus, it would not "promote constructive and cooperative labor-management relationships." It would instead engender conflict and instability in those relationships.

2. Because this instability would undoubtedly diminish the stature of unions in the federal labor-management relations scheme, a policy statement like the one OPM proposes would thwart the purposes of the Statute. As the Supreme Court has observed, "[i]n passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest than it had been under the Executive Order regime." Bureau of Alcohol, Tobacco, & Firearms v. FLRA, 464 U.S. 89, 107 (1983) (BATF). The Court reached this conclusion based in part on § 7101 of the Statute, in which, under the heading "findings and purpose," Congress declared that "labor organizations and collective bargaining in the civil service are in the public interest." BATF, 464 U.S. at 92 (quoting 5 U.S.C. § 7101(a)). The D.C. Circuit has also highlighted Congress's elevation of unions in § 7101. AFGE v. FLRA, 785 F.2d 333, 338 (D.C. Cir. 1986). It specifically warned the Authority that the pronouncements in § 7101 "constitute the 'public policy of the statute' which [C]ongress expected the [A]uthority to vindicate." Id.

Contrary to these statutory policies, an Authority policy statement re-interpreting § 7115(a) would strip unions of a valued statutory right and handicap them in the bargaining process. The issuance of OPM's proposed policy statement would eradicate a statutory right by renouncing the interpretation of § 7115(a) embodied in Authority precedent. The Authority's settled case law assured unions of some reasonable degree of financial security and predictability in the form of dues allotment revocations at annual intervals only. The issuance of the proposed policy statement would render non-negotiable unions' dues proposals derived from longstanding Authority precedent on § 7115(a). It would thus obstruct unions' achievement of workable dues-allotment provisions.[4]

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[4] In addition to flouting Congress's recognition in § 7101 that "labor organizations and collective bargaining in the civil service are in the public interest," OPM's proposed policy statement would contravene Congress's other declaration in § 7101 that the Statute "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." Indeed, re-interpreting § 7115(a) to require agencies to process dues revocations individually whenever they are submitted, instead of processing all revocations together during one designated period per year, would make agencies' handling of dues allotments much less efficient.

3. A policy statement re-interpreting § 7115(a) would, contrary to the Statute's aims, further injure unions by overburdening their day-to-day affairs. It would, for instance, make budgeting impossible. NTEU plans its budget for the year based on the dues revenue it will receive in that year, but if employees can choose to stop their dues allotments at any time, that ability to budget would be lost.

Allowing at-will dues revocations would also greatly hinder NTEU's ability to comply with legal requirements governing the election of local ("chapter") union officers. Provisions of the Labor-Management Reporting and Disclosure Act (LMRDA), made applicable to federal-sector unions by 5 U.S.C. § 7120 and 29 C.F.R. § 458.29, require unions to conduct elections in a fair and democratic manner. Among other things, the LMRDA requires that officers be selected "by secret ballot among the members in good standing." 29 U.S.C. 481(b). To achieve that objective, NTEU must identify all members in good standing so that they may have the opportunity to nominate candidates, run for office, and vote in their chapter's elections.

In every chapter election, there necessarily comes a time when the list of eligible voters (members in good standing) must be finalized. The

payment of dues is an important factor in determining good standing, and the overwhelming majority of members pay their dues pursuant to allotment authorized by § 7115. Data concerning the payment of dues by allotment is received from agencies every pay period. Even under the current regime, however, the dues data that agencies provide to the union is several weeks out of date because agencies cannot account for the continuous enrollment of new members. If members could, as OPM urges, revoke their dues-withholding authorization at any time after the first year of membership, the accuracy of agencies' lists would be diminished ever further. This would make compliance with LMRDA election principles extraordinarily difficult.

Finally, voting in officer elections is a privilege of union membership that OPM's proposed policy statement would allow employees to unfairly exploit. If employees could revoke their dues allotments at will, they could "pay dues for only a month to become eligible to vote in a Union officer election or attend the Union's convention and then renege on all future financial contributions." Fisk, 2017 U.S. Dist. LEXIS 170910, at *9. To permit such "gaming [of] the Union's system of governance," id., would be antithetical to the

"strengthen[ed] position of federal unions" that Congress aimed to create in the Statute. BATF, 464 U.S. at 107.

