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Public Comment on Regulations Concerning the Revocation of Written Assignment of Dues Allotted to an Exclusive Representative

Submitted to the Federal Labor Relations Authority

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The Federal Labor Relations Authority’s (FLRA) proposed regulations on revoking the authorization to assign membership dues to a union codify a common-sense and statutorily supported interpretation of the Federal Service Labor-Management Relations Statute. If a federal employee joins a union upon commencing employment, the statute plainly reads that they have signed a one-year contract to remain a member of that union. After the expiration of that first year, the employee may resign membership at any time. This return to the statute’s plain meaning promotes the principles of worker freedom the United States Supreme Court announced in *Janus v. AFSCME*.¹

The principles underlying this rule also underlie the *Janus* decision: unions and employers must provide workers with a meaningful opportunity to choose whether to join a union. Further, federal regulators must treat the rules surrounding dues deduction authorizations like the waiver of any other constitutionally protected right. Therefore, these rules must ensure that employees receive adequate notice of their rights to ensure a knowing and intelligent waiver. Difficult to discern opt-out windows for union member employees make it more difficult for these employees to exercise their rights.

The Buckeye Institute supports the FLRA’s effort to promote worker freedom and has been on the forefront in seeking to allow workers to choose between union membership and non-membership. In the wake of *Janus*, The Buckeye Institute was the first organization in the country to file lawsuits calling on courts to end compelled exclusive union representation.² And federal labor law impacts a number of the 78,608 Ohio-based federal employees.³

Beyond the *Janus* rights at issue in this context, the plain meaning of Title VII of the Civil Service Reform Act of 1978 or the Federal Service Labor-Management Relations Statute also supports the FLRA’s interpretation. The statute in question explicitly limits revocations of dues assignments “for a period of one year.” As the FLRA’s February decision argues, the most reasonable way to interpret this provision “is that the phrase governs only the first year of assignment.”⁴ After this one-year contract expires, an employee could opt-out of membership any time. The FLRA’s previous interpretation allowed opt-outs only during yearly windows.⁵

Bringing clarity to the opt-out process is essential to ensuring workers have the opportunity to exercise their right to choose. Collective bargaining agreements are routinely opaque in sections dealing with the opt-out process. For example, the Ohio Civil Service Employees Association, the largest public employee union in the state, allows employees to opt-out by “providing written notice to the Union at its principal offices during a thirty day period commencing sixty days prior”

¹ *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

² “**The Buckeye Institute is First Organization in the Country to File Lawsuits Calling on Courts to End Compelled Exclusive Representation by Unions After *Janus v. AFSCME* Ruling**,” The Buckeye Institute press release, August 2, 2018.

³ Mike Maciag, **Federal Employees By State**, *Governing*, April 20, 2017.

⁴ **Office of Personnel Management**, 71 FLRA No. 107 (Feb. 14, 2020).

⁵ *Ibid.*

to the CBA's expiration. The agreement runs for three years.⁶ Such contractual language necessarily confuses workers, and obfuscates the unnecessarily restrictive period in which the collective bargaining agreement purports to permit employees to exercise their core constitutionally protected associational rights.

As FLRA member James Abbott notes in a concurring opinion to the FLRA Decision on Request for General Statement of Policy or Guidance that this proposed rule would codify, *Janus* means: "once a Federal employee indicates that the employee wishes to revoke an earlier-elected dues withholding, that employee's consent no longer can be considered to be 'freely given' and the earlier election can no longer serve as a waiver of the employee's First Amendment rights. Thus, restricting an employee's option to stop dues withholding—for whatever reason—to narrow windows of time of which that employee may, or may not be, aware does not protect the employee's First Amendment rights."⁷

Though the FLRA's lone dissenting member places much weight on the statute's legislative history, The Buckeye Institute commends the FLRA's return to an interpretation supported by a plain meaning reading. It is a well-established rule of statutory interpretation that if a statute is clear, that is the end of the inquiry, and there is no need to consult interpretive tools including legislative history.⁸ Here, because the statutory language is clear and the FLRA's dissenting member's interpretation reaches a different conclusion than the one the plain meaning supports, use of legislative history as an interpretive tool is particularly inappropriate. Legislative history is not law and as the late Justice Scalia once wrote, "[n]either due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote."⁹ Further, an overreliance on legislative history empowers committee staff above duly elected officials and appointed judges: "routine deference to the detail of committee reports, the predictable expansion in that detail which routine judicial deference has produced, are converting a system of judicial construction into a system of committee-staff prescription."¹⁰

⁶ For example, see **The Collective Bargaining Agreement between the Auditor of the State of Ohio and the Ohio Civil Service Employees Association Local 11, AFL-CIO**, 2019-2023.

⁷ **Office of Personnel Management**, 71 FLRA No. 107 (Feb. 14, 2020) (internal citation omitted).

⁸ "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. United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917))). "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *United States v. Fisher*, 6 U.S. 358, 399 (1805). Or as Justice Kagan put it: "Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate *ambiguous* text." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) (emphasis added).

⁹ **Sable Communications v. FCC**, 109 S. Ct. 2829, 2840 (1989).

¹⁰ **Hirschey v. FERC**, 760 F.2d 305 (D.C. Cir. 1985).

Conclusion

The FLRA's proposed rule returns to the plain meaning of the Federal Service-Labor Management Relations Statute and helps secure the *Janus* rights of federal employees. The Buckeye Institute welcomes steps that federal regulators might take to secure and promote the constitutional rights of federal workers.



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