

# Rules and Regulations

Federal Register

Vol. 85, No. 132

Thursday, July 9, 2020

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents.

## FEDERAL LABOR RELATIONS AUTHORITY

### 5 CFR Part 2429

#### Miscellaneous and General Requirements

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Final rule.

**SUMMARY:** The Federal Labor Relations Authority (FLRA, or Authority) adopts an addition to its regulations. The additional regulation concerns the revocation of a written assignment of amounts deducted from the pay of a federal employee for the payment of regular and periodic dues allotted to an exclusive representative. Specifically, the regulation provides that, after the expiration of a one-year period during which an assignment may not be revoked, an employee may initiate the revocation of a previously authorized assignment at any time that the employee chooses. However, the additional regulation will not apply to the revocation of assignments that were authorized prior to the effective date of the regulation.

**DATES:**

*Effective Date:* This rule is effective August 10, 2020.

*Applicability Date:* This rule applies to the revocation of assignments that were authorized under 5 U.S.C. 7115(a) on or after August 10, 2020.

**FOR FURTHER INFORMATION CONTACT:** Noah Peters, Solicitor, at [npeters@flra.gov](mailto:npeters@flra.gov) or at (202) 218-7908.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

On February 14, 2020, the Authority issued a general statement of policy or guidance in Case No. 0-PS-34, *Office of Personnel Management*, 71 FLRA 571 (OPM). The Authority explained that its longstanding interpretation of section 7115(a) of the Federal Service Labor-Management Relations Statute (the

“Statute”) was unsupported by the plain wording of that section. Specifically, the Authority had previously held that the wording in section 7115(a) that “‘any such assignment may not be revoked for a period of [one] year’ *must* be interpreted to mean that authorized dues allotments may be revoked only at intervals of [one] year.” *U.S. Army, U.S. Army Materiel Dev. & Readiness Command, Warren, Mich.*, 7 FLRA 194, 199 (1981) (*Army*) (emphasis added) (quoting 5 U.S.C. 7115(a)).

Disagreeing with *Army*, the Authority in *OPM* explained that the “most reasonable way to interpret the phrase ‘any such assignment may not be revoked for a period of [one] year’ is that the phrase governs only the first year of an assignment.” 71 FLRA at 572 (quoting 5 U.S.C. 7115(a)). As the Authority observed, “[e]xcept for the limiting conditions in section 7115(b), which section 7115(a) explicitly acknowledges, nothing in the text of section 7115(a) expressly addresses the revocation of dues assignments after the first year.” *Id.* (footnote omitted).

In support of its criticism of the decision in *Army*, the Authority relied on section 7115(a)’s plain wording. *Id.* In particular, the section “says that an ‘assignment may not be revoked for a period of [one] year,’ and such wording governs only one year because it refers to only ‘[one] year.’” *Id.* (alterations in original) (quoting 5 U.S.C. 7115(a)). Further, the Authority explained why “it would be nonsensical to conclude that the one-year period under [section] 7115(a) is not the first year of an assignment.” *Id.* And because the section says that it limits revocations for “a period of [one] year,” the Authority recognized that “it does not limit revocations for multiple periods of one year.” *Id.* (alteration in original) (emphasis added).

*Army* based its interpretation of section 7115(a) almost exclusively on legislative history, but the Authority in *OPM* recognized that “Congress’s ‘authoritative statement is the statutory text, not the legislative history . . . . Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on [Congress’s] understanding of *otherwise ambiguous terms.*”” *Id.* at 573 n.23 (emphasis added in *OPM*) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). Because

the pertinent terms of section 7115(a) were not ambiguous, the Authority explained that resorting to legislative history as the basis for interpreting section 7115(a) would reflect “poor statutory construction.” *Id.* (citing *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994)). Moreover, while the request for a general statement of policy or guidance asked the Authority to find that the First Amendment to the U.S. Constitution compelled a certain interpretation of section 7115(a), the majority decision rested exclusively on statutory exegesis, rather than principles of constitutional law. *Id.* at 573.

