

Respectfully submitted,

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**FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.**

**OFFICE OF PERSONNEL MANAGEMENT
(Petitioner)**

0-PS-34

**DECISION ON REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE**

February 14, 2020

**Before the Authority: Colleen Duffy Kiko, Chairman, and
Ernest DuBester and James T. Abbott, Members
(Member Abbott concurring; Member DuBester dissenting)**

I. Background

The Office of Personnel Management (OPM) requests a general statement of policy or guidance on the applicability of the First Amendment principles that the U.S. Supreme Court clarified in *Janus v. AFSCME, Council 31 (Janus)*,¹ to the revocation of federal employees' union-dues assignments under § 7115(a) of the Federal Service Labor-Management Relations Statute (the Statute). Section 7115(a) states, in pertinent part, that “[i]f 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.”² The section further provides that, with certain exceptions, “any such assignment may not be revoked for a period of [one] year.”³

Since its decision in *U.S. Army, U.S. Army Materiel Development & Readiness Command, Warren, Michigan (Army)*,⁴ the Authority has held that the wording in § 7115(a) that “any such assignment may not be revoked for a period of [one] year” must

¹ 138 S. Ct. 2448 (2018).

² 5 U.S.C. § 7115(a).

³ *Id.*

⁴ 7 FLRA 194 (1981).

be interpreted to mean that authorized dues allotments may be revoked only at intervals of [one] year.”⁵ The Authority has also held that “parties may define through negotiations the procedures for implementing” § 7115, as long as those negotiated procedures preserve employees’ rights to have dues deducted from their pay and to revoke their dues assignments at one-year intervals.⁶

In its request, OPM asks the Authority to issue a general statement of policy or guidance holding that:

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 § 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.⁷

The Authority invited interested persons to submit written comments on whether a general statement was warranted under § 2427.5 of the Authority’s Regulations,⁸ and, if so, what the Authority’s policy or guidance should be.⁹ The Authority has carefully considered OPM’s arguments and the many substantive comments submitted concerning the request in reaching the decision below.¹⁰

⁵ *Id.* at 199.

⁶ *AFGE, AFL-CIO*, 51 FLRA 1427, 1432-37 (1996).

⁷ Request at 2-3.

⁸ 5 C.F.R. § 2427.5.

⁹ 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).

¹⁰ The Authority received more than seventy unique, substantive comments, and more than 4,000 form-letter comments. Contrary to the dissent’s insinuation that, because we do not discuss individual comments here, we have not carefully considered them, Dissent at 10-11, the Authority has never discussed individual comments from agencies, unions, or private parties in a decision like this one. See *Order Denying Request for a Gen. Ruling*, 51 FLRA 409, 412 (1995) (0-PS-33) (“The comments have been carefully considered, but are not summarized here.”); *Interpretation & Guidance*, 4 FLRA 754, 754 (1980) (0-PS-15) (“The responses submitted to the Authority . . . were detailed and helpful and have been carefully considered.”); *Decision on Request for Gen. Statement of Policy or Guidance*, 3 FLRA 333, 334 (1980) (0-PS-11) (“The Authority has carefully considered . . . the views submitted.”); *Decision on Request for Gen. Statement of Policy or Guidance*, 2 FLRA 650, 651 (1980) (0-PS-8) (“The views submitted to the Authority were most thorough and helpful.”); *Interpretation & Guidance*, 2 FLRA 274, 274 (1979) (0-PS-2) (“The responses submitted to the Authority were detailed and helpful and have been carefully considered.”); *Interpretation & Guidance*, 2 FLRA 264, 265 (1979) (0-PS-3 and 0-PS-6) (“The responses submitted to the Authority were most thorough and helpful and have been carefully considered.”); *Interpretation & Guidance*, 1 FLRA 182, 183-84 (1979) (0-PS-1) (same), *abrogated by AFGE, AFL-CIO, Dep’t of Educ. Council of AFGE Locals*, 34 FLRA 1078 (1990).

