April 8, 2020

Emily Sloop
Federal Labor Relations Authority
1400 K Street NW
Docket Room, Suite 200
Washington, D.C. 20424

Re: Federal Labor Relations Authority, Miscellaneous and General Requirements (5 CFR Part 2429), Freedom Foundation Comment

Ms. Sloop,

The Freedom Foundation is a nonprofit organization organized under 26 U.S.C. § 501(c)(3). Founded in 1991 in Olympia, Washington, the Foundation's mission is to promote individual liberty, free enterprise and limited, accountable government. As of January 2020, the Foundation has offices in Washington, Oregon, California, Ohio and Pennsylvania. Each of the Foundation's offices devotes their attention to informing public-sector workers of their constitutional rights, protecting public-sector workers rights in court, and supporting legislative reform that makes it easier for public-sector workers to assert their rights.

The Foundation has been involved with and participated in assisting tens of thousands of public-sector employees becoming informed of their constitutional rights regarding union membership, including through dozens of lawsuits and legislative battles. Due to the Foundation's experience in assisting public-sector employees in asserting their constitutional rights, including the right to refrain from association through the revocation of assignments, the Foundation writes to encourage the Federal Labor Relations Authority (FLRA) to amend 5 CFR Part 2429 to add § 2429.19 to subpart A. This amendment is in line with the plain reading of 5 U.S.C. § 7115; the FLRA's decision in *Office of Personnel Management* ("OPM"), 71 F.L.R.A. 571, 71 FLRA No. 107 (2020); and *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 201 L. Ed.2d 924 (2018).

The Foundation takes this opportunity to address the concerns that have been raised and are likely to be raised by opponents to the addition of § 2429.19 to subpart A, which states "[c]onsistent 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."

The three main arguments that the Foundation foresees to be raised as issues by commentators, especially in light of Member DuBester's dissent to the amendment, are: (1) whether *U.S. Army* was a well-reasoned decision, (2) whether this amendment will weaken the institution of collective bargaining in the federal sector, and (3) whether § 2429.19 creates a conflict between subsections (a) and (b) of § 7115. All of these issues can be answered with a resounding no. As such the FLRA should adopt the addition of § 2429.19 to subpart A of § 2429.

1. **The OPM Decision Was Rightly Decided as *U.S. Army* Was a Policy Judgment, Not a Well-Reasoned Decision.**

The FLRA's decision in *OPM* clearly articulated that the FLRA's previous decision in *U.S. Army, U.S. Army Materiel Development & Readiness Command, Warren, Michigan*, 7 F.L.R.A. 194 (1981), was "a policy judgment to impose annual revocation periods after the first year of assignment." *OPM*, 71 F.L.R.A. at 573. Member DuBester's dissenting view that "the *OPM* decision erroneously discards well-reasoned FLRA precedent governing revocation of union-dues allotments" is unfounded.

Despite Member DuBester's claims to the contrary *U.S. Army* was not a well-reasoned decision. The FLRA in *U.S. Army* concluded that "the language in § 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." 7 F.L.R.A. at 199. To reach this conclusion however, the FLRA rejected an analysis of § 7115(a) relying upon "the plain language of the statute" and instead examined it in "the context of relevant legislative history and Federal labor relations policy." *Id.* at 196.

The decision starts with the wrong analysis in failing to start with the clearly established rule for statutory construction cases – the plain meaning of the statute. "It is well established that 'when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). The FLRA erred in 1981 by first looking to the context of the statute and discussions of the legislative intent, *prior* to looking at the plain language as was proposed by the Respondent. *U.S. Army*, 7 F.L.R.A. at 196. It appears that one of the main influencing decisions of the FLRA in *U.S. Army* was that prior to the enactment of § 7115, procedures governing payroll deductions were found in section 21 of Executive Order 11491, which provides in relevant part that where a procedure for dues allotment were allowed, such procedure required a provision for the employee to revoke his authorization at stated six-month intervals. *Id.* It logically follows that the decision in *U.S. Army* was strongly influenced by the previous rule surrounding revocation intervals. However, the Executive Order policies cannot trump the statute. Looking to the plain language of § 7115(a), it is clear that reading intervals into the statute does not make sense based on the language of the statute itself.