Although the Authority explained its reasons for rejecting the interpretation of section 7115(a) set forth in *Army*, the general statement did not adopt a new rule. Instead, the Authority explained that it “intend[ed] to commence notice-and-comment rulemaking concerning section 7115(a), with the aim of adopting an implementing regulation that hews more closely to the Statute’s text.” *Id.* Anticipating its forthcoming rule proposal, the Authority expressed the view that “it would assure employees the fullest freedom in the exercise of their rights under the Statute if, after the expiration of the initial one-year period during which an assignment may not be revoked under section 7115(a), an employee had the right to initiate the revocation of a previously authorized dues assignment at any time that the employee chooses.” *Id.* However, the Authority also recognized that any rule would have to “seek a reasonable balance between competing interests.” *Id.*

On March 19, 2020, the Authority issued a proposed rule requesting comments, published at 85 FR 15742, to further the statutory reexamination that began in *OPM*. The Authority received, and has considered, written comments submitted in accordance with that proposed rule, and the Authority’s responses to summaries of those comments appear below.

#### II. Summaries of Comments and Responses

*Comment:* The Authority’s analysis in *OPM*, and in the explanation of the proposed rule, ignored the legislative history on which *Army* based its interpretation of section 7115(a), and also ignored the decades of decisional

precedent that adhered to *Army's* interpretation.

*Response:* The Authority is well aware of the legislative history on which *Army* relied. But for the reasons explained in *OPM*, relying on legislative history to alter the meaning of unambiguous statutory text is improper. Indeed, the U.S. Supreme Court has explained that we should “not resort to legislative history to cloud a statutory text that is clear.” *Ratzlaf*, 510 FLRA at 147–48. *Army* ignored that teaching. Moreover, the legislative history of section 7115(a) is not nearly as supportive of *Army's* interpretation as that decision suggested. *Army* began with the observation that dues deductions were revocable at six-month intervals under Executive Order 11,491. Then, examining congressional committee reports, *Army* concluded that the Statute was intended to provide greater union security than Executive Order 11,491, but not as much security as an “agency shop.” Finally, *Army* concluded that section 7115(a) “must” be interpreted to allow revocations only at one-year intervals. 7 FLRA at 199. The logical flaw in that reasoning is clear. Whereas Executive Order 11,491 stated explicitly that dues-deduction assignments must allow employees to “revoke [an] authorization at stated six-month intervals,” *Army*, *id.* at 196 (emphasis added), section 7115(a) of the Statute does not mention intervals at all. Rather, it mentions irrevocability for “a period of [one] year.” 5 U.S.C. 7115(a) (emphasis added). Nevertheless, based solely on perceived policy goals gleaned from legislative history, *Army* improperly grafted an interval-based revocation restriction onto the wording of section 7115(a). We reject that mode of statutory interpretation, and we reject the portions of other Authority decisions that followed *Army* in adhering to that flawed interpretive method.

*Comment:* The rule will increase administrative burdens in processing dues-assignment revocations.

*Response:* Although several union and employee commenters suggested that the rule would result in increased administrative burdens for agencies, none of the agencies that submitted comments agreed with that assessment. Indeed, the Department of Veterans Affairs, U.S. Department of Agriculture (USDA), Peace Corps, and Office of Personnel Management support adopting the rule, and USDA says specifically that it “does not foresee any negative impacts of the implementation of the proposed rule on the [a]gency.” USDA Comment (Apr. 9, 2020) at 1. Moreover, we are somewhat skeptical of

the claims of increased administrative burdens on unions in processing dues-assignment revocations because, with the exception of the system negotiated by the National Treasury Employees Union, in all of the examples discussed in the comments, assignment-revocation windows depend entirely on the date that an individual employee first authorized the assignment, or when the authorized assignment first became effective. Thus, every employee’s revocation window is uniquely dependent on the anniversary date of that employee’s assignment authorization (or effective date), and such a system does not beget administrative simplicity. Thus, we find the arguments about increased administrative burdens on unions to be weakly supported. To the extent that the rule does increase administrative burdens on unions, we note that the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has recognized—and we agree—that section 7115(a) is designed primarily for the benefit of the *employee*, not the union. *AFGE, Council 214, AFL-CIO v. FLRA*, 835 F.2d 1458, 1460–61 (D.C. Cir. 1987). Thus, in balancing the competing interests of employees in having greater freedom to revoke their dues assignments, and unions in having revocation procedures with minimal administrative burdens, we find that the rule as written properly weighs the employees’ interests more heavily.