II. Decision

The Authority's very first general statement of policy or guidance in Case No. 0-PS-1 concerned the interpretation of § 7115(a), albeit in a different context – specifically, union-dues assignments that were in effect pursuant to Executive Order 11,491,¹¹ as amended, when the Statute came into force.¹² In other words, the Authority has previously provided guidance on the proper interpretation of § 7115(a) through a general statement. However, when a party later asked the Authority to clarify its general statement from Case No. 0-PS-1, the Authority found that the clarification request did not satisfy the criteria in § 2427.5 of the Authority's Regulations for issuing general statements.¹³ We take this opportunity to overrule the Authority's previous decision that resolving questions that further clarify the proper interpretation of § 7115(a) does not warrant issuing a general statement. To the contrary, we find that granting OPM's request for a general statement here is warranted because all parties subject to the Statute must abide by § 7115(a), and, consequently, "resolution of the question presented would have general applicability under the . . . Statute."¹⁴

As mentioned, the Authority has held that the wording in § 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."¹⁵ We disagree. 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.¹⁶ Except for the limiting conditions in § 7115(b), which § 7115(a) explicitly acknowledges,¹⁷ nothing in the text of § 7115(a) expressly addresses the revocation of dues assignments after the first year.

The dissent argues that we have "point[ed] to no language in § 7115(a)" that establishes that it applies only to the first year.¹⁸ Quite the contrary. The provision 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."¹⁹ Further, it would be nonsensical to conclude that the one-year period under § 7115(a) is not the first year of an assignment. For example, we could not reasonably find that § 7115(a) prevents the revocation of an assignment during its second year, but not its first year. And because the provision says that it limits revocations for "a period of [one] year,"²⁰ it does not limit revocations for multiple periods of one year. Under the dissent's interpretation, one year means "at any time during the first year, and not during subsequent years, except at

¹¹ See generally *Labor-Management Relations in the Federal Service*, 34 Fed. Reg. 17,605 (Oct. 31, 1969).

¹² *Interpretation & Guidance*, 1 FLRA 182.

¹³ *Decision on Request for Gen. Statement of Policy or Guidance*, 3 FLRA 243 (1980).

¹⁴ 5 C.F.R. § 2427.5(c).

¹⁵ *Army*, 7 FLRA at 199 (emphasis added) (quoting 5 U.S.C. § 7115(a)).

¹⁶ *Id.* (quoting 5 U.S.C. § 7115(a)).

¹⁷ 5 U.S.C. § 7115(a) ("Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of [one] year." (emphasis added)).

¹⁸ Dissent at 11.

¹⁹ 5 U.S.C. § 7115(a).

²⁰ *Id.* (emphasis added).

annual intervals.” But the dissent fails to articulate why it ignores the actual wording of the provision in favor of a different restriction on revocations.

Although the Authority has stated that the wording in § 7115(a) “must be interpreted” to mean that dues assignments may be revoked only at one-year intervals following the first year,²¹ in fact, the Authority made a policy judgment to impose annual revocation periods after the first year of an assignment.²² In other words, notwithstanding previous assertions otherwise, § 7115(a) neither compels, nor even supports, the existing policy on annual revocation windows.²³ Because it remains our privilege and responsibility to interpret the Statute in a manner that is consistent with an efficient and effective government,²⁴ we cannot allow our decisions or statements of policy to merely rubber-stamp what was said in the past.

In our view, 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 § 7115(a), an employee had the right to initiate the revocation of a previously authorized dues assignment at any time that the employee chooses. Therefore, in the near future, the Authority intends to commence notice-and-comment rulemaking concerning § 7115(a), with the aim of adopting an implementing regulation that hews more closely to the Statute’s text. The regulation will be designed to further important policies underlying the Statute, such as robustly protecting employees’ rights and freedoms, and guarding unions’ institutional interests in a clear and effective procedure for collecting dues. Nevertheless, we recognize that the interests of bargaining-unit employees and unions are not one and the same when employees want to discontinue financial support to unions by stopping dues payments. Thus, the regulation will also seek a reasonable balance between competing interests.