The FLRA was tasked in *OPM* with issuing a general statement of policy or guidance following the *Janus* decision and clarifying what effect, if any, the *Janus* decision had upon federal employees' requests to revoke union-dues assignments under § 7115(a). *OPM*, 71 F.L.R.A. at 571. Ultimately, after careful consideration of OPM's arguments, and the substantive comments from interested persons, including the Freedom Foundation, § 7115(a)'s wording of "any such assignment may not be revoked for a period of one year" is not intended to be interpreted as "authorized dues allotments may be revoked only at intervals of one year." *OPM*, 71 F.L.R.A. at 572. The decision came to the correct conclusion that the plain language of the wording in § 7115(a) is as a phrase which only governs the first year of assignment. *Id.* This reading provides the balance between unions' interests for "security" for unions, and public-sector employees' First Amendment rights.

2. **Collective Bargaining is Not Weakened by Respecting Public-Sector Employees' First Amendment Rights.**

A common argument made by those opposed to adding § 2429.19 to subpart A is that that respecting public-sector employees' First Amendment rights, as recognized in *Janus,* will somehow lead to the demise of collective bargaining as we know it. There is no evidence that this will be true. Union

membership and the payment of union dues is no longer required, as articulated in *Janus,* and having an annual interval-based revocation system out of fear of weakening collective bargaining simply is not a valid reason to infringe upon public-sector employees' First Amendment rights.

The *OPM* decision, in Abbott's concurrence, pointed out the exact conflict with the argument made in the dissent, when he stated "[a]s much as it would be contrary to the Statute for an agency to interfere with the choice of an employee to elect to pay dues, it would be equally contrary to the intent of the Statute to interfere with the right of the employee to choose to stop paying dues after the one-year period imposed by § 7115(a)." *OPM*, 71 F.L.R.A at 574. To ignore public-sector employees' constitutional rights out of fear that it may be more difficult to bargaining collectively would be unconstitutional. The rights recognized by the Constitution should never play second fiddle to contract rights, especially when that contract right can be enforced for the first year of its existence. Collective bargaining will still be alive and well despite public-sector employees' right to revoke assignments to unions. If unions are truly worried about revocations, perhaps they should demonstrate to their members the value they bring.

3. There Is No Conflict Between Subsections (a) and (b) with the Introduction of § 2429.19.

As has been discussed in *OPM*, exceptions to § 7115 found in subsection (b) had been blatantly ignored by the FLRA in its decision in *U.S. Army*. § 2429.19 is still consistent with the exceptions found in § 7715(b). There is no conflict between the two provisions now as subsection (b) still provides for the termination of an allotment, and § 2429.19 provides for revocation of an allotment at any time outside of the first year. Section 2429.19 creates the nexus between subsections (a) and (b) of § 7115.

In conclusion, this is all evidence that the proposed addition of § 2429.19 to subpart A of 5 CFR Part 2429 is the best way to enforce the appropriate use of authorized union-dues assignments. The addition of § 2429.19 recognizes a union's ability to create a one-year-long dues deduction agreement, while still protecting a public-sector employees' First Amendment rights, including the right to refrain and the right against compelled speech. This amendment will still expressly allow unions to have "union security," a concern addressed in Member DuBester's dissent in *OPM,* without allowing for "agency shop" provisions. *OPM*, 71 F.L.R.A. at 579.

The Freedom Foundation applauds the FLRA's proposed addition to § 2429 as protecting public-sector employees constitutional rights, and appreciates the opportunity it has been given to comment. Maxford Nelsen, the Director of Labor Policy for the Freedom Foundation and a member of the Federal Service Impasses Panel, did not participate in the writing of this comment.

Sincerely,

Sydney Phillips
Litigation Counsel
Freedom Foundation
P.O. Box 552, Olympia, WA 98507
(360) 956-3482
sphillips@freedomfoundation.com