*Comment:* The Authority is ill equipped to craft an implementing regulation for the First Amendment to the U.S. Constitution.

*Response:* The rule is based on the Authority’s interpretation of section 7115(a) of the Statute.

*Comment:* Because the wording of the Statute has not changed since the decision in *Army*, the Authority should not change its interpretation of section 7115(a).

*Response:* The Authority may, as it sees appropriate, reassess its statutory interpretations even when the underlying statutory wording has not changed. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009).

*Comment:* The Authority asserts that the rule would hew more closely to the text of section 7115(a). But, in fact, the rule would violate a separate provision of that section that says that an “agency shall honor the assignment and make an appropriate allotment pursuant to the assignment,” because the rule would instruct agencies to disregard the terms of the previously authorized assignments that the agencies have received. 5 U.S.C. 7115(a) (emphases

added). Further, the rule ignores the revocation terms that appear on the current OPM-promulgated standard forms governing dues assignments and assignment revocations (SF–1187 and SF–1188, respectively).

*Response:* As explained in the **DATES** section above, the rule would apply only to dues assignments that are authorized *on or after* the rule’s effective date. Thus, the rule would not require agencies to disregard the terms of previously authorized assignments that the agencies received before the effective date of the rule. Further, OPM will have an opportunity to promulgate updated versions of the SF–1187 and the SF–1188 before the rule’s effective date, consistent with OPM’s own implementing regulation for dues allotments. 5 CFR 550.321. In that regulation, OPM states that allotments under section 7115 “shall be effected in accordance with such rules and regulations as may be prescribed by the Federal Labor Relations Authority.” *Id.*

*Comment:* The rule will destabilize negotiated dues-assignment and assignment-revocation procedures that are included in collective-bargaining agreements (CBA) that are currently in force. Thus, the rule will upset parties’ reliance interests on the previous interpretation of section 7115(a) in *Army*.

*Response:* Like all governmentwide regulations, the rule will be subject to the constraints of section 7116(a)(7) of the Statute. Thus, currently effective agreements will not be destabilized if they contain negotiated provisions that conflict with the rule.

*Comment:* The rule says that it is “[c]onsistent with the exceptions in 5 U.S.C. 7115(b),” but that subsection does not indicate that employees must be permitted to revoke their dues assignments at any time after the first year.

*Response:* Several commenters misunderstood the import of this introductory phrase. The rule begins with “[c]onsistent with the exceptions in 5 U.S.C. 7115(b),” in order to make clear that, where the conditions set forth in section 7115(b) are satisfied, a dues assignment must be cancelled, regardless of whether a year has passed since the assignment was first authorized, and regardless of whether the employee acts to revoke the authorization. *E.g., Int’l Ass’n of Machinists & Aerospace Workers, Lodge 2424*, 25 FLRA 194, 195 (1987) (“Section 7115(b) requires the termination of a dues withholding authorization in less than one year and without employee action in specified circumstances.”).

*Comment:* The Authority should not require employees to wait even one year to revoke a previously authorized assignment.

*Response:* Section 7115(a) dictates that assignments are irrevocable for the first year after authorization, and the rule adheres to that condition.

*Comment:* Several employees complained that it was difficult to determine their anniversary dates, as well as the window periods during which they were permitted to submit an SF-1188, in order to be able to revoke their previously authorized dues assignments. In addition, they explained that, in their experiences, the unions that represented them were not helpful in determining the applicable anniversary dates or form-submission window periods. Further, other commenters contended that the negotiated procedures for determining anniversary dates and window periods were not easily decipherable to a layperson. *E.g.*, Nat'l Right to Work Legal Def. Found. Comment (Apr. 9, 2020) at 5 ("In order for the SF-1188 to be timely, it must be submitted to the Union between the anniversary date of the effective date of the dues withholding and twenty-one (21) calendar days prior to the anniversary date." (quoting Master Agreement Between Dep't of Veterans Affairs & AFGE, Art. 41, sec. 6.A. (1997))).