Although we grant OPM’s request, we confine our decision to the foregoing analysis, rather than adopting the policy formulations that OPM proposed.

²¹ *Army*, 7 FLRA at 199.

²² *Id.* at 197-99 (inferring from legislative history that, because § 7115(a) was a compromise designed to provide a greater level of union security than had existed under Executive Order 11,491, but less union security than would exist under an agency-shop model, imposing annual revocation periods would advance the animating purpose behind § 7115(a)).

²³ The dissent disagrees, contending that previous Authority decisions relied on legislative history, rather than a policy judgment, to interpret § 7115(a). Dissent at 8-10. The dissent misses the mark because 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*.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (emphasis added). A restriction on the ability to revoke dues assignments “for a period of [one] year” is not ambiguous. 5 U.S.C. § 7115(a). Thus, interpreting § 7115(a) based on legislative history alone is not only a policy judgment, but also poor statutory construction. See *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear.”).

²⁴ 5 U.S.C. §§ 7101(b) (emphasizing “requirement of an effective and efficient [g]overnment”), 7105(a)(1) (prescribing Authority’s “responsib[ility] for carrying out the purpose” of the Statute).

Member Abbott concurring:

I agree that the Authority's first Policy Statement (Policy Statement 1), its decision in *U.S. Army, U.S. Army Materiel Development & Readiness Command, Warren, Michigan (AMD)*,¹ and subsequent decisions that follow that precedent are inconsistent with a plain reading of and reasonable interpretation of § 7115(a) of the Federal Service Labor-Management Relations Statute (the Statute).² Those decisions, however, are also inconsistent with the U.S. Supreme Court's decision in *Janus v. AFSCME, Council 31 (Janus)*.³

It is no small matter that the very first right accorded by our Statute is "the right of employees to organize, bargain collectively, and participate through labor organizations of *their own choosing*."⁴ In *Janus*, the Supreme Court found that the right to participate or not participate in union activity by paying or not paying dues to a union is protected by the First Amendment.⁵ According to the Court, "[b]y agreeing to pay [union dues], [employees] are waiving their First Amendment rights, and such a waiver cannot be presumed . . . [and] must be freely given."⁶ Further, the Court boldly re-considered its precedent and overruled *Abood v. Detroit Board of Education (Abood)*.⁷ We have no cause to be timid with our own precedent.

Without hesitation, I would find that 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 § 7115(a) of the Statute. In particular, the Court clarified in *Janus* the connection between paying dues to an organization and how that payment of money, albeit through dues, is subsidizing speech.⁸ The Court's wisdom has application to federal bargaining unit employees, even though the precise method of payment found in the private sector – "agency fees" – does not exist in the federal labor sector.

I am unwilling to read *Janus* as narrowly as the dissent. In its attempt to stranglehold the Court's rationale, the dissent demonstrates far more concern for the unions' interests as an institution and organization than it does for the rights and interests of the federal employees whom they represent. The theme of *Janus* is that an employee has the right to support, or to stop supporting, the union by paying, or to stop paying, dues. Similarly, the Statute is premised from the outset on *employee* rights: "the right of employees to organize, bargain collectively, and *participate* through labor organizations of *their own choosing* . . ."⁹; "to prescribe certain *rights* and obligations of *the employees*

¹ 7 FLRA 194 (1981).

² 5 U.S.C. § 7115(a).

³ 138 S. Ct. 2448 (2018).

⁴ 5 U.S.C. § 7101(a)(1) (emphasis added).

⁵ *Janus*, 138 S. Ct. at 2486.

⁶ *Id.*

⁷ *Id.* at 2450, 2486 (citing *Abood*, 431 U.S. 209 (1977)).

⁸ *Id.* at 2464.