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In sum, the Authority should reject OPM's request and allow the longstanding precedent on § 7115(a) to stand.

Sincerely,

Anthony M. Reardon
National President

Attachment

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

Memorandum For: Emily Sloop
Chief
Case Intake and Publication
Federal Labor Relations Authority

From: Mark A. Robbins
General Counsel
Office of the General Counsel
(designee for Margaret M. Weichert, OPM Acting Director)

Subject: Request for General Statement of Policy or Guidance

Date: March 19, 2019

Overview

Pursuant to 5 C.F.R. § 2427.2(a), the U.S. Office of Personnel Management (OPM) requests that the Federal Labor Relations Authority ("Authority") issue a general statement of policy or guidance pertaining to federal employee requests for revocation of union dues allotments. This request is made in light of the recent U.S. Supreme Court decision in *Janus v. AFSCME*, 585 U.S. ____ (2018), 138 S. Ct. 2448. As explained in more detail below, the Authority's guidance will alleviate uncertainty within the federal labor-management-relations community and ensure uniformity in applying the important constitutional principles the U.S. Supreme Court recognized in *Janus*.

Basis for Request

The Federal Service Labor-Management Relations Statute ("Labor Statute"), 5 U.S.C. §§ 7101-7135, requires in § 7115(a) that agencies honor a request to deduct union dues allotments and remit payment of such allotments to unions upon receiving authorization from an employee. The Labor Statute further provides that, unless the parties' collective-bargaining agreement no longer applies to the requesting employee, the assignment of dues "may not be revoked for a period of 1 year." *Id.*

Prior to the enactment of the Labor Statute, the question of dues revocation was governed by Section 21 of Executive Order 11491 (October 29, 1969), which provided for the revocation of dues allotments only at stated six-month intervals. The Labor Statute, while requiring a revocation period of not less than one year from the employee's authorization, , is silent on how agencies are to treat employee requests to revoke dues allotment assignments after this one-year period has elapsed. This is unlike EO 11491, which explicitly precluded such a revocation except at the conclusion of stated six-month intervals, a restriction that by virtue of the language of the EO, remained in force after the year following authorization of dues deduction. Nevertheless, the

Authority concluded that the statutorily mandated, one-year non-revocation period demonstrated congressional intent that there be greater union security than that which the EO afforded. In so concluding, the Authority expanded on § 7115(a) by further establishing "one year intervals" during which, and *only* during which, dues allotments may be revoked. *U.S. Army, U.S Army Materiel Dev. & Readiness Command, Warren, Mich. and Local 1658, AFGE, AFL-CIO*, 7 FLRA 194 (1981).[1] Under this framework, if an employee elects to revoke union dues allotments after the one-year period has elapsed, that employee is bound to continue making dues allotments until the new, annual revocation date arrives.[2] The Authority, in its line of decisions examining the issue of dues revocation under § 7115(a), surmised that its interpretation would provide a greater measure of union security, thereby fostering stability in labor-management relations. *See id.*

On June 27, 2018, the U.S. Supreme Court issued its decision in *Janus*, holding that the First Amendment is violated when public-sector unions take money from non-consenting, nonmember employees in the form of an agency fee. *Janus*, 138 S. Ct. at 2486. The Court reasoned that extraction of union fees from employees who do not consent to making such payments forces free and independent individuals to endorse ideas they may find objectionable. Neither an agency fee nor any other payment to a union may be deducted from a nonmember's wages, the Court found, unless the employee affirmatively consents to pay. The *Janus* Court applied a *clear and affirmative consent* standard in assessing the permissibility of employee payments to unions. *Id.* The *Janus* Court addressed the question of union security cited by the Authority in its line of cases interpreting § 7115(a). On this point, the Court explained that while public-sector unions may view these payments as an entitlement, and one on which public sector unions have relied, this security interest does not outweigh the countervailing interest of nonmembers in having their constitutional rights protected. *Id.* at 2484 (citing *Arizona v. Gant*, 556 U.S. 332, 349 (2009)).