*Response:* The Authority anticipates that this rule, once applicable, will make the sort of employee confusion or frustration mentioned above highly unlikely because employees will be able to initiate the revocation of a previously authorized assignment at any time after the first year.

*Comment:* The rule will inhibit unions' sound financial planning.

*Response:* The Authority acknowledges that this rule will make financial planning somewhat more difficult for unions, but believes that, as section 7115(a) is designed primarily for the benefit of employees (as discussed earlier), this tradeoff is justified by the increase in employees' flexibilities to exercise their rights under section 7102 of the Statute to refrain from joining or assisting any union. In addition, unions will still benefit from the certainty of the first year of irrevocability under section 7115(a). Further, we note that the rule certainly does not incentivize or require any employees to cancel dues assignments; it merely provides an option. Moreover, nothing prevents unions from developing dues-payment arrangements outside the federal payroll system that would provide them a greater measure of funding predictability.

*Comment:* The Authority lacks the power to put a matter beyond the duty to bargain through the issuance of its own governmentwide regulation.

*Response:* Section 7134 of the Statute empowers the Authority to issue regulations to carry out the Statute, 5 U.S.C. 7134, and 7105 of the Statute charges the Authority with the duty to "provide leadership in establishing policies and guidance relating to matters" under the Statute, *id.* 7105(a)(1). Further, the rule being promulgated reflects the Authority's considered judgment in its area of expertise: Interpreting and "carrying out" the Statute. *Id.* 7105(a)(1), 7134. And it reflects the Authority's finding in *OPM* that section 7115(a) of the Statute prohibits revocation only for the first year after an assignment is authorized. 71 FLRA at 572. Admittedly, the Authority has not previously issued an analogous regulation that would shape the contours of the duty to bargain in the way that this rule will. But Congress instructed in section 7117(a)(1) of the Statute that the duty to bargain would not extend to a matter that was inconsistent with any governmentwide regulation. And there is no basis in the Statute for finding that Congress intended for section 7117(a)(1) to apply to governmentwide regulations issued by all of the other federal agencies that are statutorily authorized to promulgate legislative rules, but not to governmentwide regulations issued by the Authority. The Authority's rulemaking powers under sections 7105 and 7134 are broad, and properly exercised in this instance.

*Comment:* Because the rule concerns only the *initiation* of the revocation of a previously authorized dues assignment, the rule must permit parties to negotiate for delays in the processing of revocation forms.

*Response:* The Authority intends the rule's statement that an employee may "initiate" the revocation of a previous dues assignment at any time to allow for the normal processing time that an agency needs to effectuate such a revocation after it is received. Thus, the rule does not guarantee the instantaneous cancellation of dues assignment after an employee initiates the revocation. However, the rule also does not permit parties to negotiate for delays in the processing of revocation forms because those delays would defeat the purpose of the rule, which is to assure employees the fullest freedom in the exercise of their rights under the Statute, including their rights under sections 7102 and 7115. In order to make explicit the prohibition on negotiated processing delays, we are

adding a second sentence to the rule—one that resembles wording that OPM suggested in its comment on the proposed rule. Specifically, we provide that 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. Negotiated delays in processing revocation forms may provide benefits to unions or agencies, but they do not benefit individual employees. Moreover, the Authority has held that a failure to process an assignment form is an unfair labor practice. *E.g.*, *Dep't of the Navy, Naval Underwater Sys. Ctr., Newport, R.I.*, 16 FLRA 1124, 1126-27 (1984); *cf.* *AFGE, Local 2192, AFL-CIO*, 68 FLRA 481, 482-84 (2015) (finding that a union committed an unfair labor practice by impeding the processing of revocation forms). This additional sentence clarifies agencies' processing responsibilities after receiving a request to revoke a previously authorized dues assignment, provided that the one-year irrevocability period has expired. The Authority adopts OPM's suggested standard of "administrative feasibility" in order to allow for a small measure of flexibility for the agency personnel responsible for processing assignment revocations, with the understanding that the timing of the revocation's submission, the workload of agency personnel, and other unforeseen factors may affect the speed with which revocations can be processed. However, agencies will be expected generally to process such revocations at least as quickly as they would generally process an initial authorization of dues assignment.

