August 12, 2019

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

Re: Office of Personnel Management (Petitioner), Case No. 0-PS-34, 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, Wash., the organization's mission is to promote individual liberty, free enterprise and limited, accountable government. In recent years, the Foundation has opened offices in Oregon and California and devoted much of its attention to supporting reforms to make public-sector labor unions more transparent and accountable to their members and taxpayers.

Because of the Foundation's expertise on labor union operations — developed through dozens of lawsuits, legal complaints, legislative skirmishes and interactions with tens of thousands of union-represented workers — the Foundation writes to encourage the Federal Labor Relations Authority (FLRA) to adopt, in accordance with 5 CFR § 2427.2, a general statement of policy or guidance applying the constitutional protections for public employees acknowledged by the U.S. Supreme Court in *Janus v. AFSCME, Council 31,* 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018), to union-represented employees in the federal workforce.

In *Janus,* the Supreme Court not only struck down laws compelling public employees to financially support a labor union as unconstitutional under the First Amendment but established that unions and government employers must receive employees' affirmative consent before processing any union deductions from their wages.

Specifically, the court held:

> "…States and public-sector unions may no longer extract agency fees from nonconsenting employees… Neither 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. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." (Internal citations omitted)

As explained below, the standards for employee consent articulated by the Supreme Court in *Janus* appear to invalidate several aspects of current union dues deduction practices for federal employees.

1. **Though the petitioner in *Janus* was a state employee, *Janus* applies with equal force to federal employees because there is no significant difference, for purposes of the First Amendment's protections against compelled speech, between federal public employees and nonfederal public employees.**

   Mark Janus, the petitioner in *Janus,* was an Illinois state employee who objected to a state law requiring him to pay an agency fee to a union as a condition of employment, even though he had resigned his formal union membership.

   However, throughout its decision, the *Janus* Court referred to "public employees" broadly, without differentiating between federal, state, public school, or municipal public employees. The court framed the question in *Janus* as whether "*public-sector* agency-fee arrangements are unconstitutional." (Emphasis added).

   In defending the value of free speech, the court noted that,

   > "Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth. Whenever the *Federal Government* or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends. When speech is compelled, however, additional damage is done." (Emphasis added, internal citations omitted).

   The court further noted that,

   > "…a 'significant impingement on First Amendment rights' occurs when *public employees* are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'" (Emphasis added, internal citations omitted).

   Cases involving various types of public employees, including federal employees, were included in the court's cited First Amendment jurisprudence.

   The court even went so far as to specifically reference labor relations in federal government employment in its reasoning as to why agency fee requirements are unnecessary to preserve labor peace in public-sector labor relations.

   The FLRA has also cited the U.S. Supreme Court's prior holding in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) — which upheld the constitutionality of agency fee requirements for public employees but was overturned by *Janus* — as applicable in various respects to federal employees, though the petitioner was a public-school employee from Michigan. See *American Federation of Government*

Employees, Local 1812 and Broadcasting Board of Governors, Washington, D.C., 59 F.L.R.A. No. 69 (2003); *National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration*, 6 F.L.R.A. No. 106 (1981).

In short, as a threshold matter, there is simply no disputing that the First Amendment protections recognized by the U.S. Supreme Court in *Janus* for public employees apply just as much to employees of the federal government as they do to the state employees specifically at issue in that case.

2. FLRA's holding that the irrevocability provision of 5 U.S.C. § 7115(a) applies to successive yearly periods was wrongly decided as it ignored the plain meaning of the statute.

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… [A]ny such assignment may not be revoked for a period of 1 year."

Before addressing the implications of *Janus*, it should be noted that the FLRA's past interpretation of the statute is questionable.

In *U.S. Army, U.S. Army Materiel Development & Readiness Command, Warren, Michigan*, 7 F.L.R.A. 194 (1981), 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* does. 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 addresses 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 FLRA's interpretation inappropriately rejects and alters the statute's plain meaning. Even absent *Janus*, the FLRA would be justified in adopting the proper interpretation of § 7115 — that employees may revoke a dues assignment at any time one-year after its execution — on the basis of sound statutory interpretation alone.

3. *Janus* may render the restriction on dues deduction revocation in 5 U.S.C. § 7115(a) unconstitutional.

Janus reaffirmed the Supreme Court's longstanding view that the First Amendment protects not only the ability to engage in speech, but to refrain from speech, noting that although "most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech… *measures compelling speech are at least as threatening*." (Emphasis added, internal citations omitted).

