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*),[1] 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.'' [2] I also cautioned that the majority's decision ''will only create confusion, uncertainty, and—ultimately—litigation on a myriad of issues.'' [3]

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.[4] 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.'' [5]

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).'' [6] 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.'' [7] But this explanation appears to contradict the rule's plain language, which applies its provisions to ''previously authorized assignment[s].'' [8] 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'' [9] 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.'' [10] 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.'' [11] 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.'' [12]

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.'' [13]

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.'' [14]

And, contrary to its suggestion, the reckless course of action embraced by the majority is not the kind of ''leadership'' contemplated by the Statute.[15] 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.

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[1] 71 FLRA 571 (2020) (Member DuBester dissenting).

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

[3] *Id.*

[4] Notice at 3 (''the majority decision rested exclusively on statutory exegesis, rather than principles of constitutional law'').

[5] *AFGE, Local 1929* v. *FLRA,* _F F.3d _, 2020 WL 3053410, at 7 (D.C. Cir. 2020).

[6] Notice at 16.

[7] *Id.* at 7 (emphasis in original).

[8] *Id.* at 16.

[9] *Id.*

[10] *Id.* at 8.

[11] *Id.* at 11.

[12] *Id.*

[13] *Id.* at 10.

[14] *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'').

[15] Notice at 10 (quoting 5 U.S.C. 7105(a)(1)).

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.*

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

procedural regulations governing proceedings pertaining to Marketing Agreements and Marketing Orders in 7 CFR 900 Subpart A. Those rules of practice and procedure are applicable to proceedings under the Agricultural Marketing Agreement Act of 1937, as amended (50 Stat. 246). For purposes of efficiency and modernization, and to provide flexibility to adapt procedures under unique circumstances, a provision allowing the notice of hearing to include alternative procedures is being added.

Executive Orders 12866, 13771, and 12988

This rule is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is not subject to the requirements of Executive Order 12866.

This rule is not an Executive Order 13771 regulatory action because it is exempt from the definition of ''regulation'' or ''rule'' in Executive Order 12866 and, thus, is not a regulatory action.

The rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. The rule will not preempt any state or local law, regulations, or policies, unless they present an irreconcilable conflict with this rule.

Executive Order 13132

This rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. The review reveals that this rule does not contain policies with federalism implications sufficient to warrant federalism consultation under Executive Order 13132.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation would not have substantial and direct effects on tribal governments and would not have significant tribal implications.

5 U.S.C. 553, 601, and 804

This final rule amends agency rules of practice and procedure. Under the Administrative Procedure Act, prior notice and opportunity for comment are not required for the promulgation of agency rules of practice and procedure. 5 U.S.C. 553(b)(3)(A). Additionally, only substantive rules require publication 30 days prior to their effective date. 5 U.S.C. 553(d). Therefore, this final rule is effective upon publication in the **Federal Register**.

Furthermore, under 5 U.S.C. 804, this rule is not subject to congressional review under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121. In addition, because prior notice and opportunity for comment are not required to be provided for this final rule, this rule is exempt from the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

Paperwork Reduction Act

This rule contains no information collections or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 900

General Regulations.

For the reasons stated in the preamble, the Agricultural Marketing Service amends the 7 CFR 900 Subpart A, as follows:

PART 900—GENERAL REGULATIONS

Subpart A—Procedural Requirements Governing Proceedings Pertaining to Marketing Agreements and Marketing Orders

■ 1. The authority citation for subpart A continues to read as follows:

Authority: 7 U.S.C. 610

■ 2. Revise the heading of Subpart A to read as set forth above:

■ 3. In § 900.4, revise paragraph (a) and add paragraph (d) to read as follows:

§ 900.4 Institution of proceeding.

(a) *Filing and contents of the notice of hearing.* The proceeding shall be instituted by filing the notice of hearing with the hearing clerk. The notice of hearing shall contain a reference to the authority under which the marketing agreement or marketing order is proposed; shall define the scope of the hearing as specifically as may be practicable; shall describe any alternative procedures established pursuant to paragraph (d) of this section; shall contain either the terms or substance of the proposed marketing agreement or marketing order or a description of the subjects and issues involved and shall state the industry, area, and class of persons to be regulated, the time and place of such hearing, and the place where copies of such proposed marketing agreement or marketing order may be obtained or examined. The time of the hearing shall not be less than 15 days after the date of publication of the notice in the **Federal Register**, as provided in this subpart, unless the Administrator shall determine that an emergency exists which requires a shorter period of notice, in which case the period of notice shall be that which the Administrator may determine to be reasonable in the circumstances: Provided, That, in the case of hearings on amendments to marketing agreements or marketing orders, the time of the hearing may be less than 15 days but shall not be less than 3 days after the date of publication of the notice in the **Federal Register**.

* * * * *

(d) *Alternative procedures.* The Administrator may establish alternative procedures for the proceeding that are in addition to or in lieu of one or more procedures in this subpart, provided that the procedures are consistent with 5 U.S.C. 556 and 557. The alternative procedures must be described in the notice of hearing, as required in paragraph (a) of this section.

* * * * *

■ 2. Amend § 900.8 by revising paragraph (b)(1) to read as follows:

§ 900.8 Conduct of the hearing.

* * * * *

(b) * * * (1) *Right to appear.* At the hearing, any interested person shall be given an opportunity to appear, either in person or through his authorized counsel or representative, and to be heard with respect to matters relevant and material to the proceeding, provided that such interested person complies with any alternative procedures included in the hearing notice pursuant to§ 900.4. Any interested person who desires to be heard in person at any hearing under these rules shall, before proceeding to testify, state his name, address, and occupation. If any such person is appearing through a counsel or representative, such person or such counsel or representative shall, before proceeding to testify or otherwise to participate in the hearing, state for the record the authority to act as such counsel or representative, and the names and addresses and occupations of such person and such counsel or representative. Any such person or such counsel or representative shall give such other information respecting his appearance as the judge may request.

* * * * *

Bruce Summers,

Administrator.

[FR Doc. 2020–13364 Filed 7–8–20; 8:45 am]

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