*Comment:* The rule is an attack on unions.

*Response:* The rule is rooted in the statutory text and the Authority's exercise of its judgment in balancing the competing interests of unions, agencies, and employees. It is no more accurate to say that, by increasing the ease with which employees may exercise their section 7102 rights to refrain from joining or assisting a union, the Authority is attacking unions, than it would have been to say that, by making it more difficult for employees to exercise those section 7102 rights, the rule set forth in *Army* was attacking employees. The Authority rejects the characterization of this rule as an attack on any party. As one commenter observed, "[T]his new rule does nothing to prevent any [bargaining-unit employee] from remaining a dues[-]paying member as long as they

desire.” Tammy Schuyler Comment (Apr. 7, 2020).

*Comment:* The Contracts Clause of the U.S. Constitution prohibits the rule.

*Response:* The Contracts Clause, U.S. Const. art. I, sec. 10, cl. 1, restricts the power of states, not the Federal Government. And, as explained above, the Authority’s new rule will not destabilize any previously negotiated CBA provisions.

*Comment:* Neither section 7102 nor section 7115(a) requires that employees be permitted to revoke their dues assignments at any time of their choosing, after the first year of irrevocability.

*Response:* The Authority has never suggested that this rule is dictated by a provision in the Statute. Instead, the rule is filling a gap left by section 7115(a)’s silence on the treatment of dues-assignment revocations after the first year. In doing so, the Authority has sought to ensure employees their fullest freedom to refrain from joining or assisting a union, *see* 5 U.S.C. 7102—consistent with the one-year irrevocability period that section 7115(a) requires. We do not suggest that this rule represents the only possible balance that could be struck among competing interests. But the rule represents the balance that the Authority—in the exercise of congressionally delegated power to craft legislative rules, 5 U.S.C. 7134—finds will best fulfill the animating purposes behind sections 7102 and 7115. *Cf. id.* 7112(a) (in making appropriate-unit determinations, the Authority shall “ensure employees the fullest freedom in exercising the rights guaranteed under” the Statute).

*Comment:* The National Labor Relations Board has held that, in the private sector, parties are not prohibited from negotiating limitations on the revocability of dues assignments.

*Response:* As recognized by the D.C. Circuit, the “dues withholding provision of the [Statute], 5 U.S.C. 7115, has no counterpart in the National Labor Relations Act or the Labor Management Relations Act.” *AFGE, Council 214, AFL-CIO*, 835 F.2d at 1461. Thus, the court found that reliance on private-sector decisions to interpret section 7115 was misplaced. Further, even if the NLRB’s decisions did concern an analogous statutory provision—which, as just explained, they do not—the Authority may, in the exercise of its discretion, reach conclusions that differ from the NLRB’s.

*Comment:* The Authority should abandon the proposed rule.

*Response:* For the reasons described in *OPM*, and additionally, for the

reasons explained in this preamble, the Authority had decided to amend its regulations to include the additional rule, which will now include two sentences. The first sentence will be adopted just as written in the proposed rule, and a second sentence will be added to make explicit agencies’ processing responsibilities, which were discussed earlier.

#### *Executive Order 12866*

The FLRA is an independent regulatory agency, and as such, is not subject to the requirements of E.O. 12866.

#### *Executive Order 13132*

The FLRA is an independent regulatory agency, and as such, is not subject to the requirements of E.O. 13132.

#### *Regulatory Flexibility Act Certification*

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Chairman of the FLRA has determined that this rule will not have a significant impact on a substantial number of small entities, because this rule applies only to federal agencies, federal employees, and labor organizations representing those employees.

#### *Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs*

This rule is not subject to the requirements of E.O. 13771 (82 FR 9339, Feb. 3, 2017) because it is related to agency organization, management, or personnel, and it is not a “significant regulatory action,” as defined in Section 3(f) of E.O. 12866 (58 FR 51735, Sept. 30, 1993).