⁹ 5 U.S.C. § 7101(a)(1) (emphasis added).

of the Federal Government”¹⁰; “[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.”¹¹

Taking the dissent’s reasoning to its logical conclusion, once a Federal employee elects to authorize dues withholding, the employee loses any and all rights to determine when, how, and for what reasons the employee may stop those dues. The dissent goes so far as to proclaim that to give bargaining-unit employees the right to stop dues as they see fit would “create confusion, uncertainty, and – ultimately – litigation . . . to the detriment of both unions and agencies that rely upon such agreements.”¹² As stated by the Court, “it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions” and “[t]he fact that [unions] may view [dues] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected.”¹³ In other words, the employee’s right to determine what level of participation – including whether or not to pay, or to continue to pay, union dues – must be “of their own choosing.”¹⁴ As 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).

Starting with Policy Statement 1 and continuing with *AMD* and subsequent decisions, the Authority over time has made it increasingly difficult, restrictive, and cumbersome for Federal employees to STOP dues withholding.¹⁵ After *Janus*, it is now clear that the Authority’s restrictive interpretations of § 7115(a) were wrong and that subsequent decisions of the Authority that relied on those interpretations continued to be wrong.

The Court’s decision in *Janus* leads me to one conclusion – 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.¹⁶ Thus, restricting an employee’s option to stop dues withholding –

¹⁰ *Id.* § 7101(b) (emphasis added).

¹¹ *Id.* § 7102 (emphasis added).

¹² Dissent at 12-13.

¹³ *Janus*, 138 S. Ct. at 2484 (quoting *Arizona v. Gant*, 556 U.S. 332, 349 (2009)).

¹⁴ 5 U.S.C. § 7101(a)(1).

¹⁵ I also note that another compelling factor for issuing this general statement of policy is the unlikelihood that a bargaining unit employee could successfully bring such a challenge through “other means.” See 5 C.F.R. § 2427.5(a). Only agencies and the exclusive representatives may select which grievance to take to arbitration, and even though individuals may file charges alleging either an agency or an exclusive representative committed an unfair labor practice under the Statute, an individual as a charging party does not control which charges result in complaints, let alone reach a hearing.

¹⁶ *Janus*, 138 S. Ct. at 2486.

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.

Member DuBester, dissenting:

In today's decision, the majority upends nearly four decades of Authority precedent governing revocations of union dues allotments voluntarily made by union members under § 7115(a) of the Federal Service Labor-Management Relations Statute (Statute). It does so by means of a policy statement that is neither responsive to the original request nor warranted under the Authority's standards governing the issuance of general statements of policy.¹ And it reverses the Authority's long-standing interpretation of § 7115(a) – upon which parties have relied to efficiently manage union dues allotments and revocations – with little more than a passing reference to the legislative history upon which this precedent is based. Accordingly, I dissent.

The majority's decision responds to a request that the Authority issue a general statement of policy or guidance “holding that the U.S. Supreme Court's decision in *Janus v. AFSCME, Council 31 (Janus)*² requires the Authority to reevaluate its precedent on the revocation of federal employees' union-dues assignments.”³ The short answer to this request is that *Janus* requires no such reevaluation. Indeed, the majority's decision here does not contain a scintilla of legal analysis connecting its conclusions to the Supreme Court's decision.

This omission is not inadvertent. *Janus* focuses exclusively on the constitutionality of “agency fee” payments required of employees *who are not members of a union* to support activities germane to a union's duties as the exclusive bargaining representative.⁴ As the Court carefully points out, however, “agency fee” arrangements are not permitted in the federal sector.⁵

Indeed, the Court favorably cites the “federal employment experience” as “illustrative” of how “labor peace can readily be achieved” in the absence of “agency fees.”⁶ And in a particularly relevant passage, the Court informs state governments that, in response to the *Janus* decision, they “can follow the model of the federal government” by “keep[ing] their labor-relations systems exactly as they are,” so long as they do not “force nonmembers to subsidize public-sector unions.”⁷

In short, the *Janus* decision has no impact whatsoever upon federal sector dues withholding arrangements, which apply only to employees who *voluntarily choose to*

¹ 5 C.F.R. § 2427.5.