Whether the revocation prohibition is interpreted as applying to only the first year after the assignment's execution or recurring yearly intervals thereafter, it clearly functions as a restriction of employee free choice regarding union dues payment. While the irrevocability provision of 5 U.S.C. § 7115(a) does not apply to all union-represented employees, as agency fees did, it does effectively compel at least some employees to continue subsidizing the speech of private labor organizations they may disagree with or discover they disagree with at some point after execution of the assignment.

Such an obligation to continue union dues payment via payroll deduction — imposed by the government and not stemming from a valid and voluntarily executed contract between an employee and a union — likely runs afoul of *Janus.* See *Fed. Employees Metal Trades Council, AFL-CIO, Mare Island Naval Shipyard & Dan Goin, Individual*, 47 F.L.R.A. 1289, 1292 (July 20, 1993) ("The initiation and termination of dues withholding is controlled by section 7115 of the Statute, not by a dues allotment agreement between the

parties.").

Presumably, the invalidation of a federal statute on constitutional grounds is beyond the scope or authority of a general statement of policy or guidance under 5 CFR § 2427.2. Nonetheless, a proper understanding of the full implications of *Janus* should encourage the FLRA to take whatever steps it can to protect the First Amendment rights of federal employees.

At minimum, this should include reversing the FLRA's position in *U.S. Army* and establishing that federal employees may revoke a written dues assignment at any time once a year has passed since the assignment's execution.

4. **The FLRA should consider whether 5 U.S.C. § 7115(b)(2) permits federal employees to resign union membership, and end the accompanying obligation to continue payroll deduction of union dues, at any time.**

5 U.S.C. § 7115(b)(2) provides that any dues deduction assignment "may not be revoked for a period of 1 year" unless "the employee is suspended or expelled from membership in the exclusive representative."

The FLRA does not appear to have given much attention in previous decisions as to the circumstances in which an employee may lose their union membership. Though it is clear from the statute that a union may take action to strip an employee of membership, in which the obligation to continue dues payment ends, it is less clear what happens if an employee attempts to resign union membership.

In at least some cases, unions attempt to differentiate membership from dues payment, maintaining that membership may be resigned at any time but that dues deduction obligations may continue pursuant to the terms of irrevocability provisions in written authorizations. In this case, however, it appears that 5 U.S.C. § 7115(b)(2) ties the obligation to pay dues to continued union membership in good standing.

Therefore, if an employee can end union membership, they can simultaneously end the obligation to continue dues payment.

There is growing support for the proposition that union membership can be resigned at any time. In *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), the U.S. Supreme Court recognized a statutory right under the National Labor Relations Act for union-represented employees in the private-sector to resign their union membership at any time.

Of more direct relevance, federal courts have also expressed support for the idea that public employees have a constitutionally-protected right to terminate their union membership at any time. See *Debont v. City of Poway*, 1998 WL 415844 (S.D. Cal. Apr. 14, 1998), and *McCahon v. Pennsylvania Tpk. Comm'n*, 491 F. Supp. 2d 522 (M.D. Pa. 2007).

The Supreme Court's holding in *Janus* only strengthens this position. If requiring nonmember public employees to financially support a union violates the First Amendment, then requiring public employees to remain formal union members subject to union bylaws and discipline *and* to financially support the union represents an even greater infringement of constitutional rights.

If unions have a legal obligation to "expel" members who request to be so expelled, and such a request can be submitted at any time, then 5 U.S.C. § 7115(b)(2) would appear to provide a pathway for an employee to cancel union membership and dues deductions simultaneously at any time.

Such an interpretation of the law, which the FLRA should consider further, may provide a pathway within statutory boundaries for the FLRA to fully acknowledge federal employees' rights under *Janus*.

5. **The FLRA should update Standard Form 1187 to include a notice of federal employees' First Amendment right to refrain from financially supporting a labor union.**

   While the Standard Form 1187 notes that "[c]ompleting this form is voluntary," this by itself is insufficient to meet the standards for affirmative consent articulated in *Janus.* Before a government employer may constitutionally withhold union dues from a federal employee's wages, the employee must provide the employer with "affirmative consent" that is "freely given" and "clearly" waives the employee's right not to pay.

   At minimum, Standard Form 1187 should be updated with a prominent disclosure informing the signer of the First Amendment right not to financially support a union, and the terms of the authorization should be updated to explain that, by agreeing to have union dues withheld via payroll deduction, the employee waives the First Amendment right not to pay.

The Freedom Foundation applauds the FLRA's interest in applying the constitutional protections acknowledged in *Janus* to the federal workforce and appreciates the opportunity to comment.

Sincerely,

Maxford Nelsen
Director of Labor Policy
Freedom Foundation
P.O. Box 552, Olympia, WA 98507
(360) 956-3482
MNelsen@FreedomFoundation.com