#### *Executive Order 13132, Federalism*

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, this rule does not have sufficient federalism implications to warrant preparation of a federalism assessment.

#### *Executive Order 12988, Civil Justice Reform*

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

#### *Unfunded Mandates Reform Act of 1995*

This rule change will not result in the expenditure by state, local, and tribal

governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *Small Business Regulatory Enforcement Fairness Act of 1996*

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### *Paperwork Reduction Act of 1995*

The amended regulations contain no additional information collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

#### *Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

#### **List of Subjects in 5 CFR Part 2429**

Administrative practice and procedure, Government employees, Labor management relations.

Accordingly, for the reasons stated in the preamble, the FLRA amends 5 CFR part 2429 as follows:

#### **PART 2429—[AMENDED]**

■ 1. The authority citation for part 2429 continues to read as follows:

**Authority:** 5 U.S.C. 7134; § 2429.18 also issued under 28 U.S.C. 2112(a).

■ 2. Add § 2429.19 to subpart A to read as follows:

#### **§ 2429.19 Revocation of assignments.**

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.

Federal Labor Relations Authority.

**Noah Peters,**

*Solicitor, Federal Register Liaison.*

**Note:** The following appendix will not appear in the Code of Federal Regulations.

### Member DuBester, Dissenting

In my dissenting opinion in *Office of Personnel Management (OPM)*,<sup>1</sup> I explained how the majority's decision to reverse nearly four decades of Authority precedent governing the revocation of union-dues allotments was premised upon a U.S. Supreme Court decision that, "by its own terms[,] has nothing to do with federal-sector labor relations."<sup>2</sup> I also cautioned that the majority's decision "will only create confusion, uncertainty, and—ultimately—litigation on a myriad of issues."<sup>3</sup>

The majority has now abandoned any pretense that its decision in *OPM*, or its subsequent issuance of this final rule, has anything to do with the *Janus v. AFSCME, Council 31* decision.<sup>4</sup> Nevertheless, like similar decisions in which the majority has overturned Authority precedent without a plausible rationale, the rule it has now crafted to implement its flawed *OPM* decision will generate "more questions than answers."<sup>5</sup>

For instance, the rule provides that an employee may initiate the revocation of a "previously authorized [dues] assignment" at any time the employee chooses "after the expiration of the one-year period during which an assignment may not be revoked under 5 U.S.C. 7115(a)."<sup>6</sup> As noted by the majority, a number of parties expressed concern that the rule would require agencies to unlawfully disregard the terms of previously authorized assignments, and would ignore the revocation terms that appear on the current OPM forms governing dues assignments and assignment revocations.

In response to these concerns, the majority explains that the rule would "apply only to dues assignments that are authorized *on or after* the rule's effective date," and that agencies would therefore not be required "to disregard the terms of previously authorized assignments that the agencies received before the [rule's] effective date."<sup>7</sup> But this explanation appears to contradict the rule's plain language, which applies its provisions to "previously authorized assignment[s]."<sup>8</sup>

Moreover, if the rule is indeed intended to apply only to assignments authorized after its effective date, it is unclear which "previously authorized" assignments it is referencing.

It is also not apparent how providing a "one-year period of irrevocability"<sup>9</sup> for dues assignments will not dramatically increase the administrative burdens placed upon both agencies and unions to administer these assignments. If this one-year period is intended to apply to the execution of any dues assignment, it would presumably apply to both an employee's initial assignment and to any subsequently executed assignment, thereby creating a new and different anniversary date that will now have to be tracked for each subsequent assignment. Remarkably, while the majority expresses great skepticism regarding the unions' concerns regarding the obvious administrative burdens arising from its rule, it accepts without any attendant skepticism the contrary claims of several agencies.