² 138 S. Ct. 2448 (2018).

³ 84 Fed. Reg. 33,175 (July 12, 2019) (citing *Janus*, 138 S. Ct. 2448).

⁴ *Janus*, 138 S. Ct. at 2486 (“For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees.”).

⁵ *Id.* at 2466.

⁶ *Id.*

⁷ *Id.* at 2485 n.27. Notwithstanding the Court's clarity on this point, my concurring colleague expresses his unwillingness to “read *Janus* as narrowly as the dissent,” and concludes that *Janus* applies to federal sector dues withholding “even though the precise method of payment found in the private sector – “agency fees” – does not exist in the federal labor sector.” Concurring Opinion at 5. Of course, it is this “precise method of payment” to unions that gave rise to – and consequently defines the scope of – the *Janus* decision.

become union members and who expressly consent to having their dues withheld from their paycheck.⁸ Indeed, federal courts that have had the opportunity to address *Janus*'s application to similar dues withholding arrangements in state and local governments have concluded that the decision has no effect on these arrangements.⁹

Undeterred by this inconvenient fact, the majority nevertheless decides that it must now reexamine the Authority's "existing policy" governing revocations of dues allotments voluntarily made by union members.¹⁰ And discarding nearly forty years of Authority precedent, it summarily concludes that § 7115(a) must now be interpreted to provide employees "the right to initiate the revocation of a previously authorized dues assignment at any time that the employee chooses" after the expiration of an initial one-year period.¹¹

This conclusion patently ignores the legislative history of § 7115(a) upon which the Authority based its decision in *U.S. Army, U.S. Army Materiel Development & Readiness Command, Warren, Michigan (Army)*.¹² In *Army* – addressing the very question before us today – the Authority concluded that the language of § 7115(a) "must be interpreted to mean that authorized dues allotments may be revoked only at intervals of 1 year."¹³

Contrary to the majority's dismissive claims, *Army* is not based merely upon a "policy judgment."¹⁴ Rather, the Authority reached its decision in *Army* after carefully examining § 7115(a)'s legislative history.

Before the Statute's enactment, procedures for payroll deductions of union dues were governed by Executive Order 11491, which provided that employee authorizations could be revoked at six-month intervals.¹⁵ The House Committee Report accompanying the language ultimately adopted as § 7115(a) explains that this language "reflects 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

⁸ Section 7115(a) allows agencies to withhold union dues from an employee's paycheck – and to allot such dues to the union – only if the agency "has received from an employee . . . a written assignment" authorizing such action. 5 C.F.R. § 7155(a).

⁹ See, e.g., *Cooley v. Cal. Statewide Law Enf't Ass'n*, 385 F. Supp. 3d 1077, 1079-80 (E.D. Cal. 2019), appeal docketed, No. 19-16498 (9th Cir. July 31, 2019) (rejecting plaintiff's argument that, under *Janus*, he has "a constitutional right to resign his union membership at his discretion and with immediate effect" because the "continued deduction of dues by the Union here does not offend the requirement of freely given, affirmative consent of nonmembers discussed in *Janus*."); *Anderson v. SEIU, Local 503*, 400 F. Supp. 3d 1113, 1117 (D. Or. 2019), appeal docketed, No. 19-35871 (9th Cir. Oct. 16, 2019) (rejecting similar argument because "here, unlike in *Janus*, Plaintiffs chose to become dues-paying members of their respective unions, rather than agency fee paying non-members. In doing so, they acknowledged restrictions on when they could withdraw from membership. Thus, because Plaintiffs were voluntary union members, *Janus* does not apply.").

¹⁰ Majority at 4.