The same constitutionally protected rights that applied to the nonmember employees in *Janus* would attach to a federal bargaining-unit employee who seeks to revoke a previously authorized union dues allotment after the expiration of the initial, statutorily mandated one year period. The clear and affirmative consent requirement applied by the *Janus* Court would unquestionably not be met in instances where an employee demonstrated a clear and unmistakable intent that union dues no longer be deducted from his or her pay. It follows then that forcing such an employee to continue to make such payments after the statutorily mandated one-year period has expired would represent an unconstitutional infringement on their rights as free and independent individuals. It further follows that such an action by agencies would be incompatible with the First Amendment protections afforded to federal employees and with the holding in *Janus*.

Request for Issuance of General Statement of Policy or Guidance

OPM is requesting that the Authority issue guidance to the federal labor-management-relations community clarifying that the constitutional principles clarified in *Janus* have general applicability to agencies and unions in the area of dues revocation requests made pursuant to §

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[1] The Authority revisited this question on multiple occasions, each time continuing to construe § 7115(a) in the same manner. *See e.g., VA Lakeside Med. Ctr., Chi., Ill.*, 12 FLRA 244 (1983).

[2] The Authority has clarified that agencies and unions may determine, through bargaining, the yearly intervals at which time all properly requested revocation requests will go into effect. *See Dept. of Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 19 FLRA 586 (1985).

7115(a). Specifically, OPM requests that the Authority issue guidance clarifying, consistent with *Janus*, that upon receiving an employee request to revoke a previously authorized dues allotments, agencies should process the request as soon as administratively feasible if at least one year has passed since the initial employee authorization for dues deduction.[3]

Issuing this guidance will alleviate confusion regarding how agencies and unions should apply the holding in *Janus* and promote consistency in its application. To the extent agencies and unions have collective-bargaining agreements in place that interpret § 7115(a) in a manner incompatible with the constitutionally protected rights of employees, the Authority's guidance will provide the impetus for the parties to modify these agreements to more faithfully reflect recent legal developments in a manner that fully protects employee First Amendment rights.

Absent a statement from the Authority, the question of interpreting dues-revocation requirements pursuant to § 7115(a) in a post-*Janus* environment will likely be resolved through contested and protracted litigation in forums such as arbitration hearings, negotiability appeals, and Federal Service Impasses Panel proceedings. Clear guidance from the Authority, however, more appropriately provides legal direction and clarity to parties to collective-bargaining agreements. In some cases, it might well further constructive and cooperative labor-management relationships while avoiding the need for adversarial proceedings.[4] It will also assist in avoiding the widespread confusion, inconsistency in application, and proliferation of disputes that will inevitably result from the shifting terrain brought about by recent legal developments.

The Authority is uniquely positioned to provide critical guidance over how best to incorporate complex and evolving constitutional principles rather than leaving such interpretation to the often divergent opinions of individual adjudicators in multiple forums. Moreover, such guidance would not ultimately serve to replace the adjudication of disputes, nor would it preclude agencies or unions from filing actions involving the interpretation of § 7115(a). It would, however, provide important guidance that would serve to inform parties and adjudicators when they seek to resolve any such disputes.

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[3] OPM recognizes that a request for a general advisory opinion is not the appropriate means to raise issues pertaining to the constitutionality of the statutory one-year rule itself post-*Janus*, although that issue may very well be litigated in the future when an appropriate case or controversy arises.

[4] 5 C.F.R. §.2427.5 sets forth the standards governing issuance of general statements of policy or guidance:

In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:
(a) Whether the question presented can more appropriately be resolved by other means;
(b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question;
(c) Whether the resolution of the question presented would have general applicability under the Federal Service Labor-Management Relations Statute;
(d) Whether the question currently confronts parties in the context of a labor-management relationship;
(e) Whether the question is presented jointly by the parties involved; and
(f) Whether the issuance by the Authority of a general statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the Federal Service Labor-Management Relations Statute.