More significantly, the majority does not adequately explain how its rule will operate with respect to existing and future collectively-bargained provisions governing dues assignments and revocations. Regarding existing contract provisions, the majority indicates that the rule, "[l]ike all governmentwide regulations . . . will be subject to the constraints of section 7116(a)(7) of the Statute."<sup>10</sup> And regarding bargaining agreements negotiated subsequent to issuance of the rule, it explains that the parties will not be permitted "to negotiate for delays in the processing of revocation forms because those delays would defeat the purpose of the rule."<sup>11</sup> It has also added an entirely new provision to the final rule which requires agencies to process an employee's request to revoke "a previously authorized" dues assignment "as soon as administratively feasible."<sup>12</sup>

The new provision governing agencies' obligations to process revocation requests was not part of the proposed rule. Because the parties were not afforded any opportunity to comment on this provision's implications, it is unclear what types of negotiated procedures would be considered "administratively feasible" under the rule. And it is even less clear what the majority means by advising parties that they cannot "negotiate for delays" in this process.

But more importantly, the majority's explanation regarding the rule's impact upon existing bargaining agreements illustrates the unprecedented nature of this rule. The majority indicates that the rule is intended to be applied as a government-wide regulation within the meaning of section 7117(a)(1) of the Statute. And it acknowledges that the Authority "has not previously issued an analogous regulation that would shape the contours of the duty to bargain in the way that this rule will."<sup>13</sup>

Nonetheless, with little apparent concern for the potential consequences, the majority today chooses to determine the scope of the

parties' bargaining obligations through *regulatory fiat* rather than a reasoned decision addressing the facts and circumstances of an actual dispute. Indeed, as I warned in my dissenting opinion, the majority first stepped foot on this slippery slope when it issued its *OPM* decision. That decision reversed decades of well-established precedent governing dues allotments "by means of a policy statement that [was] neither responsive to the original request nor warranted under the Authority's standards governing the issuance of general statements of policy."<sup>14</sup>

And, contrary to its suggestion, the reckless course of action embraced by the majority is not the kind of "leadership" contemplated by the Statute.<sup>15</sup> Regrettably, the confusion, uncertainty, and litigation that will inevitably arise from this ill-conceived rule will undoubtedly demonstrate why the Authority has not proceeded down this path before today. Accordingly, I dissent.

[FR Doc. 2020-14717 Filed 7-7-20; 11:15 am]

**BILLING CODE 7627-01-P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 900

[AMS-DA-20-0044]

### Procedural Requirements Governing Proceedings Pertaining to Marketing Agreements and Marketing Orders

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Agriculture (USDA) is adopting a final rule to amend the procedural regulations governing proceedings to formulate or amend Marketing Agreements and Marketing Orders. This final rule adopts a provision to allow the agency to utilize alternative procedures for conducting a rulemaking proceeding as outlined in a notice of hearing.

**DATES:** This final rule is effective on July 9, 2020.

**FOR FURTHER INFORMATION CONTACT:** Erin Taylor, Acting Director, Order Formulation and Enforcement Division, Dairy Program, 202-720-7311, [erin.taylor@usda.gov](mailto:erin.taylor@usda.gov).

**SUPPLEMENTARY INFORMATION:** USDA is issuing this final rule to amend the

<sup>14</sup> *OPM*, 71 FLRA at 576; *see also id.* at 579 (noting that "questions regarding whether particular dues withholding arrangements offend employees' statutory rights" are "the types of questions that are particularly appropriate for resolution in the context of the facts and circumstances presented by parties in an actual dispute").

<sup>15</sup> Notice at 10 (quoting 5 U.S.C. 7105(a)(1)).

<sup>1</sup> 71 FLRA 571 (2020) (Member DuBester dissenting).

<sup>2</sup> *Id.* at 579 (Dissenting Opinion of Member DuBester) (citing *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018)).

<sup>3</sup> *Id.*

<sup>4</sup> Notice at 3 ("the majority decision rested exclusively on statutory exegesis, rather than principles of constitutional law").

<sup>5</sup> *AFGE, Local 1929 v. FLRA*, \_F.3d\_, 2020 WL 3053410, at 7 (D.C. Cir. 2020).

<sup>6</sup> Notice at 16.

<sup>7</sup> *Id.* at 7 (emphasis in original).

<sup>8</sup> *Id.* at 16.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 8.

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 10.