¹¹ *Id.*

¹² 7 FLRA 194 (1981).

¹³ *Id.* at 199.

¹⁴ Majority at 4.

¹⁵ *Army*, 7 FLRA at 196.

employees ('agency shop')."¹⁶ The Committee Report further indicates that, pursuant to § 7115(a), dues assignments "normally are to be irrevocable for one year."¹⁷

Based on this legislative history, the Authority concluded in *Army* that § 7115(a) is intended to provide a "more effective" method for handling authorized dues allotments, "without going so far as to authorize an 'agency shop.'"¹⁸ More specifically, it found that "Congress intended in [§] 7115(a) . . . 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."¹⁹ And it found that its conclusion is consistent with the statutory purpose of "fostering stability in labor-management relations."²⁰

Subsequent to its decision in *Army*, the Authority has consistently held that parties "may define through negotiations the yearly intervals required by [§] 7115(a) of the Statute."²¹ These procedures are routinely incorporated into the parties' bargaining agreements. And, consistent with *Army*, the form signed by federal employees to authorize voluntary payroll deductions of their union dues specifically acknowledges that any request to cancel the authorization is not effective unless it is made during the one-year interval periods.²²

The majority does not provide a single compelling reason why we should now abandon *Army* and subsequent precedent applying § 7115(a) to the federal sector. As

¹⁶ *Id.* at 197 (quoting from Legislative History of the Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong., 1st Sess., Comm. Print No. 96-7 (Nov. 19, 1979), at 694).

¹⁷ *Id.*

¹⁸ *Id.* at 198.

¹⁹ *Id.* at 198-99 (explaining further 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"). Thus, contrary to my concurring colleague's assertion, nothing in *Army* states or suggests that once an employee authorizes a dues assignment, "the employee loses any and all rights to determine when, how, and for what reasons the employee may stop those dues." Concurring Opinion at 6.

²⁰ *Army*, 7 FLRA at 199. The Authority also noted that its interpretation of § 7115(a) is consistent with the guidance provided to agencies by the Civil Service Commission, the predecessor to the U.S. Office of Personnel Management (OPM), when the Statute was enacted. *Id.* at 199 n.16.

²¹ *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 19 FLRA 586, 589 (1985) (*Portsmouth*); see also *AFGE*, 51 FLRA 1427, 1433 (1996) (*AFGE*) ("parties may define through negotiations the procedures for implementing section 7115' of the Statute, so long as those procedures do not infringe on employees' rights," which include the freedom to revoke their dues authorizations at annual intervals (quoting *Fed. Emps. Metal Trades Council, Mare Island Naval Shipyard*, 47 FLRA 1289, 1294 (1993)).

²² Standard Form 1187, OPM (Revised March 1989) (requiring employee to sign acknowledgement stating, in relevant part: "I further understand . . . that I may cancel this authorization by filing Standard Form 1188 or other written cancellation request with the payroll office of my employing agency. Such cancellation will not be effective, however, 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.").

noted, it fails to explain how *Army* is incompatible with *Janus*.²³ It does not identify any flaws in *Army*'s analysis of the legislative history upon which the decision was based.

Moreover, the majority's decision does not demonstrate how *Army* is incompatible with the language of § 7115(a). On this point, the majority reasons that, because § 7115(a) "says that an 'assignment may not be revoked for a period of [one] year,'" this restriction on revocations "governs only one year because it refers to only '[one] year.'"²⁴ But it points to no language in § 7115(a) that would indicate this provision *must* be interpreted to "govern[] only the *first year* of an assignment."²⁵ Indeed, the majority acknowledges that "nothing in the text of § 7115(a) expressly addresses the revocation of dues assignments after the first year."²⁶ Accordingly, it is entirely appropriate that the *Army* decision examined the meaning of § 7115(a) "in the context of relevant legislative history and Federal labor relations policy."²⁷

And, although the majority claims to have "carefully considered"²⁸ the "more than seventy unique, substantive comments"²⁹ received in response to the Authority's request

²³ Ironically, my colleague's concurring opinion – while at least attempting to explain the relevance of *Janus* by selectively quoting from the decision – actually illustrates why it does not apply to the majority's conclusion. See, e.g., Concurring Opinion at 5 ("According to the Court, '[b]y agreeing to pay [union dues], [employees] are waiving their First Amendment rights, and such a waiver cannot be presumed . . . [and] must be freely given.'" (quoting *Janus*, 138 S. Ct. at 2486)). Here is what the Court actually says in the quoted passage:

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

Janus, 138 S. Ct. at 2486 (emphasis added) (internal citations omitted). In other words, the Court is simply reiterating that its decision concerns the payment of agency fees by nonmembers who have otherwise not consented to such payments. See also, e.g., Concurring Opinion at 6 ("As stated by the Court . . . 'the fact that [unions] may view [dues] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected.'" (quoting *Janus*, 138 S. Ct. at 2484)). Here is what the Court actually says in the quoted passage:

'The fact that [public-sector unions] may view [*agency fees*] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected.'

Janus, 138 S. Ct. at 2484 (emphasis added) (quoting *Arizona v. Gant*, 556 U.S. 332, 349 (2009)). In other words, the Court is neither stating nor suggesting in this passage that a union's reliance interest in collecting its *members' dues* is outweighed by nonmembers' interests in protecting their constitutional rights. Indeed, such a statement would not make any sense in the context of its decision.

²⁴ Majority at 3 (internal citations omitted).

²⁵ *Id.* (emphasis added).

²⁶ *Id.*

²⁷ *Army*, 7 FLRA at 196.

²⁸ Majority at 2.

²⁹ *Id.* at 2 n.10.

for comments on this issue, it does not otherwise reference the views of any of the commenting parties.

Contrary to the cavalier assertions in both the majority's decision³⁰ and my colleague's concurrence,³¹ the Authority has been repeatedly cautioned that it "must either follow its own precedent or 'provide a reasoned explanation for' its decision to depart from that precedent."³² The majority's decision falls well short of this standard. And I disagree that we are compelled to reverse our precedent on this matter because of our "responsibility to interpret the Statute in a manner that is consistent with an efficient and effective government."³³ Indeed, a reviewing court has rejected this rationale in the context of concluding that the Authority had otherwise failed to provide an adequate rationale for its decision.³⁴

Equally troubling is the majority's failure to explain how it is even remotely appropriate to reverse the Authority's precedent on this important matter through the issuance of a policy statement. Since its decision in *Army*, the Authority has proven quite capable at resolving questions that have arisen regarding the application of § 7115(a) in the context of actual disputes, including questions regarding whether particular dues withholding arrangements offend employees' statutory rights.³⁵ These 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.³⁶

And rather than providing the clarity that will "prevent the proliferation of cases" involving the application of § 7115(a),³⁷ today's decision jettisons our governing precedent in favor of "notice-and-comment rulemaking" that will apparently commence

³⁰ "[W]e cannot allow our decisions or statements of policy to merely rubber-stamp what was said in the past." Majority at 4.

³¹ "We have no cause to be timid with our own precedent." Concurring Opinion at 5.

³² *NFFE, FD-1, IAMAW, Local 951 v. FLRA*, 412 F.3d 119, 124 (D.C. Cir. 2005) (quoting *Local 32, AFGE, AFL-CIO v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985)).

³³ Majority at 4.

³⁴ *AFGE, Local 32, AFL-CIO v. FLRA*, 853 F.2d 986, 993 (D.C. Cir. 1988) ("It is not enough [for the Authority] to refer in Delphic tones to inherent authority, or to rely vaguely on the Authority's general duty to interpret the statute with government efficiency in mind.").

³⁵ See, e.g., *NTEU*, 64 FLRA 833, 838 (2010) (holding that negotiated procedure requiring dues revocation forms to be signed or initialed by a union official is not inherently coercive of employees' right to freely refrain from joining a union), *aff'd*, *NTEU v. FLRA*, 647 F.3d 514 (4th Cir. 2011); *AFGE*, 51 FLRA at 1438 (finding that union's failure to process employees' timely requests to revoke their dues withholding interfered with employees' rights under the Statute); *NAGE*, 40 FLRA 657, 688 (1991) (provision that would preclude employees from revoking dues authorizations "in almost all cases, for a period in excess of [one] year" is nonnegotiable); *Portsmouth*, 19 FLRA at 589 (holding that negotiated procedures requiring dues withholding revocations to be executed on forms which could only be obtained from the union "are inherently coercive of the employees' right[s]" under the Statute).

³⁶ This is also, ironically, illustrated by my colleague's concurring opinion, in which he expresses concerns – including whether an employee "may not be aware" of restrictions placed on dues withholding revocations – that are wholly fact-dependent and therefore appropriately addressed in the context of an actual dispute.

³⁷ 5 C.F.R. § 2427.5(b).

“in the near future.”³⁸ This will only create confusion, uncertainty, and – ultimately – litigation on a myriad of issues, including the legal status of negotiated dues allotment provisions in existing bargaining agreements. It will almost certainly disrupt the administration of these provisions, to the detriment of both unions and agencies that rely upon such agreements to efficiently manage union dues allotments and revocations. And, as noted in the comments received by the Authority, discarding Authority precedent in this area will have a particularly detrimental impact on the ability of unions to manage their daily affairs; plan their annual budgets; and even comply with legal requirements governing the election of local union officers.³⁹

The majority’s decision today constitutes the sort of judicial activism that is squarely inconsistent with the Authority’s decision-making responsibilities under our Statute. The request for a policy statement ostensibly giving rise to the majority’s decision relies upon a Supreme Court decision that – by its own terms – has nothing to do with federal-sector labor relations. Nevertheless, the majority seizes this fabricated opportunity to reverse the Authority’s well-reasoned precedent concerning § 7115(a) with barely a passing nod to the comments the Authority solicited on this matter.

In *Army*, the Authority concluded that its application of § 7115(a) is consistent with the statutory purpose of “fostering stability in labor-management relations.”⁴⁰ Absent any plausible rationale for reversing this decision, the majority’s true objective is unmistakable. By undermining the ability of unions to carry out their obligations under the Statute, the majority’s decision further weakens the institution of collective-bargaining in the federal sector. I refuse to join a decision so fundamentally adverse to the principles and purposes of our Statute.

³⁸ Majority at 4.

³⁹ See NTEU Comments in Response to Federal Register Notice (August 8, 2019) at 25-26. NTEU notes that, because it “plans its budget for the year based on the dues revenue it will receive in that year,” it will lose this ability if it cannot rely upon its members’ dues withholding commitments. *Id.* at 25. It further notes that under the Labor-Management Reporting and Disclosure Act, the union must finalize a list of members in good standing who are eligible to participate in union elections in advance of any election. *Id.* at 25 (citing 29 U.S.C. § 481(b)). It explains that, because “the overwhelming majority of members pay their dues pursuant to allotment[s] authorized by § 7115,” preparing and maintaining accurate lists will be made much more difficult if the union cannot rely upon members’ dues withholding commitments. *Id.* at 26.

⁴⁰ *Army*, 7 FLRA at 199.

**FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.**

**OFFICE OF PERSONNEL MANAGEMENT
(Petitioner)**

0-PS-34

I hereby certify that copies of the Notice of the FLRA in Case No. 0-PS-34 have this day been mailed to the following:

Mark Robbins
General Counsel
United States Office of Personnel Management
Office of General Counsel
1900 E St. NW, Room 7353
Washington, D.C. 20415

Dated: February 14, 2010
WASHINGTON, D.C.


FOR _____
Belinda Stevenson
Legal Assistant